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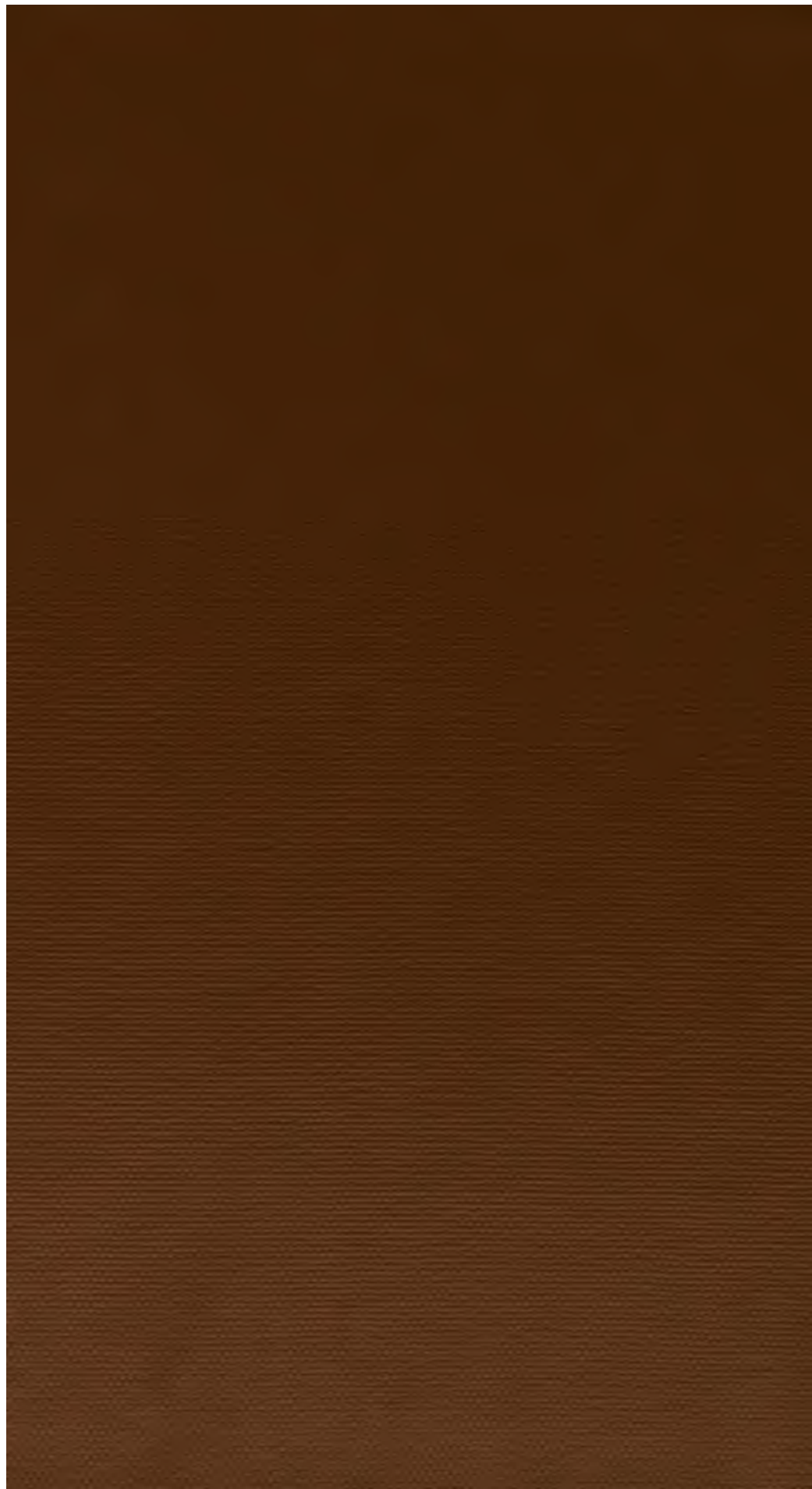
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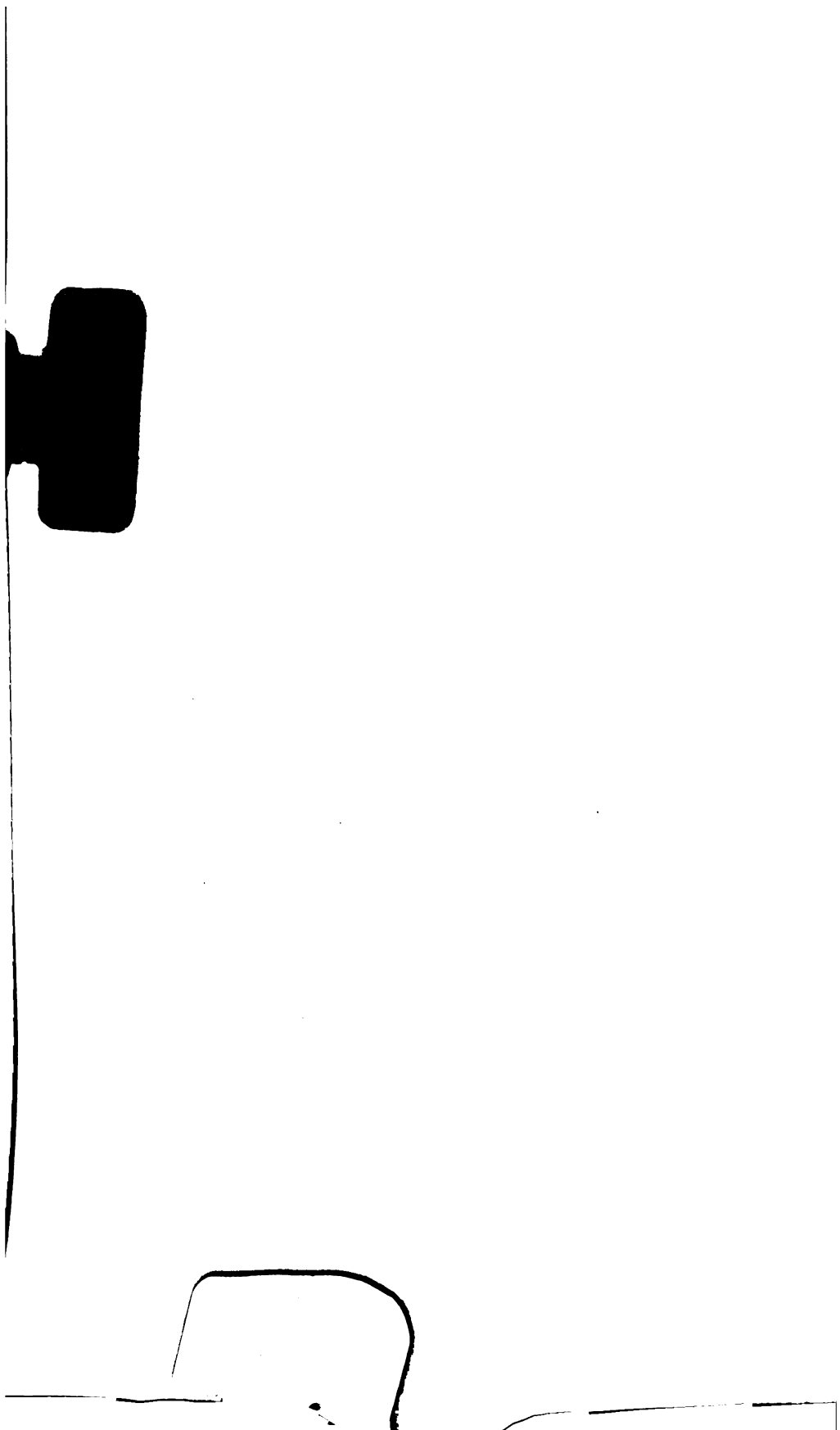
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A TREATISE ON THE LAW OF EVIDENCE

BEING A CONSIDERATION OF THE
NATURE AND GENERAL PRINCIPLES OF EVIDENCE, THE INSTRUMENTS OF EVIDENCE
AND THE RULES GOVERNING THE PRODUCTION, DELIVERY AND USE OF EVIDENCE,
TOGETHER WITH INCIDENTAL MATTERS OF PRACTICE, INCLUDING ALSO
UNDER AN ALPHABETICAL ARRANGEMENT THE APPLICATION OF
THE RULES AND PRINCIPLES OF EVIDENCE TO PARTICULAR
ACTIONS, ISSUES AND PARTIES IN CIVIL, CRIMINAL,
EQUITY AND ADMIRALTY CASES, TOGETHER
WITH EVIDENCE IN COURTS MARTIAL

BY BYRON K. ELLIOTT

AND

WILLIAM F. ELLIOTT

Authors of "ROADS AND STREETS," "RAILROADS," "GENERAL PRACTICE"
and "APPELLATE PROCEDURE"

IN FOUR VOLUMES

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CIVIL TRIAL EVIDENCE

PARTICULAR ACTIONS, ISSUES AND PARTIES

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THE LAW OF EVIDENCE.

CHAPTER LXXV.

ABANDONMENT.

Sec.

1571. Generally.

1572. Burden of proof.

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1574. Range of evidence.

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Sec.

1576. The intent.

1577. What is sufficient evidence.

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1579. Non-user and misuser.

1580. Lapse of time.

§ 1571. **Generally.**—Abandonment has been defined as the relinquishment or surrender of rights or property by one person to another.¹ But it is to be distinguished from a mere surrender, gift, or conveyance to some particular person;² and it would, perhaps, be better to define it as a voluntary relinquishment, or leaving and giving up, of a right or property without transferring or surrendering it to any particular person. Both the intention to abandon and the external act are essential; or, in other words, there must be both the intention to abandon and the actual relinquishment, so that, in the case of property, it may be appropriated by the next comer.³ But the intention may sometimes be inferred from the act and circumstances. Abandonment may be in issue in many cases, for there may be an abandonment of an equitable right,⁴ or of almost any kind of prop-

¹ Bouv. Law Dict. (Rawle's Ed.)
2; Hickman v. Link, 116 Mo. 123,
22 S. W. 472, 473.

² Hagan v. Gaskill, 42 N. J. Eq.
215, 6 Atl. 879; Richardson v. Mc-
Nulty, 24 Cal. 339; McLeran v. Ben-
ton, 43 Cal. 467. See also, Eads v.
Brazelton, 22 Ark. 499, 79 Am. Dec.
88.

³ Hickman v. Link, 116 Mo. 123,
22 S. W. 472, 473; Stevens v. Nor-
folk, 42 Conn. 377; Livermore v.
White, 74 Me. 452, 43 Am. R. 600;
Judson v. Malloy, 40 Cal. 309; Utt
v. Frey, 106 Cal. 392, 39 Pac. 807,
809.

⁴ Picket v. Dowdall, 2 Wash.
(Va.) 106; Derby v. Alling, 40

erty. Title to personal property may thus be lost,⁵ and so, in some instances may the title to land.⁶ Trademarks,⁷ inventions or patent rights,⁸ water rights,⁹ mining claims,¹⁰ highways,¹¹ and easements generally,¹² may also be abandoned.¹³

Conn. 410; *Dikes v. Miller*, 24 Tex. 417; *Dodge v. Marden*, 7 Ore. 456; *Philadelphia v. Riddle*, 25 Pa. St. 259; *Gluckauf v. Reed*, 22 Cal. 469.

⁵ *McGoon v. Ankeny*, 11 Ill. 558; *Wyman v. Hurlburt*, 12 Ohio 81, 40 Am. Dec. 461; *Haslam v. Lockwood*, 37 Conn. 500, 9 Am. R. 350; *Dougherty v. Creary*, 30 Cal. 290, 39 Am. Dec. 116.

⁶ *Dikes v. Miller*, 24 Tex. 417; *Tiebout v. Millican*, 61 Tex. 517; *Fine v. St. Louis Pub. Schools*, 30 Mo. 166; *Clark v. Hammerly*, 36 Mo. 620; *Burke v. Hammond*, 76 Pa. St. 172. See also, *Jones v. Merimack & Co.*, 31 N. H. 381.

Homesteads: See, *Sides v. Scharff*, 93 Ala. 106, 9 So. 228; *Fyffer v. Beers*, 18 Iowa 4, 85 Am. Dec. 577; *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247 and note; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. 767; *Taylor v. Hargons*, 2 Cal. 268, 60 Am. Dec. 607, note; *McCord & Co. v. Tessier*, 66 Neb. 740, 96 N. W. 342. But the title to land, especially if acquired by deed, cannot ordinarily be abandoned in the true sense. *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *Perkins v. Blood*, 36 Vt. 273; *Hummel v. Cumberland & C. R. Co.*, 175 Pa. St. 537, 34 Atl. 848; *School Dist. v. Benson*, 31 Me. 381, 52 Am. Dec. 618.

⁷ *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572; *Mouson v. Bochem*, 26 Ch. Div. 398, 28 Sol. Jour. 361; *Bower v. Boulton*, 53 Fed. 389.

⁸ *Pennock v. Dialogue*, 2 Pet. (U. S.) 1; *United States v. Hall*, 7 Mackey (D. C.) 19; *Planing Machine Co. v. Keith*, 101 U. S. 479;

Seymour v. Osborne, 11 Wall. (U. S.) 516, evidence held sufficient to show abandonment of unpatented invention.

⁹ *Dodge v. Marden*, 7 Ore. 456; *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807; *Hewitt v. Story*, 51 Fed. 101; *North Am. & C. Co. v. Adams*, 104 Fed. 404.

¹⁰ *Harkrader v. Carroll*, 76 Fed. 474, and cases cited.

¹¹ *Hewes v. Village of Crete*, 175 Ill. 348, 51 N. E. 696; *Los Angeles v. Cohn*, 101 Cal. 373, 35 Pac. 1002; *Derby v. Alling*, 40 Conn. 410; *Phillips v. Lawrence* (Ky.), 64 S. W. 411; *Larson v. Fitzgerald*, 87 Iowa 402, 54 N. W. 441; *Jeffersonville & C. R. Co. v. O'Connor*, 37 Ind. 95; *Kelsoe v. Mayor*, (Ga.) 48 S. E. 366. See, *Elliott Roads and Streets* (2nd ed.) §§ 871-874; *Maire v. Kruse*, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449, note.

¹² *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Farrar v. Cooper*, 34 Me. 394; *Smyles v. Hastings*, 22 N. Y. 217; *Canny v. Andrews*, 123 Mass. 155. But as to the evidence where the easement is acquired by deed, see, *Townsend v. Mich. Cent. R. Co.*, 101 Fed. 757; *Edgerton v. McMullan*, 55 Kans. 90, 39 Pac. 1021; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Welch v. Garrett*, 5 Idaho 639, 51 Pac. 405; *Dill v. Board & C.* 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276.

¹³ The term is also used in other connections with a somewhat varying meaning. In divorce proceedings, for instance, it is often used in the sense of desertion, and in

§ 1572. **Burden of proof.**—The burden of proof as to the issue of abandonment is usually upon the party that asserts it.¹⁴ The burden of proof in the sense of making out his case by proving ownership, or the like, may be and remain upon the plaintiff; and yet the burden of going forward with the evidence at the proper time, in order to defeat the plaintiff's prima facie case by showing an abandonment, may rest upon the defendant.¹⁵ It will not be presumed that an owner has abandoned valuable property, or that a highway, or the like, has been abandoned.¹⁶ Upon the same principle, a homestead right, when once acquired will not be presumed, without proof, to have been abandoned; and the burden is upon the party that claims that it has been abandoned.¹⁷ But it has been held that proof of an actual removal from the premises throws upon the person who claims the homestead the burden of showing an intention to return and occupy the premises as a homestead.¹⁸

§ 1573. **Question of law or fact.**—The question of abandonment is generally a question of fact, or a mixed question of law and fact, as distinguished from a question of law.¹⁹ But it may, in some cases,

marine insurance it has a special meaning. See also as to abandonment of an animal which will prevent recovery against a railroad company for killing it; *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55, 4 N. E. 410; *Ft. Wayne &c. R. Co. v. Woodward*, 112 Ind. 118, 13 N. E. 260.

¹⁴ *Tayon v. Ladew*, 33 Mo. 205; *Hicks v. Steigleman*, 49 Miss. 377; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 89; *Providence &c. Co. v. Burke* (Ariz.), 57 Pac. 641; *Oreamuno v. Uncle Sam &c. Co.*, 1 Nev. 215; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047. See also, *Hennessy v. Murdock*, 137 N. Y. 317.

¹⁵ *Muhle v. New York &c. R. Co.*, 86 Tex. 459, 25 S. W. 607-608. As to when defendant may show abandonment under general denial, see, *Bell v. Red Rock Tunnel &c.*

Co., 36 Cal. 214; *Willson v. Cleveland*, 30 Cal. 192.

¹⁶ *Hicks v. Steigleman*, 49 Miss. 377; *Shirk v. Chicago*, 195 Ill. 298, 63 N. E. 193, 199, citing *Elliott Roads and Streets* (2nd ed.) § 872. See also, *Dingwall v. County Com.*, 19 Colo. 415, 36 Pac. 148; *Hennessy v. Murdock*, 137 N. Y. 317; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 89.

¹⁷ *Boot v. Brewster*, 75 Iowa 631, 36 N. W. 649, 9 Am. St. 515; *Cooper v. Basham* (Tex.), 19 S. W. 704.

¹⁸ *Newman v. Franklin*, 69 Iowa 244, 28 N. W. 579; *Bell v. Great-house*, 20 Tex. Civ. App. 478, 49 S. W. 258.

¹⁹ *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738; *Russell v. Davis*, 38 Conn. 562; *Landes v. Perkins*, 12 Mo. 238; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; *Wiggins v. McCleary*, 49 N. Y. 346; *Oreamuno v. Uncle Sam &c. Co.*, 1 Nev. 215;

be a question of law for the court. This is the case where the facts are undisputed and but one reasonable inference can be drawn from them. Thus, where there is no dispute as to the facts, and it clearly appears that a party has thrown away an article and has declared that he has relinquished all rights to it, or where he has removed all improvements from a mining claim, or wild land, to which he has not yet acquired a legal title and has remained continuously absent for many years, and permitted it to return to its wild state without asserting any rights to it, and has done other acts to indicate an abandonment, and nothing indicative of ownership or claim to it, the question may become one of law for the court.²⁰ So, if the law conclusively implies an abandonment from certain facts and those facts are proved without dispute or explanation, the question is one of law;²¹ and it is likewise evident that where there is no evidence even tending to show the existence of an element necessary, under the law, to constitute an abandonment, the court may declare as matter of law that there has been no abandonment.

§ 1574. **Range of evidence.**—The relinquishment or non-user of property, although it may not, of itself, be sufficient evidence of abandonment, may, of course, be shown in a proper case as one of the elements thereof.²² Indeed, the voluntary leaving or relinquishment is one of the essential elements that must be shown.²³ The other essential element is the intent, and this must also be shown, but, as will hereafter appear, it may be shown by circumstantial as well as by direct evidence. It may, indeed, sometimes be inferred from lapse of time coupled with the act of relinquishment, or from the manner and

Brentlinger v. Hutchinson, 1 Watts Pa. St. 214; *Sample v. Robb*, 16 Pa. (Pa.) 46, 52; *Parkins v. Dunham*, 3 St. 305.

Strobh. (S. Car.) 224; *Hatch v. Dwight*, 17 Mass. 289, 297, 9 Am. Dec. 145; *Schwartz v. Kuhn*, 10 Me. 274, 25 Am. Dec. 239; *North Am. & Co. v. Adams*, 104 Fed. 404; *Carr v. Foster*, L. R. 3 Q. B. 581, 43

E. C. L. 876; *Chicago & C. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223; *Muhle v. New York & C. R. Co.*, 36

Tex. 459, 25 S. W. 607. ²⁰ *Pairie v. Griffiths*, 86 Fed. 452; *Atchison v. McCulloch*, 5 Watts 461. (Pa.) 13; *Wilson v. Watterson*, 4

²¹ *Brentlinger v. Hutchinson*, 1 Watts (Pa.) 46; *Clemmins v. Gottshall*, 4 Yeates (Pa.) 330; *Grant v. Allison*, 43 Pa. St. 427.

²² *Stieber v. Frink*, 7 Colo. 148, 2 Pac. 901.

²³ *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807, 809; *Cook v. McCord*, 9 Okla. 200, 60 Pac. 497; *Whitwell v. Wells*, 24 Pick. (Mass.) 25; *Wyman v. Hurlburt*, 12 Ohio 81, 40 Am. Dec. 461.

circumstances of the relinquishment itself. All relevant evidence to show or rebut, the relinquishment or intention is generally admissible. Indeed, it has been stated in broad terms that upon this question, as upon a question of fraud, a wide range should be allowed; for it is generally from facts and circumstances that the truth is to be discovered, and "both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived."²⁴ Thus, evidence of removal, making a sworn inventory, as an insolvent, which did not include the property in question, and knowledge of the taking possession of the property by another person under claim of title, without objection, has been held competent as tending to show an abandonment.²⁵ So, on the other hand, evidence that an agent was left in charge,²⁶ or to explain the apparent abandonment by showing that it was not voluntary, or the like, has also been held admissible.²⁷ Both the acts and the declaration of the party claimed to have abandoned the property, made at the time of the alleged abandonment, are generally admissible on the question of abandonment.²⁸

§ 1575. **The act.**—As already stated, in order to constitute an abandonment there must be both an actual relinquishment of the right or property, and an intention to abandon it. The act of relinquishment may be proved, in general, as any other act, and there

²⁴ *Willson v. Cleaveland*, 30 Cal. 192, 201; *Bell v. Red Rock Tunnel &c. Co.*, 36 Cal. 214; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Lockhart v. Wills*, 9 N. Mex. 263, 50 Pac. 318. On an issue as to the abandonment of a railroad right of way where the company had ceased to operate its branch to a mine after the mine was exhausted and had torn up its tracks, evidence that the road was built merely to haul supplies and coal to and from the mine was held competent in a recent case. *Chicago &c. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223. To much the same effect is, *Gill v. Chicago &c. R. Co.*, 118 Iowa 88, 90 N. W. 606.

²⁵ *Barada v. Blumenthal*, 20 Mo. 162; *Sweeney v. Reilly*, 42 Cal. 402.

²⁶ *Keane v. Canavan*, 21 Cal. 293, 82 Am. Dec. 738.

²⁷ *Lockhart v. Wills*, 9 N. Mex. 263, 50 Pac. 318; *Livermore v. White*, 74 Me. 452, 43 Am. Dec. 600; *Welch v. Garrett*, 5 Idaho 639, 51 Pac. 405; *Utah &c. Co. v. Dickert &c. Co.*, 6 Utah 183, 21 Pac. 1002, 5 L. R. A. 259. See also, where party acts under mistake or ignorance: *Ross v. Gould*, 5 Greenl. (Me.) 204; *Williams v. Champion*, 6 Ohio 169.

²⁸ *Kercheval v. Ambler*, 4 Dana (Ky.) 166; *Dodge v. Marden*, 7 Ora. 456; *Perkins v. Blood*, 36 Vt. 273. See also, *Bliss v. Ellsworth*, 36 Cal. 310; *McMillan v. Warner*, 38 Tex. 410; *Benbow v. Boyer*, 89 Iowa 494, 56 N. W. 544.

is nothing peculiar to this branch of the subject, so far as the admissibility of evidence is concerned. Lapse of time may be an important element in determining whether there has been an abandonment,²⁹ but time is not an essential element, for the moment that the actual relinquishment and the intention concur the abandonment is usually complete.³⁰

§ 1576. **The intent.**—The intention is usually the paramount subject or inquiry where abandonment is claimed.³¹ There must also be an act of relinquishment; but, while it alone or in connection with the circumstances may furnish evidence of an intention to abandon, there is no abandonment unless there is an intention to abandon or to relinquish the right or property.³² Direct evidence as to the intention is usually admissible,³³ although it is not necessarily conclusive. But the intention is frequently proved by circumstantial evidence, and all the relevant and proper facts and circumstances of the case may be shown to prove or rebut an intention to abandon.³⁴

²⁹ *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Patchin v. Stroud*, 28 Vt. 394; *Mallett v. Uncle Sam &c. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Dawson v. Daniel*, 2 Flip. (U. S.) 305.

³⁰ *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; *Mallett v. Uncle Sam &c. Co.*, 1 Nev. 188, 90 Am. Dec. 484.

³¹ *Mallett v. Uncle Sam &c. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Sweeney v. Reilly*, 42 Cal. 402; *City of Cleveland v. Cleveland &c. R. Co.*, 93 Fed. 113, 122; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 89, and cases cited.

³² *Dyer v. Sanford*, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; *Smith v. Cushing*, 41 Cal. 97; *Polson v. Ingram*, 22 S. Car. 541, 546; *Wilson v. Pearson*, 20 Ill. 81; *Rowe v. Minneapolis*, 49 Minn. 148, 51 N. W. 907; *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334; *Weill v. Lucerne &c. Co.*, 11 Nev. 200; *Wiggins v. McCleary*, 49 N. Y. 346. So, the

mere suspension of the exercise of a right is not an abandonment unless the intention is present, *Banks v. Banks*, 77 N. Car. 186; *Faw v. Whittington*, 72 N. Car. 321; *Mason v. Anderson*, 3 Baxt. (Tenn.) 290; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257; *Mouson v. Boehm*, 26 Ch. Div. 398.

³³ *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Boot v. Brewster*, 75 Iowa 631, 36 N. W. 649, 9 Am. St. 515; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212. See also, *Bidinger v. Bishop*, 76 Ind. 244; *Over v. Schiffing*, 102 Ind. 191; *Georgia &c. R. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. 490; *Mann v. Taylor*, 78 Iowa 355, 43 N. W. 220; *Gardom v. Woodward*, 44 Kans. 758, 21 Am. St. 310; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417; *Elliott Roads and Streets* (2nd ed.) § 156.

³⁴ *Myers v. Spooner*, 55 Cal. 257; *Willson v. Cleaveland*, 30 Cal. 192, 201; *Davis v. Perley*, 30 Cal. 630;

§ 1577. **What is sufficient evidence.**—A Connecticut case⁵⁵ illustrates the doctrine of the preceding section and is of importance in this connection as showing both what is sufficient evidence of an abandonment by the original owner and what is not sufficient to prove an abandonment by the finder and appropriator. In that case manure dropped in the street by horses was left there by the owners of the horses, as worthless to them, and the plaintiff raked it up into heaps intending to cart it away the next day, but before he could do so, the defendant took it and carted it away. It was held that the original owners had abandoned it and that the first appropriator had not abandoned it, and that he was entitled to maintain an action of trover against the defendant. If an article is purposely thrown away by the owner, this is sufficient evidence of its abandonment.⁵⁶ So, where a mining claim was located in the name of four persons and the one who located it and was the only person who had anything to do with it, testified that after working it a while he decided it was worthless and destroyed the monuments and left with the intention of having nothing further to do with it, it was held that the claim was abandoned by all four.⁵⁷ The non-user of a water right, and the diversion of the water to another ditch may, under certain circumstances, constitute an abandonment of the first ditch,⁵⁸ but the mere non-user of the right for a time, or suffering the ditch to become obstructed, will not necessarily constitute an abandonment.⁵⁹ Removal of a homestead with the intention of permanently residing and going into business

Ross v. Hellyer, 26 Fed. 413; *Kimball v. Wilson*, 59 Iowa 638; *Lehman v. Bryan*, 67 Ala. 558; *Lockhart v. Wills*, 9 N. Mex. 263, 50 Pac. 318, 320. See also, *Elliott Roads and Streets* (2nd ed.) § 156. Statements of the owner at the time the act was done have been held admissible for, as well as against, him in a dedication case; *City of Denver v. Jacobson*, 17 Colo. 497, 30 Pac. 246, 247. Acts and declarations at time of alleged abandonment also held admissible: *Kercheval v. Ambler*, 4 Dana (Ky.) 166.

⁵⁵ *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. R. 350.

⁵⁶ *McGoan v. Ankeny*, 11 Ill. 558.

⁵⁷ *Kinney v. Fleming* (Ariz.), 56

Pac. 723. See also, *Myers v. Spooner*, 55 Cal. 257, evidence of abandonment sufficient to justify jury in so finding notwithstanding party testified he did not intend to abandon; *Harkrader v. Carroll*, 76 Fed. 474.

⁵⁸ *Hewitt v. Story*, 51 Fed. 101, affirmed in 64 Fed. 510, 30 L. R. A. 265, where the subject is also treated in the note.

⁵⁹ *North Am. &c. Co. v. Adams*, 104 Fed. 404; *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807; *Hall v. State*, 77 N. Y. 282; *Herriman &c. Co. v. Keel*, 25 Utah 96, 69 Pac. 719. See also, *Butterfield v. O'Neill* (Colo. App.), 72 Pac. 807.

elsewhere, has also been held sufficient evidence of abandonment of the homestead, even though the owner intended at some time to return if his business elsewhere should prove unsuccessful.⁴⁰ So, while mere non-user, without adverse possession, has been held insufficient to destroy an easement, especially when the easement was acquired by grant and not by prescription; yet it has often been held that non-user accompanied by acts clearly evincing an intention to abandon, especially if such acts destroy the object or enjoyment of the easement, will be sufficient to show an abandonment.⁴¹

§ 1578. **What is not sufficient evidence.**—Where the lessee of a stone quarry, after taking out a large quantity of stone, left the stone taken out, together with his tools, upon the ground, and went away for two years to attend to other business, it was held that there was no abandonment, unless there was intention to abandon, and that the nature and value of the property and the fact that it was left because it could not be sold for an adequate price at the time tended to repel any abandonment and justified the jury in finding that there was none.⁴² So, in many cases, the non-user for many years of property condemned for railroad purposes has been held insufficient, of itself, to show an abandonment.⁴³ The mere removal from a house does not establish an intent to abandon the ownership of it;⁴⁴ nor does the mere failure to pay taxes on property necessarily show an intent to

⁴⁰ *Kimball v. Wilson*, 59 Iowa E. 1053; *Hayford v. Spokesfield*, 100 E. 1053; *Conway v. Nichols*, 106 Iowa Mass. 491; *Smith v. Worn*, 93 Cal. 358, 76 N. W. 681; *Wolf v. Hawkins*, 206; *Fairbury Agriculture Board v. Holly*, 169 Ill. 9, 48 N. E. 149; *Bowen v. Cooper* (Ky.), 66 S. W. 601. ⁴¹ *Russell v. Stratton*, 201 Pa. St. 277, 50 Atl. 975.

⁴² *Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Steere v. Tiffany*, 13 R. I. 568; *Canny v. Andrews*, 123 Mass. 155; *Vogler v. Geiss*, 51 Md. 407; *Monaghan v. Memphis Fair & Co.*, 95 Tenn. 108, 31 S. W. 497; *Stein v. Dahn*, 96 Ala. 481; *Fitzpatrick v. Boston & Co.*, 84 Me. 33, 24 Atl. 432; *Reg. v. Chorley*, L. R. 12 Q. B. 515, 64 E. C. L. 515. But see as to what is insufficient and as to what must be shown: *Roby v. New York & Co.*, 142 N. Y. 176, 36 N.

⁴³ *Struve v. Republican & Co.*, 2 Neb. 585, 89 N. W. 604; *Morgan v. Des Moines & Co.*, 113 Iowa 561, 85 N. W. 902; *St. Louis & Co. v. Foltz*, 52 Fed. 627, 633; *Southern Pac. R. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Hummel v. Cumberland & Co.*, 175 Pa. St. 537, 34 Atl. 848; *Gurney v. Minneapolis & Co.*, 63 Minn. 70, 65 N. W. 136.

⁴⁴ *Howard v. Fessenden*, 14 Allen (Mass.) 124.

abandon it.⁴⁵ And the fact that a landowner has left his premises vacant and remained absent for several years, while it is admissible as evidence of abandonment, does not necessarily require that inference.⁴⁶ The removal of a fence for the purpose of replacing it with a better one does not show an intention to abandon the premises.⁴⁷ The failure to operate a mine continuously does not necessarily amount to an abandonment,⁴⁸ nor does an unsuccessful attempt to relocate a mining claim effect an abandonment of a prior valid location.⁴⁹

§ 1579. *Non-user and misuser.*—It seems to be the rule at common law that easements and other incorporeal hereditaments, acquired by user, might be lost by non-user, at least if the non-user were continued for the time necessary to acquire them;⁵⁰ but when they were acquired by deed they could not be extinguished by mere non-user, without other evidence of intention to abandon, or unless adverse user or some element of estoppel were present.⁵¹ But this distinction has been denied in some cases,⁵² and it has often been held, although generally in other classes of cases, that abandonment may be inferred from non-user for many years.⁵³ Non-user is at least an element to be

⁴⁵ *Keane v. Canovan*, 21 Cal. 219, 82 Am. Dec. 738. *Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Farrar v. Cooper*, 34 Me. 394; *Corning v. Gould*, 16 Wend. (N. Y.) 530; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *Canny v. Andrews*, 123 Mass. 155.

⁴⁶ *Judson v. Malloy*, 40 Cal. 299; *Langdon v. Templeton*, 66 Vt. 173, 33 Atl. 866; *Cravens v. Moore*, 61 Mo. 178. But see, *Crutsinger v. Catron*, 10 Humph. (Tenn.) 24.

⁴⁷ *Sweetland v. Hill*, 9 Cal. 556.

⁴⁸ *Belk v. Meagher*, 104 U. S. 279; *Buffalo &c. Co. v. Crump*, 70 Ark. 525, 69 S. W. 572. But see, as to leases: *Parish Fork &c. Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; *Barnsdall v. Boley*, 119 Fed. 191; *Calhoon v. Nelly*, 201 Pa. St. 97, 50 Atl. 967; *Gadbury v. Ohio &c. Co. (Ind.)*, 67 N. E. 259. In locating mining claims, however, a certain amount of work is required and failure to perform it may work a forfeiture under the law.

⁴⁹ *Temescal &c. Co. v. Salcido*, 137 Cal. 211, 69 Pac. 1010.

⁵⁰ *Peoria v. Johnson*, 56 Ill. 45;

⁵¹ *Welsh v. Tayler*, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535 and note; *Kuecken v. Voltz*, 110 Ill. 264; *Curran v. Louisville*, 83 Ky. 628; *Arnold v. Stevens*, 24 Pick. (Mass.) 106, 35 Am. Dec. 217; *Dill v. Camden Board &c.*, 47 N. J. Eq. 421, 10 L. R. A. 276; *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490.

⁵² *Veghte v. Raritan &c. Co.*, 19 N. J. Eq. 156.

⁵³ *Paine v. Griffiths*, 86 Fed. 452; *Pratt v. Sweetzer*, 68 Me. 344; *French v. Braintree &c. Co.*, 23 Pick. (Mass.) 216, 222; *Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319, 329; *Clemmins v. Gottshall*, 4 Yeates (Pa.) 330; *Hartford*

considered, with other circumstances, upon the question. But if it alone is not sufficient to show an intention to abandon, and abandonment is necessary, there must be other evidence of the intention.⁵⁴ Thus, the mere non-user of a railroad right of way, or the like, has been held insufficient to constitute an abandonment unless an intention to abandon is also shown by the circumstances or other evidence.⁵⁵ So, as to highways.⁵⁶ But it has been held that the failure for over twenty years to operate a street railroad on a certain street raises a presumption of abandonment of the grant so far as concerns that street.⁵⁷ In some jurisdictions the non-user of an old highway and the establishment of a new way in its place, will operate as an abandonment or discontinuance of the old way.⁵⁸ But in nearly all states this matter is largely controlled by statute. The misuser of an easement or of a franchise, although it may constitute a ground for forfeiture in a proper case, is not of itself sufficient to constitute an abandonment.⁵⁹

Bridge Co. v. East Hartford, 16 Conn. 149, 173; *Muhle v. New York &c. R. Co.*, 86 Tex. 459, 25 S. W. 607, 608.

⁵⁴ *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1123; *Barnes v. Lloyd*, 112 Mass. 224; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866.

⁵⁵ *Townsend v. Michigan Cent. R. Co.*, 101 Fed. 757; *Barlow v. Chicago &c. R. Co.*, 29 Iowa 276; *Durfee v. Peoria &c. R. Co.*, 140 Ill. 485, 30 N. E. 686; *Rutland R. Co. v. Chaffee*, 71 Vt. 84, 42 Atl. 984; *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794; *Southern Pac. R. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272; *Virginia &c. R. Co. v. Crow*, 108 Tenn. 17, 64 S. W. 485.

⁵⁶ *Kelly Nail &c. Co. v. Lawrence*, 46 Ohio St. 544, 22 N. E. 639; *Brown v. Hiatt*, 16 Ind. App. 340, 45 N. E. 481; *State v. Culver*, 65 Mo. 607, 27 Am. R. 295. See also, *Watkins v. Lynch*, 71 Cal. 21; *Little Rock v. Wright*, 58 Ark. 142, 23 S. W. 876; *Eureka v. Armstrong*, 83 Cal. 623,

22 Pac. 928; *Herald v. Moore*, 79 Me. 271, 9 Atl. 734; *Elliott Roads and Streets* (2nd ed.) §§ 873, 874.

⁵⁷ *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296; *Henderson v. Central &c. R. Co.*, 21 Fed. 358. But see, *Wright v. Milwaukee &c. Co.*, 95 Wis. 29, 69 N. W. 791; *Denson &c. R. Co. v. St. Louis &c. Co.*, 30 Tex. Civ. App. 474, 72 S. W. 201; *Columbus v. Columbus &c. R. Co.*, 37 Ind. 294.

⁵⁸ *Peoria v. Johnson*, 56 Ill. 45; *Warner v. Holyoke*, 112 Mass. 362; *Bowley v. Walker*, 8 Allen (Mass.) 21; *Stahr v. Carter*, 116 Iowa 380, 90 N. W. 64; *Brook v. Horton*, 68 Cal. 554, 10 Pac. 204; *Lyle v. Lesia*, 64 Mich. 16, 31 N. W. 23; *Nichols v. Sutton*, 22 Ga. 369; *Closson v. Hamblet*, 27 Vt. 728; *Millcreek Tp. v. Reed*, 29 Pa. St. 195; *State v. Reesa*, 59 Wis. 206, 17 N. W. 873. See generally *Maire v. Kruse*, 85 Wis. 302, 26 L. R. A. 449, and extended note.

⁵⁹ *Roby v. New York &c. Co.*, 142 N. Y. 176, 36 N. E. 1053. The erec-

§ 1580. *Lapse of time.*—As we have already said, non-user for any particular period of time is not an essential element of abandonment. Actual relinquishment accompanied by the necessary intention will operate as an abandonment at once. But, on the other hand, absence or non-user of property, without any intention to abandon it, will not constitute an abandonment even though years may elapse. Thus, absence from the premises for a number of years will not of itself necessarily constitute an abandonment,⁶⁰ nor is the mere non-user of a portion of the right of way of a railroad for eight or ten years sufficient to constitute an abandonment if there is no intention to abandon.⁶¹ But lapse of time is generally a circumstance to be considered.⁶² As already shown, an easement may sometimes be lost by lapse of time; or lapse of time may lead to the inference of abandonment, and, with other circumstances, justify a finding to that effect.

tion of a warehouse and elevator on a right of way does not constitute an abandonment: *Gurney v. Minneapolis &c. El. Co.*, 63 Minn. 70, 65 N. W. 136. Similar decisions have also been made where part of the property has been leased or devoted to other purposes: *Peirce v. Boston &c. R. Co.*, 141 Mass. 481, 6 N. E. 96; *Rutland R. Co. v. Chaffee*, 71 Vt. 84, 42 Atl. 984; *Southern Pac. R. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032; *Dillon v. Kansas City &c. R. Co.*, 67 Kana. 687, 74 Pac. 251; *Durfee v. Peoria &c. R. Co.*, 140 Ill. 435, 30 N. E. 686; *Roby v. New York &c. R. Co.*, 142 N. Y. 176, 36 N. E. 1053. See also, *Proprietors of Locks &c. v. Railroad Co.*, 104 Mass. 1; 1 *Elliott Railroads*, §§ 52, 55; 3 *Elliott Railroads*, § 931.

⁶⁰ *Cravens v. Moore*, 61 Mo. 178; *Judson v. Malloy*, 40 Cal. 299; *Langdon v. Templeton*, 66 Vt. 178, 28 Atl.

866. See also, *Gassert v. Noyes*, 18 Mont. 216, 44 Pac. 959; *Pratt v. Sweetzer*, 68 Me. 344; *Mallett v. Uncle Sam &c. Co.*, 1 Nev. 188, 90 Am. Dec. 484.

⁶¹ *Durfee v. Peoria &c. R. Co.*, 140 Ill. 435, 30 N. E. 686; *Struve v. Republican &c. R. Co.*, 2 Neb. 585, 89 N. W. 604; *Morgan v. Des Moines &c. R. Co.*, 113 Iowa 561, 85 N. W. 902. But see as to failure to comply with conditions in deeds and provisions for forfeiture and reverter: *Gill v. Chicago &c. R. Co.*, 118 Iowa 88, 90 N. W. 606; *Hickox v. Chicago &c. Co.*, 78 Mich. 615, 44 N. W. 143; *Indianapolis &c. R. Co. v. Hood*, 66 Ind. 580.

⁶² *Judson v. Malloy*, 40 Cal. 299; *Jeffersonville &c. R. Co. v. O'Connor*, 37, Ind. 95; *Paine v. Griffiths*, 86 Fed. 452; *Patchin v. Stroud*, 28 Vt. 394; *Mallett v. Uncle Sam &c. Co.*, 1 Nev. 188, 90 Am. Dec. 484.

CHAPTER LXXVI.

ABATEMENT.

Sec.	Sec.
1581. Burden of proof.	1587. Misnomer.
1582. Question of law or fact.	1588. Non-joinder of parties.
1583. Order of proof and hearing.	1589. Another action pending.
1584. Alien enemy.	1590. Pendency of former action.
1585. Want of legal capacity to sue.	1591. Best and secondary evidence.
1586. Insufficient service.	

§ 1581. **Burden of proof.**—A plea in abatement is an affirmative plea, and the burden of proving it is on the defendant.¹ Thus, to prove want of jurisdiction the evidence must show that the jurisdictional ground did not exist.² So, where the plea is of another action pending, the burden of proving it is upon the party who pleads it.³ And this is also true, as a general rule at least, as to a plea of alienage.⁴

§ 1582. **Question of law or fact.**—A plea in abatement generally tenders an issue of fact, and must be proved like any other issue in the case;⁵ but a pure issue of law raised by plea in abatement is triable

¹ *Gilmer v. Grand Rapids*, 16 Fed. 708; *Woodward v. Stark*, 4 S. Dak. 588, 57 N. W. 496; *Kluteman v. Page*, 3 Willson App. Cas. (Tex.) 203; *Graves v. First Nat. Bank*, 77

Tex. 555, 14 S. W. 163; *Hart, Wiggin & Co. v. Kanady*, 33 Tex. 720; *Jewett v. Davis*, 6 N. H. 518; *Bellows v. Murray*, 66 Me. 199. But see, *Hawkins v. Albright*, 70 Ill. 87.

² *Robertson v. Ephriam*, 18 Tex. 118; *Hopson v. Saswell*, 13 Tex. Civ. App. 492, 36 S. W. 312; *Gilmer v. Grand Rapids*, 16 Fed. 708; *Sheppard v. Graves*, 14 How. (U. S.) 505; *Henwood v. State*, 11 Ind. App. 636, 39 N. E. 289.

³ *Fowler v. Byrd*, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4999a; *People v. De la Guerra*, 24 Cal. 73; *Hoag v. Weston*, 10 N. Y. Civ. Proc. 92.

⁴ *Richards v. Moore*, 60 Vt. 449, 15 Atl. 119; *State v. Haynes*, 54 Iowa 109, 6 N. W. 156; *Keenan v. State*, 8 Wis. 26; *Moore v. Wilson*, 10 Yerg. (Tenn.) 406; but see *Allen Enemy*, post § 1584.

⁵ *Sheppard v. Graves*, 14 How. (U. S.) 505; *Hart, Wiggin & Co. v. Kanady*, 33 Tex. 720. See also, *Harmon v. McRae*, 91 Ala. 401, 8 So. 548, 551.

by the court.* An issue of fact raised by such plea should usually be submitted to the jury,⁷ but an issue of fact if the parties agree,⁸ is, of course, triable by the court.

§ 1583. **Order of proof and hearing.**—The evidence upon the plea in abatement should be first in order of proof.⁹ Regularly, issues in abatement should be tried and disposed of before issues on the merits.¹⁰ This was the rule at common law and is the rule still in force in most of the states, but in some instances it has been changed by statute. Where the rule prevails, the evidence on the hearing of the issue in abatement is confined to that issue; and the merits of the case are not ordinarily gone into.¹¹

§ 1584. **Alien enemy.**—When a plaintiff is incapacitated from suing, by reason of his alienage, the defendant should raise the objection by plea in abatement.¹² An alien enemy is not permitted to prosecute

* *People v. De la Guerra*, 24 Cal. 73; *D'Wolf v. Rabaud*, 1 Pet. (U. S.) 476; *Wickliffe v. Owings*, 17 How. (U. S.) 47; *Jones v. League*, 18 How. (U. S.) 76; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386. *Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. 734; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. 615; *Carmien v. Comell*, 148 Ind. 83, 89, 47 N. E. 216.

⁹ *McCormick v. Blossom*, 40 Iowa 256; *Elders v. Beck*, 18 Iowa 86; *Stoever v. Gloninger*, 6 S. & R. (Pa.) 63. ¹¹ *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877; *Tyler v. Murray*, 57 Md. 418; *Sauerwein v. Renard & Co.*, 68 Mo. App. 29; but see, *Thompson v. Greenwood*, 28 Ind. 327. Even under a statute permitting pleas in abatement and pleas in bar to be filed together, going to trial on the merits without bringing the plea in abatement to trial is held a waiver of such plea: *Stephen Pl. 105*; *Gould Pl.*, ch. 5, § 2; *Maupin v. Scottish & Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

¹⁰ *Anderson v. Garrett*, 9 Gill (Md.) 120; *Tyler v. Murray*, 57 Md. 418. ¹² *Shivers v. Wilson*, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; *Martin v. Woods*, 9 Mass. 377; *McNair v. Toler*, 21 Minn. 175; *Educational & Soc. v. Varney*, 54 N. H. 376; *Burnside v. Matthews*, 54 N. Y. 78; *Lee v. Salinas*, 15 Tex. 495; *Rateau v. Bernard*, 3 Blatchf. (U. S.) 244, 20 Fed. Cas. No. 11579; *Bee, The*, 1

¹¹ *Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. 500; *Blackwell v. Dibbrell*, 103 N. Car. 270, 9 S. E. 192; *Small v. Gwinn*, 6 Cal. 447; *White v. Thompson*, 1 Ill. 72; *Wells v. Patton*, 50 Kans. 732, 33 Pac. 15; *Flournoy v. Flournoy*, 29 La. Ann. 737; *Coombs & Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

¹² *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524; *Hummel v. Meyers*, 26 Wkly. Notes Cas. (Pa.) 279; *Brown County v. Van Stralen*, 45 Wis. 675; *Fremont v. Merced Min. Co.*, McAll. (U. S.) 267, 9 Fed. Cas. No. 5095;

suits in court; and if the plaintiff, at the commencement of a suit, is an alien enemy, there is a cause for abatement; but the right of action generally revives on cessation of hostilities.¹³ The reason for prohibiting alien enemies from suing is that aid would be given the enemy by recovery.¹⁴ It has been held, however, that the rule, that an alien enemy has no standing in court, does not apply to courts of admiralty;¹⁵ and it has also been held that where one of the plaintiffs is a mere nominal party, the fact that he is an alien enemy is no ground for dismissing the petition of the real plaintiff who is not an enemy.¹⁶ The burden of proving alienage is ordinarily upon the party who asserts it;¹⁷ but it has been held that foreigners by birth are presumed to be aliens,¹⁸ and that, when once this fact is established, the status is presumed to continue,¹⁹ at least in the absence of anything

Ware (U. S.) 336, 3 Fed. Cas. No. 1219; Comyns Dig. 428; Burk v. Brown, 2 Atk. 397. But see, Dewitt v. Buchanan, 54 Barb. (N. Y.) 31; White v. Sabariego, 23 Tex. 243.

¹³ Daniell Pl. and Pr. 45-53; Kent Comm. 68; O'Mealey v. Wilson, 1 Campb. 482; De Luneville v. Phillips, 2 B. & P. N. R. 97; Daubigny v. Davallon, 2 Anst. 462; Anthon v. Fisher, 2 Doug. 649 note, 3 Doug. 166, 26 E. C. L. 69; Alcinous v. Nigreu, 4 El. & Bl. 217, 82 E. C. L. 217, 1 Jur. N. S. 16; Sylvester's Case, 7 Mod. 150; Kanawha Coal Co. v. Kanawha &c. Coal Co., 7 Blatchf. (U. S.) 391; Adventure, The, 8 Cranch (U. S.) 221; Crawford v. The William Penn, 3 Wash. (U. S. C. C.) 484; Knoefel v. Williams, 30 Ind. 1; Perkins v. Rogers, 35 Ind. 124, 9 Am. R. 639; Norris v. Doniphan, 4 Metc. (Ky.) 385; Dorsey v. Kyle, 30 Md. 513, 96 Am. Dec. 617; Hutchinson v. Brock, 11 Mass. 119; Levine v. Taylor, 12 Mass. 8; Bonneau v. Dinsmore, 23 How. Pr. (N. Y.) 397; Bell v. Chapman, 10 Johns. (N. Y.) 183; Sanderson v. Morgan, 39 N. Y. 231, 25 How. Pr. (N. Y.) 144; Russell v. Skipwith, 6 Bin. (Pa.) 241; Hardy v. De Leon, 5

Tex. 211; Bishop v. Jones, 23 Tex. 294.
¹⁴ Zacharie v. Godfrey, 50 Ill. 186, 99 Am. Dec. 506; Clarke v. Morey, 10 Johns. (N. Y.) 69; Russ v. Mitchell, 11 Fla. 80; Hoskins v. Gentry, 2 Duv. (Ky.) 285; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Emulous, The, 1 Gall. (U. S.) 563; Johnson v. Thirteen Bales &c., 2 Paine (U. S.) 639.

¹⁵ United States v. 1756 Shares Capital Stock, 5 Blatchf. (U. S.) 231; see also, Ottridge v. Thompson, 2 Cranch (U. S.) 108; Sylvester's Case, 7 Mod. 150; Wells v. Williams, 1 Ld. Raym. 282, 1 Lutw. 84, 1 Salk. 46; Ricord v. Bettenham, 3 Burr. 1734.

¹⁶ Hoskins v. Gentry, 2 Duv. (Ky.) 285.

¹⁷ Smith v. Dovers, 2 Doug. 428; Moore v. Willson, 10 Yerg. (Tenn.) 406; Keenan v. State, 8 Wis. 132; State v. Haynes, 54 Iowa 109, 6 N. W. 156; Richards v. Moore, 60 Vt. 449, 15 Atl. 119; but compare authorities cited in next note below.

¹⁸ Behrensmeyer v. Kreltz, 135 Ill. 591, 26 N. E. 704; White v. White, 2 Metc. (Ky.) 185.

¹⁹ Hauenstein v. Lynhan, 100 U. S.

to the contrary. In a charge of alienage the best evidence of which the nature of the case admits must be produced.²⁰ For instance, the declarations of a juror after verdict have been held inadmissible to show that he was an alien and therefore not qualified.²¹ A certificate of naturalization in a foreign country has been held admissible,²² as evidence of alienage; and so has the recital in a deed,²³ but it is not conclusive. Where the defendant pleads that the plaintiff is an alien enemy and the plaintiff replies that he is a native citizen, the burden is upon the defendant to prove that the plaintiff is an alien as alleged;²⁴ and if the plaintiff replies that he was duly naturalized, the proper evidence thereof is the record, or an exemplified copy of the record of the court in which he was naturalized.²⁵ But naturalization may sometimes be inferred from the fact that one has long exercised the privileges of a citizen.²⁶ The courts take judicial notice of the existence of a war in which this country is involved,²⁷ and also of the restoration of peace proclaimed by the President.²⁸

§ 1585. **Want of legal capacity to sue.**—Ability is the rule and disability the exception.²⁹ In the absence of anything to the contrary

483; *Kadlec v. Pavik*, 9 N. Dak. 278, 83 N. W. 5. But it may be rebutted by proper evidence.

²⁰ *Keenan v. State*, 8 Wis. 132.

²¹ *Schuster v. State*, 80 Wis. 107, 49 N. W. 30.

²² *Newcomb v. Newcomb*, 22 Ky. L. R. 286, 57 S. W. 2.

²³ *Lacoste v. Odam*, 26 Tex. 458.

²⁴ *Smith v. Dovers*, 2 Doug. 428; see also, *State v. Haynes*, 54 Iowa 109, 6 N. W. 156; but compare, *White v. White*, 2 Metc. (Ky.) 185; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

²⁵ And parol or secondary evidence is not ordinarily admissible: *Belcher v. Farren*, 89 Cal. 73, 26 Pac. 791; *Berry v. Hull*, 6 N. Mex. 643, 30 Pac. 936; *State v. O'Hearn*, 58 Vt. 718, 6 Atl. 606; *Green v. Salas*, 31 Fed. 106.

²⁶ *Boyd v. Nebraska*, 143 U. S. 135, 12 Sup. Ct. 375, and secondary evidence is admissible where the record has been destroyed; *Hogan v.*

Kurtz, 94 U. S. 778; *Scott v. Strobach*, 49 Ala. 477; *Heney v. Brooklyn & C. Soc.*, 39 N. Y. 333.

²⁷ *Swinneaton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. R. 639; *Ogden v. Lund*, 11 Tex. 688; *United States v. Greathouse*, 2 Abb. (U. S.) 364; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Alcinous v. Nigren*, 4 El. & Bl. 217, 82 E. C. L. 217; *Rex v. De Berenger*, 3 M. & S. 67; in one case the court seems to have taken judicial notice that a litigant was an alien enemy, *Beckham's Succession*, 16 La. Ann. 352.

²⁸ *Perkins v. Rogers*, 35 Ind. 124, 9 Am. R. 639; so held in *United States v. Fifteen hundred Bales of Cotton*, 10 Int. Rev. Rec. 52, although no proclamation had been made by the President.

²⁹ *Briscoe v. Johnson*, 73 Ind. 573; *Frankboner v. Corder*, 127 Ind. 164, 26 N. E. 766.

it will be presumed that all the parties to an action are adults;³⁰ and one who relies upon a plea that one of the parties is an infant has the burden of proving it.³¹ In a recent case it is said: "It is true that infancy may be pleaded either in abatement or in bar, depending on the facts shown. In case the facts pleaded show, or do not deny a good cause of action, but merely disclose that the party is a minor and therefore cannot maintain or defend the action, then the plea, if made, would be in abatement."³² Doubtless, however, the court, in such case, would appoint a guardian ad litem for a minor defendant, and the trial would proceed; and even if judgment should be entered without such appointment, the error would be but an irregularity, and the judgment, if not attacked on its merits, would stand.³³ In case, however, the facts should show that the party against whom the action was brought was a minor at the time of executing the note or other obligation sued on, then, it is plain, that no cause of action would be shown against him. The minor having been incapable of entering into the alleged contract, there would, in fact, be no contract; and the answer setting up such a state of facts would be a plea in bar, and not in abatement." Coverture, like infancy, when it does not appear on the face of the complaint or declaration, and goes merely in abatement, must be so pleaded;³⁴ and the same has been held as to the want of legal capacity of an administrator to sue.³⁵ So, it has been held that the fact that a corporation has ceased to exist,³⁶ or that it has no legal existence,³⁷ should be pleaded in abatement. But the weight of authority at common law seems to be to the

³⁰ *McSweeney v. McMillen*, 96 Ind. 298; *Rowe v. Arnold*, 39 Ind. 24.

³¹ *Frankboner v. Corder*, 127 Ind. 164, 26 N. E. 766; *McSweeney v. McMillen*, 96 Ind. 298; *Palmer v. Wright*, 58 Ind. 486; *Shirley v. Hagar*, 3 Blackf. (Ind.) 225. See as to plea in abatement being proper: *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Young v. Young*, 3 N. H. 346, 26 Am. Law Reg. 42.

³² *Winer v. Mast*, 146 Ind. 177, 183, 184, 45 N. E. 66.

³³ *Citing Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920.

³⁴ *Surtell v. Brailsford*, 2 Bay (S.

Car.) 333; *Rangler v. Hummell*, 37 Pa. St. 130.

³⁵ *Nolte v. Libbert*, 34 Ind. 163; see also, *Conkey v. Kingman*, 24 Pick. (Mass.) 115; *Kane v. Paul*, 14 Pet. (U. S.) 33; *Thomas v. Cameron*, 16 Wend. (N. Y.) 579.

³⁶ *President &c. v. Hamilton*, 34 Ind. 506; *Meikel v. German &c. Soc.*, 16 Ind. 181.

³⁷ *Jones v. Cincinnati Type &c. Co.*, 14 Ind. 89; see also, *Propagation Soc. v. Town of Pawlet*, 4 Pet. (U. S.) 480, 501; *Jones v. Bank of Tenn.*, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540; *Phoenix Bank v. Curtia*, 14 Conn. 437, 36 Am. Dec. 492.

effect that a plea of nul tiel corporation is a plea in bar when directed against the plaintiff.³⁸ In most jurisdictions, however, either by statute or decision, an unverified general denial alone does not put the plaintiff to proof of its corporate existence. But where the question is properly raised, the burden is upon the plaintiff, suing as a corporation, to prove that it has corporate existence.³⁹

§ 1586. Insufficient service.—Irregularities in process or service should be taken advantage of, by plea in abatement, or, in some instances, by motion to quash; as a general appearance by pleading to the merits, or the like, waives such irregularities.⁴⁰ Where defective or improper service is the foundation of a plea in abatement, as where it was improper in that the day of service was Sunday, the court will take judicial notice of the day and refer to a proper almanac in the matter. The same rule is applicable to other days on which, either by statute or by proclamation of the chief executive of any state, service is improper and defective.⁴¹ But, as already stated, irregularity in the service of a summons on such a day, is cured by a general appearance without objecting or properly raising the question.⁴² And it has been held that the insufficiency of the return of service of summons on a foreign corporation may be corrected by amendment, if the facts warrant it, so as to conform to the statute, and is not ground for abatement.⁴³

§ 1587. Misnomer.—A general appearance waives a misnomer in a summons.⁴⁴ An allegation by the defendant in pleading, that he was

³⁸ 6 Thompson Corp., § 7669.

³⁹ Spangler v. Indiana &c. R. Co., 21 Ill. 276; Bailey v. Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Indianapolis &c. Min. Co. v. Herkimer, 46 Ind. 142; Johnson v. Hanover Nat. Bank, 88 Ala. 271, 6 So. 909; Hallett v. Harrower, 33 Barb. (N. Y.) 537.

⁴⁰ 2 Elliott Gen. Pr., §§ 475-477.

⁴¹ 2 Greenleaf Ev., § 20; Draper v. Moriarity, 45 Conn. 476; Weleker v. Le Pelletier, 1 Campb. 479; that defects in process or return may be pleaded in abatement to the writ, see also, Sebree v. Clay, 3 A. K.

Marsh. (Ky.) 552; Embry v. Devinney, 8 Dana (Ky.) 202; Renner v. Reed, 3 Ark. 339; Hooper v. Jellison, 22 Pick. (Mass.) 250.

⁴² White v. Morris, 107 N. Car. 92, 12 S. E. 80.

⁴³ Zelnicker &c. Co. v. Mississippi &c. Oil Co., 103 Mo. App. 94, 77 S. W. 321; but see, Clark v. Oregon &c. Co. (Mont.), 74 Pac. 734.

⁴⁴ New Eng. Mfg. Co. v. Starin, 60 Conn. 369, 22 Atl. 952; see also, Phillips Code Pl., § 238; Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66.

baptized by a certain name, though it may have been unnecessary to have made such averment, must be proved as made. Proof is by production of the baptismal records or register, or by an authenticated copy thereof, and this record must be further accompanied by proof of the defendant's identity with the person named therein. A name may be proved in other ways, however, if there be no averment of the fact of baptism; as by competent evidence that the defendant was known by, and claimed the said name.⁴⁵ If a defendant is sued by the wrong name, or, if an initial letter is used instead of his christian name, a plea in abatement is the proper mode of taking advantage of such an error; and the same is true where the name of the defendant differs in the writ and declaration.⁴⁶ The use of the word "the" in a declaration or complaint before the title of a defendant corporation, where defendant's true title contains no such word, has been held a misnomer which is cause for a plea in abatement.⁴⁷ So, where the defendant answered in abatement for misnomer, stating its true name, it was held error for the court to render judgment against the defendant on the merits, and that the plaintiff should either have amended, the truth of the plea being conceded, or the action should have been abated.⁴⁸ Ordinarily, where there is no plea in abatement, a slight variance between the name of the corporation as stated in the pleadings, and that as stated in articles of incorporation offered in evidence, will not cause the exclusion of such articles if the identity of the corporation is clear; but in a case where the variance was so great as to leave a doubt as to whether the articles referred to the same alleged corporation, they were held inadmissible in evidence.⁴⁹

§ 1588. **Non-joinder of parties.**—Another cause of a plea in abatement is the non-joinder of proper parties.⁵⁰ Several excellent illus-

⁴⁵ 2 Greenleaf Ev., § 21; Holman Co. (Del.), 56 Atl. 366; but see, Zelnicker & Co. v. Mississippi & Co. Oil Co., 103 Mo. App. 94, 77 S. W. 321.

⁴⁶ Seely v. Boon, Coxe (N. J.) 138; State v. Knowlton, 70 Me. 200; Simons v. Waldron, 70 Ill. 281; Pedens v. King, 30 Ind. 181; Sinton v. Steamboat R. R. Roberts, 46 Ind. 476; see also, Weld v. Hubbard, 11 Ill. 573; Pierce v. Lacy, 23 Miss. 193; Smith v. Bowker, 1 Mass. 76; Whittier v. Gould, 8 Watts (Pa.) 485.

⁴⁷ Bank of Commerce v. Mudd, 32 Mo. 218; see also, Bartlett v. Brickett, 14 Allen (Mass.) 62.

⁴⁸ Bledsoe v. Irvin, 35 Ind. 293; Dillon v. State Bank, 6 Blackf. (Ind.) 5; Wadsworth v. Woodford, 1 Day (Conn.) 28.

⁴⁹ Lapham v. Philadelphia & Co. R.

trations are given in an earlier work.^{50*} If the defendant pleads that he made the promise jointly with another, evidence of a promise jointly with an infant will sustain the plea;⁵¹ for the promise of an infant is voidable only, and not void.⁵² If he has avoided the promise it will be a good replication, and plaintiff must prove it. Where the plea was that several persons being the assigns of a bankrupt, ought to have joined as co-defendants, it was held that proof of having acted as assignees was not sufficient, and that nothing less than proof of the assignment would satisfy the allegation.⁵³ And if, on the face of the assignment, it should appear that there were other assignees not named in the plea, it would falsify it.⁵⁴ If, on the plea of non-joinder of other partners as defendants, it is proved that while the contract is in the firm name, it was made by agency and for the use of the defendant, and the proceeds were so applied by him in fraud of his partners, the plea will not be maintained.^{54*}

§ 1589. **Another action pending.**—It is a well established general rule that the pendency of a prior suit for the same cause of action, between the same parties in a court of competent jurisdiction, of the same state, will abate a later suit.⁵⁵ This rule is applicable, in most

^{50*} See 2 Greenleaf Ev., § 24.

⁵¹ Gibbs v. Merrill, 3 Taunt. 307; Woodward v. Newhall, 1 Pick. (Mass.) 500; Story Pl. 35; Wentworth Pl. 17; Chitty Preced., p. 197; Gould v. Lasbury, 1 C. M. & R. 254; Gale v. Capern, 1 Ad. & El. 102.

⁵² Fisher v. Jewett, 1 Berton (N. B.) 35; Kent Comm. 234-236; 4 Cruise Dig. (Greenleaf) 14, n. 2.

⁵³ Pasmore v. Bousfield, 1 Stark. 236, per Ld. Ellenborough.

⁵⁴ Ibid.

⁵⁵ Hudson v. Robinson, 4 M. & S. 475; Burgess v. Merrill, 4 Taunt. 468; Phillips v. Cummings, 11 Cush. (Mass.) 469; Gulf & C. R. Co. v. Cusenberry, 86 Tex. 525; Putney v. Lapham, 10 Cush. (Mass.) 234; Briggs v. Taylor, 35 Vt. 66; Chitty Pl. 75; Snow v. Carpenter, 49 Vt. 426.

⁵⁶ Foster v. Napier, 73 Ala. 595;

Moss v. Ashbrooks, 12 Ark. 369; Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327; Damon v. Denny, 54 Conn. 253, 7 Atl. 409; Quinebaug Bank v. Tarbox, 20 Conn. 510; Beach v. Norton, 8 Conn. 71; National Ex. & Co. v. Burdette, 7 App. Cas. (D. C.) 551; Steele v. Grand Trunk & Co., 125 Ill. 385, 17 N. E. 483; Heath v. Bates, 70 Ga. 633; Branigan v. Rose, 8 Ill. 123; Shepard v. Meridian Nat. Bank, 149 Ind. 20, 48 N. E. 352; Loyd v. Reynolds, 29 Ind. 299; Rawson v. Guilberson, 6 Iowa 507; Challiss v. Smith, 25 Kans. 563; Graves v. Allan, 13 T. B. Mon. (Ky.) 190; Rochereau v. Lewis, 26 La. Ann. 581; Bischoff v. Theurer, 8 La. Ann. 15; Kline v. Freret, 5 La. Ann. 492; Dick v. Gilmer, 4 La. Ann. 520; Fahy v. Brannagan, 56 Me. 42; Commonwealth v. Churchill, 5 Mass. 174; Wales v. Jones, 1 Mich. 254;

jurisdictions, to an action between privies, or parties representing the same interest, of the parties to the prior pending action.⁵⁸ But the character in which the defendant is sued must usually be the same,⁵⁷ although the fact that in one action the plaintiff is called a receiver and in the other a trustee, where the complaints are identical and the relief demanded is the same and for the same purpose, will not make the plea bad.⁵⁸ The general test for determining whether the causes of action are identical within the rule, is found in the answer to the question; would a judgment on the merits in the prior action be a bar to the second action.⁵⁹ It has also been said that the true criterion is: whether the evidence, properly admissible in the one action, will support the other.⁶⁰ The relief sought, as well as the grounds upon which the relief is sought, must ordinarily be the same, or substantially the same in both actions;⁶¹ and if the prior action cannot fur-

- Merriam v. Baker*, 9 Minn. 40; *Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326; *Richardson v. Opelt* (Neb.), 82 N. W. 377; *Needham v. Wright*, 140 Ind. 190, 195, 39 N. E. 510; *Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536; *Morley v. Power*, 5 Lea (Tenn.) 691.
- Dengler v. Hays*, 63 N. J. L. 14, 42 Atl. 775; *Blackburn v. Watson*, 85 Pa. St. 241; *Foster v. Foster*, 24 Ky. L. R. 1396, 71 S. W. 524.
- Shepard v. Meridian Nat. Bank*, 149 Ind. 20, 48, N. E. 346; *Beach v. Norton*, 8 Conn. 71.
- Richardson v. Opelt* (Neb.), 82 N. W. 377; *Hall v. Suskind*, 109 Cal. 203, 41 Pac. 1012; *Beyersdorf v. Sump*, 39 Minn. 495, 41 N. W. 101, 12 Am. St. 678; *Moore v. Holt*, 3 Tenn. Ch. 141; *Newell v. Newton*, 10 Pick. (Mass.) 470; *Watson v. Jones*, 13 Wall. (U. S.) 679; *Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992.
- Steers v. Shaw*, 53 N. J. L. 358, 21 Atl. 940; *Steam Packet Co. v. Bradley*, 5 Cranch (U. S.) 393.
- Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 17 Pac. 537, 7 Am. St. 183; *Ayres v. Bensley*, 32 Cal. 620; *Eaton v. Eaton*, 68 Mich. 158, 36 N. W. 50; *Johnson v. Robert-*
- Warder v. Henry*, 117 Mo. 530, 23 S. W. 776; *State v. Matley*, 17 Neb. 564, 24 N. W. 200; *Rogers v. Odell*, 39 N. H. 417; *Hixon v. Schooley*, 26 N. J. L. 461; *Schenck v. Schenck*, 10 N. J. L. 327; *Porter v. Kingsbury*, 77 N. Y. 164; *Baker v. Baker*, 70 Hun (N. Y.) 95, 23 N. Y. S. 1083; *Alexander v. Norwood*, 118 N. Car. 381, 24 S. E. 119; *McNeill v. Currie*, 117 N. Car. 341, 23 S. E. 216; *Well v. Guerin*, 42 Ohio St. 299; *Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326; *Cleveland & C. R. Co. v. Erie*, 27 Pa. St. 380; *O'Reilly v. New York & C. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 864; *Walters v. Laurens Cotton Mills*, 53 S. Car. 155, 31 S. E. 1; *Kirby v. Jackson*, 42 Vt. 552; *Tacoma v. Commercial Electric & C. Co.*, 15 Wash. 515, 46 Pac. 1043; *Blair v. Cary*, 9 Wis. 495; *Renner v. Marshall*, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; *Harvey v. Lord*, 10 Fed. 236; *Wadleigh v. Veazie*, 3 Sumn. (U. S.) 165, 28 Fed. Cas. No. 17031; *Sparry's Case*, 5 Coke 61a; *Bain v. Bain*, 10 U. C. Q. B. 572; *Commercial Bank v. Jarvis*, 6 U. C. Q. B. (O. S.) 257.

nish adequate relief which can be furnished in the second action,⁶² and the second action is not vexatious, as where the proceedings in the first action are fatally defective,⁶³ it is held in many jurisdictions that the second action should not be abated. But in some jurisdictions it is generally presumed as a matter of law that the action is vexatious.⁶⁴ The general rule under consideration does not apply where the prior action is pending in a court of another state or government.⁶⁵ This is true where one action in personam is in a state court, and the other action is in a federal court.⁶⁶ But it seems that the court in which the subsequent action is pending may stay pro-

son, 20 Ky. 35, 45 S. W. 523; *Coles v. Yorks*, 31 Minn. 213, 17 N. W. 341; *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. R. 648; *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. 678.

* *Branigan v. Rose*, 8 Ill. 123; *Scott v. Rand*, 118 Mass. 215; *Seebold v. Lockner*, 30 Md. 133; *Thompson v. Lyon*, 14 Cal. 39; *Horton v. Bassett*, 17 R. I. 129, 20 Atl. 234; *Gibson v. Southwestern Land Co.*, 89 Wis. 49, 61 N. W. 282; *Atlantic Mut. Ins. Co. v. Alexander*, 16 Fed. 279; *Carpenter v. Talbot*, 33 Fed. 537; 1 Cyc. 29.

* See *Byne v. Byne*, 1 Rich. (S. Car.) 438; *O'Malia v. Glynn*, 42 Ill. App. 51; *Drea v. Cerlveau*, 28 Minn. 380, 9 N. W. 802; *Dyer v. Sealmanini*, 69 Cal. 637, 11 Pac. 327; *Reynolds v. Harris*, 9 Cal. 338; *Griffin v. Board*, 71 Miss. 767, 15 So. 107; *Norfolk &c. R. Co. v. Nunally*, 88 Va. 546, 14 S. E. 367, second action instituted before dismissing first, to avoid running of statute of limitations.

*1 *Bacon Abr.* 13; *Jones v. McPhillips*, 82 Ala. 102, 2 So. 468; *Gamsby v. Ray*, 52 N. H. 513; *Orman v. Lane*, 130 Ala. 305, 30 So. 441.

* *Hill v. Hill*, 51 S. Car. 134, 28 S.

E. 309; *Sloan v. McDowell*, 75 N. Car. 29; *Smith v. Lathrop*, 44 Pa. St. 326, 84 Am. Dec. 448, and note; *De Armond v. Bohn*, 12 Ind. 607; *Grider v. Apperson*, 32 Ark. 332; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116; *Chattanooga &c. R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109; *Mutual Life Ins. Co. v. Brune*, 96 U. S. 588.

* *Gordon v. Gilfoil*, 99 U. S. 169; *Stanton v. Embrey*, 93 U. S. 548; *Humphrey v. Thorp*, 89 Fed. 66; *Short v. Hepburn*, 75 Fed. 113; *Rice v. Ashland County*, 114 Wis. 130, 89 N. W. 908; *Russell v. Alvarez*, 5 Cal. 48; *State v. Superior Court*, 14 Wash. 686, 45 Pac. 670; *Oneida Co. Bank v. Bonney*, 101 N. Y. 173, 4 N. E. 332; *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782. Even when the federal court is in the same district: *North Muskegon v. Clark*, 62 Fed. 694; *Dwight v. Central Vt. R. Co.*, 9 Fed. 785; see also, *International &c. R. Co. v. Barton*, 24 Tex. Civ. App. 122, 57 S. W. 292; *Vail v. Central R. Co.*, (N. J.) 4 Atl. 663; but compare, *Radford v. Folsom*, 14 Fed. 97; *Hughes v. Green*, 75 Fed. 693; *Smith v. Atlantic Mut. F. Ins. Co.*, 22 N. H. 21; *Wilson v. Milleken*, 103 Ky. 165, 44 S. W. 660.

ceeding or grant a continuance until the former action in the foreign jurisdiction is determined.⁶⁷

§ 1590. **Pendency of former action.**—The action pleaded in abatement must usually be shown to be actually pending at the time of the trial;⁶⁸ but it has been held sufficient to show that the action pleaded in abatement was pending at the time the second suit was commenced.⁶⁹ There is ordinarily no presumption that suit commenced is still pending until it is affirmatively proved.⁷⁰ But it was held in one case that when the defendant showed the issuing of a writ for the same cause of action, he proved *prima facie* the pendency of suit; and it then devolved on plaintiff to prove suit no longer pending.⁷¹ The former action is considered pending during an appeal which suspends the judgment and which has not been dismissed or determined.⁷²

⁶⁷ *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179; *Kerr v. Willetts*, 48 N. J. L. 79, 2 Atl. 782; *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. 448; see also, *Martin v. Baldwin*, 19 Fed. 340; *Ryan v. Seaboard &c. R. Co.*, 89 Fed. 397.

⁶⁸ *Grider v. Apperson*, 32 Ark. 332; *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. 248; *Balfour Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Yentzer v. Thayer*, 10 Colo. 63, 14 Pac. 53, 3 Am. St. 563; *Rumph v. Truelove*, 66 Ga. 480; *Gilmore v. Georgia R. &c. Co.*, 93 Ga. 482, 21 S. E. 50; *Morris v. State*, 101 Ind. 560; *Ball v. Keokuk &c. R. Co.*, 71 Iowa 306, 32 N. W. 354; *Moorman v. Gibbs*, 75 Iowa 537, 39 N. W. 832; *Rush v. Frost*, 49 Iowa 183; *Adams v. Gardiner*, 13 B. Mon. (Ky.) 197; *Wilson v. Millikin*, 19 Ky. L. R. 1843, 44 S. W. 660, 42 L. R. A. 449; *Schmidt v. Braunn*, 10 La. Ann. 26; *Clark v. Comfort*, 45 La. Ann. 502, 12 So. 763; *Leavitt v. Mowe*, 54 Md. 613; *Lewis v. Higgins*, 52 Md. 614;

Nichols v. Bank, 45 Minn. 102, 47 N. W. 462; *Page v. Mitchell*, 37 Minn. 368, 34 N. W. 896; *Warder v. Henry*, 117 Mo. 530, 27 S. W. 776; *Gamsby v. Ray*, 52 N. H. 513; *Crossman v. Universal Rubber Co.*, 131 N. Y. 636, 30 N. E. 225; *Averill v. Patterson*, 10 How. Pr. (N. Y.) 85; *Porter v. Kingsbury*, 77 N. Y. 164; *Lord v. Ostrander*, 43 Barb. (N. Y.) 337; *Hyatt v. Ingalls*, 124 N. Y. 93, 26 N. E. 285; *Findlay v. Keim*, 62 Pa. St. 112; *Burnett v. Southern R. Co.*, 62 S. Car. 281, 40 S. E. 679; *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93, 46 Atl. 183; *Trawick v. Martin Brown Co.*, 74 Tex. 522, 12 S. W. 216; *Payne v. Benham*, 16 Tex. 364; *Williamson v. Paxton*, 18 Gratt. (Va.) 475.

⁶⁹ *Lee v. Hefley*, 21 Ind. 98; *Porter v. Kingsbury*, 77 N. Y. 164.

⁷⁰ *Phelps v. Winona &c. R. Co.*, 37 Minn. 485, 35 N. W. 273, 5 Am. St. 867.

⁷¹ *Fowler v. Byrd*, Hempst. (U. S.) 213, 9 Fed. Cas. No. 4999a; contra: *Hirsch v. Manhattan R. Co.*, 82 N. Y. S. 754.

⁷² *Flisk v. Atkinson*, 71 Cal. 452, 10 Pac. 374; *Merritt v. Richey*, 100 Ind.

§ 1591. **Best and secondary evidence.**—The proper evidence to support a plea of another action pending is the record or a duly authenticated copy or transcript thereof.⁷³ But secondary evidence is admissible, upon a proper showing, where the record is lost or destroyed.⁷⁴ And, under proper pleadings, where it cannot be satisfactorily determined from the record whether the parties and the causes of action are the same, parol evidence has been held admissible for that purpose.⁷⁵

416; *Walker v. Heller*, 73 Ind. 46; *Churchill*, 5. Mass. 174; *Parker v. Bond v. White*, 24 Kans. 45; *Althen Colcord*, 2 N. H. 36.
v. Tarbox, 48 Minn. 18, 50 N. W. " *Suggett v. Bank*, 8 Dana (Ky.)
 1018, 31 Am. St. 616; *Municipal* 201; *Tolle v. Alley* (Ky.), 24
Court v. McDonough, 24 R. I. 498, 53 S. W. 113; *Dean v. Massey*, 7 Ala.
 Atl. 866; but compare, *Rieden v.* 601; see also, *Woodward v. Stark*, 4
Kothman (Tex. Civ. App.), 73 S. W. S. Dak. 588, 57 N. W. 496; see, Vol.
 425. I, § 618.

" *Smiley v. Dewey*, 17 Ohio 156; " *Davis v. Dunklee*, 9 N. H. 545;
Walker v. Heller, 73 Ind. 46; *Kel-* *Damon v. Denny*, 54 Conn. 253, 7
logg v. Sutherland, 38 Ind. 154; Atl. 409; see also, *Foye v. Patch*, 132
Bond v. White, 24 Kans. 45; *Craig* Mass. 105; *Morris v. State*, 101 Ind.
v. Smith, 10 Colo. 220, 15 Pac. 337; 560; *Bain v. Bain*, 10 U. C. Q. B.
People v. De la Guerra, 24 Cal. 78; 572; but compare, *Wright v. Mase-*
Parmelee v. Tennessee &c. R. Co., 13 ras, 56 Barb. (N. Y.) 521; see, Vol.
Lea (Tenn.) 600; *Commonwealth v.* I, § 618.

CHAPTER LXXVII

ACCORD AND SATISFACTION.

Sec.	Sec.
1592. Generally.	1597. Parties.
1593. Burden of proof.	1598. Documentary and parol evidence.
1594. Questions of law or fact.	1599. Range and sufficiency of evidence.
1595. Satisfaction as well as accord must be proved.	
1596. Liquidated and unliquidated claims or demands.	

§ 1592. **Generally.**—Accord and satisfaction is defined in a recent case as “the discharge of a contract, or cause of action or disputed claim arising either in contract or tort, by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement.”¹ The issue, it has been said, on a plea of accord and satisfaction, is upon the delivery and acceptance of something in satisfaction of debt or damages demanded.² At common law evidence of accord and satisfaction was admissible under the general issue in assumpsit, case, and debt, on simple contract. Greenleaf states that substantially the same rules prevail in the United States,³ but both in England and America the general rule now is that accord and satisfaction must be specially pleaded.⁴ Such a plea is a plea in confession and avoidance, and pro-

¹ *Hennessy v. St. Paul City R. Co.*, 65 Minn. 13, 67 N. W. 635.

² *Greenleaf Ev.*, § 28.

³ *Greenleaf Ev.*, § 29.

⁴ *Coles v. Soulsby*, 21 Cal. 47; *Ingram v. Hilton & Co.*, 108 Ga. 194, 33 S. E. 961; *Covell v. Carpenter (R. I.)*, 51 Atl. 425; *Barnum v. Green*, 13 Colo. App. 254, 57 Pac. 757; *Parker v. Lowell*, 11 Gray (Mass.) 353; *Combs v. Smith*, 78 Mo. 32; *Jacobs v. Day*, 25 N. Y. 763; *Randall v.*

Brodhead, 70 N. Y. S. 43; *Alexander v. Strong*, 9 M. & W. 733. Or, in some jurisdictions, due notice of the defense must be given when pleading the general issue, in order to let in such evidence: *Seaver v. Wilder*, 68 Vt. 423. It is inadmissible under a plea of payment: *Smith v. Elrod*, 122 Ala. 269, 24 So. 994; *Hamilton v. Coons*, 5 Dana (Ky.) 317; see also, *Frieremuth v. McKee*, 86 Mo. App. 64; *Owens v. Chandler*, 16 Ark. 651;

ceeds on the theory that although the plaintiff once had a cause of action it has been discharged by some subsequent act or matter; but where it is established, the accord and satisfaction will operate as a bar to the cause of action covered by it in the absence of fraud, duress, or mistake, as effectually as if the plaintiff never had any such cause of action.⁵

§ 1593. **Burden of proof.**—The defendant has the burden of proof upon the issue of accord and satisfaction raised by his plea.⁶ But in a suit or in an action to set aside an accord and satisfaction on the ground of fraud or mistake, the burden is upon the plaintiff.⁷ So in jurisdictions and cases in which the plaintiff may set up fraud or mistake in the same action in which the accord and satisfaction is pleaded to his original claim, if he admits the accord and satisfaction but seeks to avoid it for fraud, mistake, or the like, the burden of doing so is upon him.⁸ And when, in making out his own case, the plaintiff shows an accord, it seems that he has the burden of showing that there was no satisfaction.⁹

§ 1594. **Questions of law or fact.**—It is a general rule that the construction of written instruments is for the court, and where the agreement is in writing, it would seem, ordinarily at least, to be a question for the court, to determine whether it constituted an accord.¹⁰ So, if there is no conflict in the evidence, and if but one reasonable inference can be drawn therefrom, the question is one of law for the court.¹¹ But in other cases, where the question as to whether

Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757; but compare, *Howe v. Mackay*, 5 Pick. (Mass.) 44; *First Nat. Bank v. Kimberland*, 16 W. Va. 555; *Ligon v. Dunn*, 6 Ired. L. (N. Car.) 133.

⁵*Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312; *Oliver v. Phelps*, 20 N. J. L. 180; *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. 556; *Hosler v. Hursh*, 151 Pa. St. 415, 25 Atl. 52; *Lane v. Applegate*, 1 Stark. 78; *Nicklin v. Williams*, L. R., 10 Exch. 259.

⁶*Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543; *Oilwell Supply Co.*

v. Wolfe, 127 Mo. 616, 30 S. W. 145; *McDavitt v. McNay*, 78 Ill. App. 396; *Noe v. Christie*, 51 N. Y. 270; *Board v. Durnell*, 17 Colo. App. 85, 66 Pac. 1073; *Johnson v. Collins*, 20 Ala. 435.

⁷*Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897; *Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443.

⁸*Helling v. United Order*, 29 Mo. App. 309; *Haist v. Grand Trunk R. Co.*, 22 A. R. (Ont.) 505.

⁹*Browning v. Crouse*, 43 Mich. 489, 5 N. W. 664.

¹⁰*Sanford v. Abrams*, 24 Fla. 181, 2 So. 373.

¹¹*Hinkle v. Minneapolis &c. R. Co.*, 31 Minn. 434, 18 N. W. 275; *Gibbs v.*

there has been an accord and satisfaction is disputed, it is a question of fact for the jury to determine.¹² So, where fraud or mistake is in issue the question is generally one of fact; and where the evidence is conflicting as to whether the claim constituting the cause of action is included in the accord and satisfaction, the question is generally one of fact for the jury.¹³

§ 1595. Satisfaction as well as accord must be proved.—In order to constitute a bar the accord must be executed; or, in other words, satisfaction as well as accord must be proved.¹⁴ There are some authorities which hold that an accord with tender of performance and refusal to accept is sufficient, and this doctrine seems to be approved by Greenleaf;¹⁵ but the better rule, which is sustained by the weight of authority, is that mere readiness to perform, without acceptance or execution of the accord, is insufficient to make it a bar,¹⁶ unless the

Wall, 10 Colo. 153, 14 Pac. 216; Logan v. Davidson, 45 N. Y. S. 961; Washburn v. Winslow, 16 Minn. 33; Helling v. United Order of Honor, 29 Mo. App. 309; see also, Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Vedder v. Vedder, 1 Denio (N. Y.) 257.

¹² Oilwell Supply Co. v. Wolfe, 127 Mo. 616, 30 S. W. 145; Perlin v. Cathcart, 115 Iowa 553, 89 N. W. 12; Robinson v. Railroad Co., 84 Mich. 685, 48 N. W. 205; Stone v. Miller, 16 Pa. St. 450; Brenner v. Herr, 8 Pa. St. 106; Frick v. Algeier, 87 Ind. 255; see also, Mortlock v. Williams, 76 Mich. 568, 43 N. W. 592; Rosenfeld v. New, 10 N. Y. S. 232.

¹³ Madden v. Blain, 66 Ga. 49. Where the whole is in writing, however, the question as to what is included may be merely a question of the construction of the writing for the court to determine.

¹⁴ Slover v. Rock, 96 Mo. App. 335, 70 S. W. 268; Burgess v. Denison & Co., 79 Me. 266, 9 Atl. 726; Alexander Lumber Co. v. Johnson, 70 Ark. 215, 66 S. W. 921; Arnett v. Smith, 11 N. Dak. 55, 88 N. W. 1037; Her-

mann v. Orcutt, 152 Mass. 405, 25 N. E. 735; New York & C. R. Co. v. Martin, 158 Mass. 313, 33 N. E. 578, 579; Roger v. City of Spokane, 9 Wash. 168, 37 Pac. 300; Cobb v. Malone, 86 Ala. 571, 6 So. 6; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; Jacobs v. Mark, 183 Ill. 533, 56 N. E. 154; Anderson v. Scholey, 114 Ind. 553, 557, 17 N. E. 125; Jackson v. Olmstead, 87 Ind. 92; Bradley v. Palen, 78 Iowa 126, 42 N. W. 623; Bank v. De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Russell v. Lytle, 6 Wend. (N. Y.) 390.

¹⁵ 2 Greenleaf Ev., § 31; Coit v. Houston, 3 Johns. Cas. (N. Y.) 243. Heirn v. Carron, 11 Smed. & M. (Miss.) 361, 49 Am. Dec. 65; Bradshaw v. Davis, 12 Tex. 336; but see, Bank v. Curtis, (Tex.) 36 S. W. 911; Bradley v. Gregory, 2 Campb. 383; see also, Evans v. Powis, 11 Jur. 1043, 1 Welsh. H. & G. 601; Case v. Barber, T. Raym. 450; 1 Comyn Dig. Accord. B. 4; Goodrich v. Stanley, 24 Conn. 613; Babcock v. Hawkins, 23 Vt. 561.

¹⁶ Francis v. Deming, 59 Conn. 108, 21 Atl. 1006; Hearn v. Klehl, 38 Pa.

new agreement or promise, instead of actual performance, is accepted as a satisfaction.¹⁷ Much depends, however, on the agreement in the particular case.¹⁸

§ 1596. Liquidated and unliquidated claims or demands.—It is well settled in most jurisdictions, although the rule has met with much apparently just criticism, that the mere payment of a part of a debt or liquidated demand that is due is not an accord and satisfaction of the entire demand even though the creditor agrees to accept it as such.¹⁹ But this rule has been abrogated or modified by

St. 147, 80 Am. Dec. 472; Blackburn v. Ormsby, 41 Pa. St. 97; Noe v. Christie, 51 N. Y. 270; Kromer v. Helm, 75 N. Y. 574; Clark v. Hawkins, 5 R. I. 219; Pettis v. Ray, 12 R. I. 344; Carpenter v. Chicago & C. Co., 7 S. Dak. 584, 64 N. W. 1120; Harbor v. Morgan, 4 Ind. 158; Yazoo & C. R. Co. v. Fulton, 71 Miss. 385, 14 So. 271; Globe v. Bank, 46 Neb. 891, 65 N. W. 1062; Dudley v. Kennedy, 63 Me. 465; Gleason v. Allen, 27 Vt. 364.

¹⁷ Hosler v. Hursh, 151 Pa. St. 415, 25 Atl. 52; White v. Gray, 68 Me. 579; Smith v. Elrod, 122 Ala. 269, 24 So. 994; Morehouse v. Second Nat. Bank, 98 N. Y. 503; Whitney v. Cook, 53 Miss. 551; Allison v. Abendroth, 108 N. Y. 4701, 15 N. E. 606; Gulf & C. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556; Whitney v. Richards, 17 Utah 226, 53 Pac. 1122; Cartwright v. Cooke, 3 B. & Ad. 701; Evans v. Powis, 11 Jur. 1043, 1 Welsh. H. & G. 601; but see, Frost v. Johnson, 8 Ohio 393.

¹⁸ Hosler v. Hursh, 151 Pa. St. 415, 25 Atl. 52; Whitney v. Richards, 17 Utah 226, 53 Pac. 1122; Sharp v. Mauston, 92 Wis. 629, 66 N. W. 803; Gowing v. Thomas, 67 N. H. 399, 40 Atl. 184; Simmons v. Clark, 56 Ill. 36; Perdew v. Tillman, 62 Neb. 865, 88 N. W. 123; Rogers v. City of

Spokane, 9 Wash. 168, 37 Pac. 300, 301, 302; Bennett v. Hill, 14 R. I. 322; Gulf & C. R. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556, 557. The acceptance of a note of third persons in lieu of the debtor's, without any agreement to accept it in satisfaction is held not to discharge the original debt; Mount v. De Haven, 29 Ind. App. 127, 62 N. E. 330.

¹⁹ Leading Article in 57 Cent. Law Jour. 244; Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. 377; Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132; Meyer v. Green, 21 Ind. App. 138, 51 N. E. 942, 69 Am. St. 349 and note; Jennings v. Durlfinger, 23 Ind. App. 673, 55 N. E. 979; Hayes v. Massachusetts Co., 125 Ill. 626, 18 N. E. 322; Keller v. Strong, 104 Iowa 585, 73 N. W. 1071; St. Louis & C. R. Co. v. Davis, 35 Kans. 464, 11 Pac. 421; Leeson v. Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. 597; Robert v. Barnum, 80 Ky. 28; Rohr v. Anderson, 51 Md. 205; Twitchell v. Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; Murphy v. Kastner, 50 N. J. Eq. 214, 24 Atl. 564; Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606; Commonwealth v. Cummins, 155 Pa. St. 30, 25 Atl. 996;

statute in several jurisdictions; and as it is a rule "which obviously may be urged in violation of good faith, it is not to be extended beyond its precise import," so that whenever the technical reason for its application does not exist, the rule itself is not to be applied.²⁰ Hence, courts are disposed to hold it inapplicable where there is a new consideration or collateral benefit received by the payee or claimant, which constitutes a sufficient consideration even though it may be less than the actual debt or demand. Thus, evidence of payment before the debt or demand is due of a less sum which is received in full satisfaction is sufficient to support a plea of accord and satisfaction,²¹ and the same has been held where the payment is so made and received in full satisfaction at a different place from that at which the debtor was otherwise bound to pay.²² So, satisfaction by giving new security,²³ transferring property other than money,²⁴ or the like,²⁵ has been held

Bowdon v. Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816; *Bowker v. Harris*, 30 Vt. 424; *Smith v. Chilton*, 84 Va. 840, 6 S. E. 142; *Palmer v. Yager*, 20 Wis. 91; *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84; *Thomas v. Heathorn*, 2 B. & C. 477; *Steinman v. Magnus*, 11 East 390; *Pinnel's Case*, 5 Coke 117; but see *Clayton v. Clark*, 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. 521, 37 L. R. A. 771; *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677. A new consideration or, in some cases, a release under seal, may render the rule inapplicable. See also for a discussion and history of the rule, *Foakes v. Beer*, 54 L. J. Q. B. Div. 130, L. R. 9 App. Cas. 605.

²⁰ *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95, 96. See also leading article in 57 Cent. Law Jour. 244.

²¹ *Boyd v. Moats*, 75 Iowa 151, 39 N. W. 237; *Kirchoff v. Voss*, 67 Tex. 320, 3 S. W. 548; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Barry v. Goodrich*, 98 Mass. 335; *Schweider v. Lang*, 29 Minn. 254, 13

N. W. 33; *Miller v. Building Asso.*, 50 Pa. St. 32; *Bryant v. Proctor*, 14 B. Mon. (Ky.) 451; *Smith v. Brown*, 3 Hawks. (N. Car.) 580; see also, *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84; *Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Smith v. Trowdale*, 3 E. & B. 83; *Adams v. Tipling*, 4 Mod. 88.

²² *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Cavaness v. Ross*, 33 Ark. 572; *Pope v. Tunstall*, 2 Ark. 209; *McKenzie v. Culbrett*, 66 N. Car. 534; *Fenwick v. Phillips*, 3 Metc. (Ky.) 87; see also, *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351.

²³ *Smith v. Ludwig*, 26 Minn. 85, 1 N. W. 803; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *Boyd v. Hitchcock*, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351; *Day v. Gardner*, 42 N. J. Eq. 199, 7 Atl. 365; *Post v. Springfield &c. Bank*, 138 Ill. 559, 28 N. E. 978; *Gunn v. McAden*, 37 N. Car. 79; *Steinman v. Magnus*, 11 East 390.

sufficient; and the same is true as to a compromise or composition agreement between an insolvent and his creditors.²⁶ If the alleged debt or demand is genuinely in dispute, concessions made by one party will constitute sufficient consideration for concessions by the other, and if a smaller sum than that claimed by the one is received by him in full satisfaction by way of compromise, or the like, this will usually amount to an accord and satisfaction.²⁷ So, if the amount is unliquidated the general rule that the payment and acceptance of a smaller sum than the debt or demand due is not an accord and satisfaction, does not apply.²⁸ In such cases if the debtor tenders a sum

²⁶ *Neal v. Handley*, 116 Ill. 418, 6 N. E. 45, 56 Am. R. 784; *Savage v. Everman*, 70 Pa. St. 315, 10 Am. R. 676; *Gavin v. Annan*, 2 Cal. 494; *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 386; *Ridlon v. Davis*, 51 Vt. 457; *Hasted v. Dodge*, (Iowa) 35 N. W. 462; *Williams v. Phelps*, 16 Wis. 80; *Pinnel's Case*, 5 Coke 117; see also, *Traphagen v. Vorhees*, 44 N. J. Eq. 21, 12 Atl. 895; *Thurber v. Sprague*, 17 R. I. 634, 24 Atl. 48.

²⁷ *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159; *Singleton v. Thomas*, 73 Ala. 205; *Wippermann v. Hardy*, 17 Ind. App. 142, 46 N. E. 537; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Guild v. Butler*, 127 Mass. 386; *Thompson v. Percival*, 5 B. & Ad. 925; *Lytle v. Ault*, 7 Exch. 669; *Sibree v. Tripp*, 15 M. & M. 23; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606; *Mason v. Wickershaw*, 4 S. & R. (Pa.) 100. In most of these cases the note or indorsement of a third person was given and accepted.

²⁸ *Pontius v. Durlinger*, 59 Ind. 27; *Hill v. Werthmiller & Co.*, 150 Mo. 483, 51 S. W. 702; *Murray v. Snow*, 37 Iowa 410; *Bartlett v. Woodworth & Co.*, 69 N. H. 316, 41 Atl. 264; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. R. 103; *Paddleford v. Thatcher*, 48 Vt. 574; *Steinman v. Magnus*, 11 East 390; *Norman v. Thompson*, 4 Exch. 755; see also, *Freeman In re*, 117 Fed. 680; but compare, *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159.

²⁹ *Hutton v. Stoddart*, 83 Ind. 539; *Little v. Koerner*, 28 Ind. App. 625, 63 N. E. 766; *Nassoity v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Chicago & C. R. Co. v. Buckstaff* (Neb.), 91 N. W. 426; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 62 Am. St. 687; *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717; *Fuller v. Fuller*, 23 Fla. 236, 2 So. 426; *Neely v. Thompson* (Kans.), 75 Pac. 117; *Truax v. Miller*, 48 Minn. 62, 50 N. W. 935; *Shaw v. Chicago & C. R. Co.*, 82 Iowa 199, 47 N. W. 1004; *Brown v. Ladd*, 144 Mass. 310, 10 N. E. 839, and note. So held as to contingent or uncertain claim, *Carter's Estate*, In re, (*Rep. Rice v. London & C. Co.*) 70 Minn. 77, 72 N. W. 826; but see, *Ness v. Minnesota & C. Co.*, 87 Minn. 413, 92 N. W. 333. Other cases in which settlements of doubtful claims were held good are, *Lee v. Swilling*, 68 Ark. 82, 56 N. W. 447; *Boffinger v. Tuyen*, 120 U. S. 198, 7 Sup. Ct. 529; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76.

³⁰ *Baird v. United States*, 96 U. S. 430, 431; *Shaw v. Chicago & C. R. Co.*,

with notice that it is tendered in full payment and satisfaction of the demand, and the creditor accepts it, this will amount to an accord and satisfaction;²⁹ and this is true where the creditor retains it when the payment is made on such condition, known to him, even though he protests at the time that it is not all that is due or afterwards claims he did not accept it in full satisfaction.³⁰ But to have this effect the payment must be made upon such condition and not under such circumstances as justify the creditor in treating it as a mere payment on account or the like.³¹

§ 1597. **Parties.**—There was once a tendency to regard satisfaction from a stranger as insufficient, under any circumstances, to constitute a bar;³² but if it is accepted as such by the creditor and is authorized or ratified³³ by the debtor, it is now well settled that it will

82 Iowa 199, 47 N. W. 1004; *People v. Board*, 96 N. Y. 640, and cases cited in following notes.

²⁹ *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785 and note; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Truax v. Miller*, 48 Minn. 62, 50 N. W. 935; *Marion v. Heimback*, 62 Minn. 214, 64 N. W. 386; *Keck v. Insurance Co.*, 89 Iowa 200, 56 N. W. 438; *Petit v. Woodlief*, 115 N. Car. 120, 20 S. E. 208; *Bull v. Bull*, 43 Conn. 455; *Smith v. Cohn*, 170 Pa. St. 132, 32 Atl. 565.

³⁰ *Hutton v. Stoddart*, 83 Ind. 539; *Talbott v. English*, 156 Ind. 299, 59 N. E. 857; *Potter v. Douglass*, 44 Conn. 541; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834; *Nassoity v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Freiberg v. Moffit*, 91 Hun (N. Y.) 17, 36 N. Y. S. 95; *Roach v. Gilmer*, 3 Utah 389, 4 Pac. 221; *McDaniels v. Lapham*, 21 Vt. 222; but see, *Robinson v. Detroit & C. R. Co.*, 84 Mich. 858, 48 N. W. 205; *Day v. McLea*, 58 L. J. Q. B. 293; *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12; *Neely v. Thompson (Kans.)*, 75 Pac. 117.

³¹ *Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030; *Curran v. Rum-mell*, 118 Mass. 482; *Van Dyke v. Wilder*, 66 Vt. 579, 29 Atl. 1016; *Boston Rubber Co. v. Peerless & Co.*, 58 Vt. 551, 5 Atl. 407; *De Kalb & Works v. White*, 59 Ill. App. 171; *Perkins v. Headley*, 49 Mo. App. 556; *Cooley v. Kinney*, 119 Mich. 377, 78 N. W. 332; *Fremont Foundry & Co. v. Norton*, 3 Neb. 804, 92 N. W. 1058; *Board v. Runnell*, 17 Colo. App. 85, 66 Pac. 1073.

³² See, *Groshon v. Grant*, 2 Ky. Dec. 268; *Stark v. Thompson*, 3 T. B. Mon. (Ky.) 296; *Blum v. Hartman*, 3 Daly (N. Y.) 47; *Daniels v. Hallenbeck*, 19 Wend. (N. Y.) 408; *Grymes v. Blofield*, Cro. Ellz. 541; *Edgcombe v. Rodd*, 5 East 294.

³³ As to the necessity of authority or ratification, see, *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Snyder v. Pharo*, 25 Fed. 398; *James v. Isaac*, 22 L. J. C. P. 73; *Goodwin v. Cremer*, 18 Q. B. 757; *Kemp v. Balls*, 10 Exch. 607; but it need not be express, *Bennett v. Hill*, 14 R. I. 322; *Snyder v. Pharo*, 25 Fed. 398; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; see also, *Belshaw v.*

be sufficient to sustain a plea of accord and satisfaction.³⁴ Proof of accord and satisfaction made by one of several joint obligors³⁵ or wrongdoers³⁶ is good and available to all. So, if it is made with one of several plaintiffs or joint creditors.³⁷ But a covenant not to sue one of several persons jointly liable, or a part payment by one of them, not accepted in full satisfaction of the damage or injury at least so far as he is concerned, has been held not to release the others;³⁸ and the

Bush, 11 C. B. 191; *Harrison v. Snyder*, 99 Tenn. 618, 42 S. Hicks, 1 Port. (Ala.) 423, 27 Am. W. 441; *Spurr v. North Hudson &c. Dec. 638*; *Wellington v. Kelly*, 84 N. R. Co., 56 N. J. L. 346, 28 Atl. 582; Y. 543; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; *Griffin v. Petty*, 101 N. Car. 380; *Strasser v. Conklin*, 54 Wis. 102, 11 N. W. 254; *Chicago &c. R. Co. v. Brown (Neb.)*, 97 N. W. 1038.

³⁴ *Ritenour v. Mathews*, 42 Ind. 7; *Chicago &c. R. Co. v. Brown (Neb.)*, 97 N. W. 1038; *Crumlish v. Central Imp. Co.*, 38 W. Va. 399, 18 S. E. 456, 45 Am. St. 872, 23 L. R. A. 120, and note; *Harvey v. Tama County*, 53 Iowa 228, 5 N. W. 130; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Snyder v. Pharo*, 25 Fed. 398; *Simpson v. Eggington*, 10 Exch. 845; *Belshaw v. Bush*, 11 C. B. 191; *Hawkshaw v. Rawlings*, 1 Str. 23.

³⁵ *Strang v. Holmes*, 7 Cowp. (N. Y.) 224; see also, *Connecticut Fire Ins. Co. v. Oldendorff*, 73 Fed. 88; *Thomas v. Wilson*, 6 Blackf. (Ind.) 203; *Scofield v. Clark*, 48 Neb. 711, 67 N. W. 754; *Maslin v. Hiett*, 37 W. Va. 16, 16 S. E. 437; but compare, *Elgin &c. Banking Co. v. Self (Tex. Civ. App.)*, 35 S. W. 953. In many jurisdictions to have this effect there must usually be a technical release under seal.

³⁶ *Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180; *Cobb v. Malone*, 86 Ala. 571, 6 So. 6; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135;

Snyder v. Witt, 99 Tenn. 618, 42 S. W. 441; *Spurr v. North Hudson &c. R. Co.*, 56 N. J. L. 346, 28 Atl. 582; *Brown v. Cambridge*, 3 Allen (Mass.) 474; *Ruble v. Turner*, 2 H. & M. (Va.) 38; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Brown v. Louisville*, 126 N. Car. 701, 36 S. E. 166, 78 Am. St. 677; *Dufresne v. Hutchinson*, 3 Taunt. 117; *Thurman v. Wild*, 11 Ad. & El. 453; see also, *Aschraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69; and note in 11 Am. St. 906-909; *Abb v. Northern Pac. R. Co.*, 58 L. R. A. 293, and note.

³⁷ *State v. Story*, 57 Miss. 738; *Erwin v. Rutherford*, 1 Yerg. (Tenn.) 169; *Morrow v. Starke*, 4 J. J. Marsh. (Ky.) 367; *Austin v. Hall*, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645, so held even though it is not shown that he had any authority from the others. *State v. Story*, 57 Miss. 738; *Wallace v. Kelsall*, 7 M. & W. 264; see also, *Thurman v. Wild*, 11 Ad. & El. 453; *Husband v. Davis*, 10 C. B. 645; *Crowe v. Lysaght*, 12 Ir. C. L. 481.

³⁸ *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Smith v. Gayle*, 58 Ala. 600, 62 Ala. 446; *Arnett v. Missouri Pac. R. Co.*, 64 Mo. App. 368; see also, *Clark v. Dinsmore*, 5 N. H. 136; *Durell v. Wendell*, 8 N. H. 372; *Bozeman v. State Bank*, 7 Ark. 328, 46 Am. Dec. 291; *Couch v. Mills*, 21 Wend. (N. Y.) 425; *Rowley v. Stod-*

same conclusion has been reached where the person from whom the satisfaction as a joint wrongdoer moved, was not liable,³⁹ and also where the claimant was an infant.⁴⁰ It is well settled, however, that if there is a complete accord and satisfaction, it will release all, notwithstanding any agreement between the party injured and the wrongdoer from whom the satisfaction moves, that it shall not operate to release any of the other joint wrongdoers.⁴¹

§ 1598. **Documentary and parol evidence.**—At common law there could be no parol accord and satisfaction of an obligation which was required to be and was under seal, or of a judgment, and the same rule has been laid down in many decisions in this country;⁴² but it has been largely changed by statute, and is generally enforceable in equity, or will constitute a good defense in actions at law in jurisdic-

dard, 7 Johns. (N. Y.) 207; Goodnow v. Smith, 18 Pick. (Mass.) 414; Hutton v. Eyre, 6 Taunt. 296, 1 E. C. L. 388; Waluesley v. Cooper, 11 Ad. & El. 216; Ford v. Beech, L. R. 11 Q. B. 852, 63 E. C. L. 852.

* Wagner v. Union Stock Yards &c. Co., 41 Ill. App. 408; Turner v. Hitchcock, 20 Iowa 310; Selber v. Amunson, 78 Wis. 679, 47 N. W. 1126; see also, Gilbert v. Finch, 46 N. Y. App. Div. 75; Wilson v. Reed, 3 Johns. (N. Y.) 175; Thomas v. Central R. Co., 194 Pa. St. 512, 45 Atl. 344; Missouri R. Co. v. McWherter, 59 Kans. 345, 53 Pac. 135; Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548; contra: Brown v. Cambridge, 3 Allen (Mass.) 474; Leddy v. Barney, 139 Mass. 394; Tompkins v. Clay, St. R. Co., 66 Cal. 166; Denver &c. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 501; Hartigan v. Dickson, 81 Minn. 284, 83 N. W. 1091.

³⁹ Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88; see, Burt v. McBain, 29 Mich. 260; also as to settlements by administrators and agents: Stuber v. McEntee, 142 N.

Y. 200, 36 N. E. 878; Anderson v. Highland Tpk. Co., 16 Johns. (N. Y.) 86; Jones v. Ransom, 3 Ind. 327; Maddox v. Bevan, 39 Md. 485.

⁴⁰ Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Ruble v. Turner, 2 H. & M. (Va.) 38; Abb v. Northern Pac. R. Co., 28 Wash. 428, 68 Pac. 954; Arnett v. Missouri Pac. R. Co., 64 Mo. App. 368; Ellis v. Bitzer, 2 Ohio St. 89, 15 Am. Dec. 534; Brown v. Kecheloe, 3 Coldw. (Tenn.) 192; see also, Urton v. Price, 57 Cal. 270; Seither v. Philadelphia Traction Co., 125 Pa. St. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. 905, and note; Gunther v. Lee, 45 Md. 67, 24 Am. R. 504; McBride v. Scott (Mich.), 93 N. W. 243, 61 L. R. A. 445.

⁴¹ Ligon v. Dunn, 28 N. Car. 133; Milnes v. Van Horn, 8 Blackf. (Ind.) 198; Weber v. Couch, 134 Mass. 26, 45 Am. R. 274; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Riley v. Riley, 20 N. J. L. 114; Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; Parker v. Ramsbottom, 3 B. & C. 257; Cordwent v. Hunt, 8 Taunt. 596; Spence v. Healey, 8 Exch. 668.

tions in which equitable defenses may be set up in such actions.⁴³ So, except in jurisdictions in which the rules requiring a writing, as above stated, obtain, the accord and satisfaction may usually rest in parol.⁴⁴ If the agreement of accord and satisfaction is in writing the instrument must generally be produced or its absence satisfactorily explained;⁴⁵ but it has been held that when the agreement itself is not in writing but was consummated by the execution and delivery of a note or the like, this may be shown by parol without producing the note.⁴⁶ So, where an agreement of accord and satisfaction between a county board, representing the county, and a claimant has been executed and the benefits received and accepted by the latter, it has been held that this may be shown by parol evidence in the absence of any written record or minutes thereof.⁴⁷ Parol evidence has also been held admissible to remove the doubt where a written agreement is ambiguous, and it is doubtful as to what it covers.⁴⁸

§ 1599. *Range and sufficiency of evidence.*—The proof must accord with the allegations and not make a substantially different case.⁴⁹ Hence, evidence of an accord and satisfaction of a materially different character is not admissible,⁵⁰ and the same has been held where the

⁴³ *Steeds v. Steeds*, L. R. 22 Q. B. 537; *Smitherman v. Kidd*, 36 N. Car. 36; see also, *Boffinger v. Tuyer*, 120 U. S. 198, 7 Sup. Ct. 529; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Keeler v. Salisbury*, 33 N. Y. 648, affirming, 27 Barb. 485; *Moody v. Leavitt*, 2 N. H. 171; *Cutler v. Cox*, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152; *Neldon v. Smith*, 36 N. J. L. 148; *Cabe v. Jameson*, 32 N. Car. 193, 51 Am. Dec. 386; *Savage v. Carter*, 2 B. Mon. (Ky.) 512; *Paune v. Barnett*, 2 A. K. Marsh. (Ky.) 312; *Leavitt v. Savage*, 16 Me. 72; see likewise as to judgments: *Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396; *Jones v. Ransom*, 3 Ind. 327; *Savage v. Everman*, 70 Pa. St. 315, 10 Am. 676; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Boffinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529.

⁴⁴ See, *Lavery v. Turley*, 6 H. & N. 239; *Massey v. Johnson*, 1 Exch. 241; *Green v. Lancaster County*, 61 Neb. 473, 85 N. W. 439.

⁴⁵ *American v. Rinpert*, 75 Ill. 228; see also, *Brantley Co. v. Lee*, 106 Ga. 313, 32 S. E. 101.

⁴⁶ *Fisher v. George S. Jones Co.*, 93 Ga. 717, 21 S. E. 152; *Brantley Co. v. Lee*, 106 Ga. 313, 32 S. E. 101.

⁴⁷ *Green v. Lancaster County*, 61 Neb. 473, 85 N. W. 439.

⁴⁸ *Seloer's Assigned Estate*, 7 Pa. Co. Ct. 417; see also, *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84; *Simons v. Johnson*, 3 B. & A. 175.

⁴⁹ *Smith v. Elrod*, 122 Ala. 269, 24 So. 994; *Walker v. Reese*, 110 Ga. 582, 35 S. E. 771.

⁵⁰ *Walker v. Reese*, 110 Ga. 582, 35 S. E. 771; but see, *Smitherman v. Smith*, 20 N. Car. 89.

evidence was of an accord with a different person from that alleged.⁵¹ A receipt in full is admissible in support of the plea,⁵² and where the amount is disputed, evidence of the retention by the plaintiff of a check stated to be in full of the claim has been held admissible in support of the plea, although indorsed by the plaintiff as received on account.⁵³ So, evidence of the discontinuance of a former action for the same cause on payment of costs by the defendant has been held sufficient prima facie evidence of an accord and satisfaction,⁵⁴ and lapse of time after the breach and before the commencement of the action may be shown with other evidence of accord and satisfaction.⁵⁵ Where a claim is presented to a municipal corporation and allowed and accepted for a sum less than that demanded, this has been held evidence of an accord and satisfaction,⁵⁶ and it has been held that it may be shown by parol evidence where no record thereof was made.⁵⁷ But saying "It is not enough but there will be no trouble" is not sufficient,⁵⁸ and an order given by the plaintiff to the defendant is not admissible to support a plea of accord and satisfaction unless there is other evidence that it was intended or accepted in accord and satisfaction⁵⁹ or at least an offer or promise of evidence to connect it with

⁵¹ *Chappell v. Phillips, Wright of an account, Kinman v. Cannefax*, 34 Mo. 147.

⁵² *Grumley v. Webb*, 48 Mo. 562; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834; *Vedder v. Vedder*, 1 Denio (N. Y.) 257; *Serat v. Smith*, 15 N. Y. S. 330; *Springfield &c. R. Co. v. Allen*, 46 Ark. 217; *United States v. Adam*, 7 Wall. (U. S.) 463; see also as to refusal to give receipt as evidence to the contrary; *Sicotte v. Barber*, 83 Wis. 431, 53 N. W. 697; with which compare; *Keck v. Insurance Co.*, 89 Iowa 200, 56 N. W. 438; *Nassolt v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. 695. As to explanation of receipt, see, *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84; *Tanner v. Merrill*, 108 Mich. 58, 65 N. W. 664, 62 Am. St. 687.

⁵³ *King v. Dorman*, 55 N. Y. 876. So giving a note has been held prima facie evidence of settlement

⁵⁴ *Dana v. Taylor*, 150 Mass. 25, 22 N. E. 65; but see, *Carter v. Wilson*, 2 Dev. & B. (N. Car.) 276; *Bond v. McNider*, 3 Ired. L. (N. Car.) 440.

⁵⁵ *Jenkins v. Hopkins*, 9 Pick. (Mass.) 543; *Ketchum v. Gulick*, (N. J.) 20 Atl. 487; *Abbott v. Wilmot*, 22 Vt. 437; *Bradley v. Gregory*, 2 Campb. 383. But it has been held insufficient of itself to establish the plea, *Austin v. Moore*, 7 Metc. (Mass.) 116; *Siboni v. Kirkman*, 1 M. & W. 418.

⁵⁶ *Brick v. Plymouth County*, 63 Iowa 462, 19 N. W. 304.

⁵⁷ *Green v. Lancaster County*, 61 Neb. 473, 85 N. W. 439.

⁵⁸ *Willey v. Warden*, 27 Vt. 655; but see, *Neary v. Bostwick*, 2 Hilt. (N. Y.) 514.

⁵⁹ *Hogan v. Burns*, (Cal.) 33 Pac. 631.

the accord and satisfaction pleaded. So where an agreement and acceptance by the plaintiff of the covenant of a third person in full satisfaction of a note sued on was alleged by the defendant evidence of an indorsement on the note by such third person that he was to pay the same at a certain date and a credit of the same date still legible, though lines were drawn through it, was held insufficient to show an accord and satisfaction.⁶⁰ Only a fair preponderance of the evidence, however, is required to support such a plea.⁶¹

⁶⁰ *Bruce v. Bruce*, 4 Dana (Ky.) 530. For other cases in which the evidence was held insufficient to establish accord and satisfaction, see, *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431; *Bloomington Min. Co. v. Brooklyn &c. Co.*, 68 N. Y. 699, affirmed in 171 N. Y. 673, 64 N. E. 1118; *Mount v. De Haven*, 29 Ind. App. 127, 63 N. E. 330.

⁶¹ *Bruce v. Bruce*, 4 Dana (Ky.) 530; *Cheeves v. Danielly*, 74 Ga. 712. As to evidence in rebuttal, see: *Bliss v. New York &c. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504; *Leslie v. Keepers*, 68 Wis. 123, 31 N. W. 486; *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84; *St. Louis &c. R. Co. v. Davis*, 35 Kans. 464, 11 Pac. 421; with which compare, *Roach v. Gilmer*, 3 Utah 389, 4 Pac. 221; *Vandervelden v. Chicago &c. R. Co.*, 61 Fed. 54.

CHAPTER LXXVIII.

ACCOUNTS AND ACCOUNTING.

Sec.	Sec.
1600. Generally.	1609. Impeachment of accounts stated.
1601. Evidence and procedure.	1610. Accounting in equity—Before interlocutory decree.
1602. Accounts.	1611. Accounting in equity—After interlocutory decree.
1603. Actions on accounts.	1612. Accounting in equity—Answer as evidence.
1604. Burden of proof and evidence.	1613. Accounting under the code.
1605. Accounts stated—Generally.	
1606. Questions of law or fact.	
1607. Burden and manner of proving account stated.	
1608. Presumptions in cases of account stated.	

§ 1600. **Generally.**—At common law account, or “account render,” was a form of action used where one had received goods or money for another, to ascertain and recover the balance due; but it could be maintained only where the amount was unliquidated.¹ It was one of the oldest forms of actions, and was, perhaps, most frequently used where two persons were parties in a mercantile adventure, or where the defendant was under a duty to account as bailiff, receiver, or guardian in socage;² but it has been abolished or changed by statute in some states,³ and has very generally fallen into disuse by reason of the fact

¹ Shipman Com. Law Pl. (2nd ed.) 46; 1 Bouv. Law Dict. (Rawle's ed.) 64; see also, Godfrey v. Saunders, 3 Wils. 94; Foster v. Allanson, 2 Term R. 479; Harrington v. Deane, 1 Hob. 36; Conklin v. Bush, 8 Pa. St. 514; Duncan v. Lyons, 3 Johns. Ch. (N. Y.) 351; Shriver v. Nimick, 41 Pa. St. 91; Lee v. Alrams, 12 Ill. 111; Morgan v. Adams, 37 Vt. 233; Park v. McGowen, 64 Vt. 173, 23 Atl. 855; Appleby v. Brown, 24 N. Y. 143.

² Beach v. Hotchkiss, 2 Conn. 425; Fowle v. Kirkland, 18 Pick. (Mass.) 299; Leonard v. Leonard, 1 W. & S. (Pa.) 342; Griffith v. Willing, 3 Bin. (Pa.) 317; see also, Field v. Brown, 146 Ind. 293, 45 N. E. 464.

³ In a few jurisdictions the action or remedy has been enlarged or extended by statute. See, Garrity v. Hamburger Co., 136 Ill. 499, 27 N. E. 11; Park v. McGowan, 64 Vt. 173, 23 Atl. 855; Cooley Blackstone 163; Andrews Am. Law 1074; see also,

that there is usually a more satisfactory remedy by an action of assumpsit or a proceeding in equity. Accounts, however, so often come in question and evidence relating to accounts and accounting is so often of importance in actions at law, as well as in suits in equity, that it has been deemed advisable to treat the whole subject here, so far at least as questions of evidence are concerned.

§ 1601. **Evidence and procedure.**—We have stated the general nature of the action of account at common law, but have not yet fully considered the course of procedure and the admissibility of evidence in such actions. The first question, and usually the only question, to be determined before verdict or judgment *quod computet*, is the liability of the defendant to account, and, it being found that the defendant should account an interlocutory judgment *quod computet* is rendered.⁴ The matter is then referred to an auditor or auditors to take and to report the account with the balance found due, and thereupon final judgment *quod recuperet* is usually rendered by the court.⁵ It seems that the only plea in bar is one which shows that the defendant is not liable to account,⁶ and, as the judgment to account is usually conclusive as to the mere liability to account, such a plea should be pleaded before the interlocutory judgment to account; and the defendant cannot, ordinarily, introduce evidence to show that he has accounted, or the like, after such a judgment is rendered.⁷ But a plea denying the relation on which the alleged liability to account is based,⁸ or a plea that the defendant has fully accounted, *plene com-*

Black v. Nichols, 68 Me. 227; *Bitterling v. Deshler*, 160 Pa. St. 1, 28 Atl. 445; *Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724.

⁴ *Lee v. Abrams*, 12 Ill. 111; *Hawley v. Burd*, 6 Ill. App. 454; *Lee v. Yanaway*, 52 Ill. App. 23; *Hathaway v. Russell*, 46 N. Y. Super. Ct. 103; *McPherson v. McPherson*, 11 Ired. L. (N. Car.) 391, 53 Am. Dec. 416.

⁵ *Shipman Com. Law Pl.* (2nd ed.) 49; *Bouv. Law Dict.* (Rawle's ed.) 64; *Lee v. Abrams*, 12 Ill. 111; *McPherson v. McPherson*, 11 Ired. L. (N. Car.) 391, 53 Am. Dec. 416; 1 Cyc. 413.

⁶ *Garrity v. Hamburger Co.*, 136 Ill. 499, 27 N. E. 11. Nor should the plea be to separate items nor to release separate items of the account; *Mott v. Downer*, 1 Root (Conn.) 425; *Joy v. Walker*, 29 Vt. 257.

⁷ *Lee v. Abrams*, 12 Ill. 111; *Godfrey v. Saunders*, 3 Wils. 94; *Taylor v. Page*, 3 Cro. Car. 116; *Day v. Lockwood*, 24 Conn. 185; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. R. 372.

⁸ *McMurray v. Rawson*, 3 Hill (N. Y.) 59; *Bishop v. Baldwin*, 14 Vt. 145; *Bruismaid v. Mayo*, 9 Vt. 31; *Ricketts v. Loftus*, L. R. 14 Q. B. 482.

putavit,⁹ if interposed before the interlocutory judgment, is proper as showing that there is no liability to account,¹⁰ although it is held that if the defendant pleads *plene computavit*, the burden is upon him to show an actual accounting and balance struck.¹¹ The evidence on the part of the plaintiff must support the material averments in the declaration.¹² There must be evidence, unless otherwise provided by statute of a privity, either by contract, express or implied,¹³ by the law; and if the defendant is charged as bailiff, or guardian, or receiver, or tenant in common, or joint tenant, he must be proved to have acted in the specific character charged, for the measure of their liability is different;¹⁴ and the property, or interest in the money demanded, or the goods bailed, must be stated and proved as laid, as it is a material allegation.¹⁵ And if the action is against several defendants jointly, they must be proved to be jointly and not severally liable.¹⁶ It is said by some courts and text writers that a special demand to account is not necessary to be proved;¹⁷ but it is safer and probably necessary in most cases to allege and prove a demand.¹⁸ After a judgment *quod computet*, and a reference to auditors, all articles of account between

⁹ *Godfrey v. Saunders*, 3 Wils. 94; *Whelan v. Watmough*, 15 S. & R. (Pa.) 153.

¹⁰ It is said in general terms that it is proper to plead any facts showing that the defendant is not liable to account: *Ricketts v. Loftus*, L. R. 14 Q. B. 482; 2 Chitty Pl. 294; as to pleas of nothing in arrear, release and infancy, see, *Lee v. Abrams*, 12 Ill. 111; *Pickett v. Pearsons*, 17 Vt. 470; *Godfrey v. Saunders*, 3 Wils. 94; *Bishop v. Baldwin*, 14 Vt. 145.

¹¹ *Baxter v. Hozier*, 5 Bing. N. Cas. 288; *McPherson v. McPherson*, 11 Ired. L. (N. Car.) 391, 53 Am. Dec. 416; *Lee v. Abrams*, 12 Ill. 111; see also, *Read v. Bertrand*, 20 Fed. Cas. No. 11602, 4 Wash. (U. S.) 556; but compare, *Evans v. Birch*, 3 Campb. 10.

¹² *Jordan v. Williams*, 13 Fed. Cas. No. 7526; see also, *Spear v. Newell*, 22 Fed. Cas. No. 13224.

¹³ *King of France v. Morris*, cited 3 Yeates (Pa.) 251; *Coke Litt.* 40 b,

172 a; *Wood v. Merrow*, 25 Vt. 340; *Portsmouth v. Donaldson*, 32 Pa. St. 202, 72 Am. Dec. 782.

¹⁴ 1 Selwyn, N. P. 1-3; *Coke Litt.* 172 A; *Sargent v. Parsons*, 12 Mass. 149; *Cearnes v. Irving*, 31 Vt. 604; *Barnum v. Landon*, 25 Conn. 137; *Griffith v. Willing*, 3 Bin. (Pa.) 317; *Hughes v. Woosley*, 15 Mo. 492; *Wheeler v. Horne*, Willes 208; *Jordan v. Wilkins*, 2 Wash. (U. S.) 485; Stat. 4 & 5 Anne, § 27; *Irvine v. Hanlin*, 10 S. & R. (Pa.) 221; *Wright v. Guy*, 10 S. & R. (Pa.) 227.

¹⁵ *Jordan v. Wilkins*, 2 Wash. (U. S.) 482; *Spalding v. Dunlap*, 1 Root (Conn.) 319.

¹⁶ *Whelan v. Watmough*, 15 S. & R. (Pa.) 158.

¹⁷ *Sturges v. Bush*, 5 Day (Conn.) 452; 2 Greenleaf Ev. 337; *Shipman Com. Law Pl.* (2nd ed.) 236.

¹⁸ *Topham v. Braddick*, 1 Taunt. 572; *Barnum v. Landon*, 25 Conn. 137; *Chadwick v. Divol*, 12 Vt. 499.

the parties incurred since the commencement of the action are to be included by the auditors, and the whole is to be brought down to the time when they make an end of the account.¹⁹ But it has been held that after such judgment, rendered on confession against a receiver, if the auditors certify issues to be tried, the plaintiff, upon the trial of such issues, cannot give evidence of moneys received by the defendant during any other period than that described in the declaration.²⁰ The judgment *quod computet*, however, does not conclude the defendant as to the precise sums or times mentioned in the declaration; but the account is to be taken according to the truth of the matter, without regard to the verdict.²¹

§ 1602. **Accounts.**—An account is usually defined as a detailed statement of mutual demands in the nature of debt and credit between parties, arising out of contract or some fiduciary relation;²² but it is said that the term has no very clearly defined legal meaning,²³ and that an account is not necessarily anything more than a list or catalogue of items, whether of debits or credits;²⁴ and it would seem that, in the ordinary sense, items of charge by one person against another arising out of contract, express or implied, or from some fiduciary relation or duty imposed by law may be none the less an account notwithstanding there are no mutual demands of debit and credit.²⁵ The term, however, usually imports a general course of dealing rather than an isolated transaction resting upon special contract,²⁶ and it has been said that the items must be proper subjects of entries

¹⁹ *Robinson v. Bland*, 2 Bur. 1086; *Couscher v. Tulam*, 4 Wash. (U. S.) 442; *Stehman's Appeal*, 5 Pa. St. 413; *Smith v. Brush*, 11 Conn. 359; *Newbold v. Sims*, 2 S. & R. (Pa.) 317.

²⁰ *Swelgart v. Lowmarter*, 14 S. & R. (Pa.) 200.

²¹ *Newbold v. Sims*, 2 S. & R. (Pa.) 317; *James v. Browne*, 1 Dall. (Pa.) 339; *Sturges v. Bush*, 5 Day (Conn.) 452.

²² 1 *Bouv. Law Dict.* (Rawle's ed.) 63; see also, *Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787; *Whitwell v. Willard*, 1 Metc. (Mass.) 216; *McWil-*

Hams v. Allen, 45 Mo. 573; *Gale v. Drake*, 51 N. H. 78.

²³ *Nelson v. Board*, 105 Ind. 287, 4 N. E. 703.

²⁴ *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587, 593; approved in, *Nelson v. Board*, 105 Ind. 287, 4 N. E. 703.

²⁵ *Nelson v. Board*, 105 Ind. 287, 4 N. E. 703; *People v. Peck*, 57 How. Pr. (N. Y.) 315; *Camp v. Ingersoll*, 86 N. Y. 433; *Eaton v. Peavy*, 75 Iowa 740, 38 N. W. 423.

²⁶ *McCamant v. Batsell*, 59 Tex. 363.

in an account book;²⁷ but it is not necessary that they should be entered in an account book in order to constitute an account.²⁸

§ 1603. **Actions on accounts.**—Matters of account are frequently, although not always, the subject of an action in assumpsit, and the remedy and the evidence are, in many jurisdictions, now regulated, to some extent, by statute. There are some cases in which a party may waive a tort and sue upon the implied contract,²⁹ but he cannot, where he has no such election, by merely tabulating his claim, convert an action in tort into an action on account.³⁰ An entire account, consisting of several items, may be regarded as a unit on which an action may be brought;³¹ and it is held that a party cannot claim the benefit of credits without also submitting to debits as shown by the account.³² So, in actions on a general balance, the plaintiff, by showing the debits with the credits to which the account is entitled, may thus prove the balance to be recovered unless other credits are shown, or the account is otherwise falsified;³³ but where a payment is shown on the account generally, it has been held that the full balance cannot be recovered without proof of the specific items of debt because there is no authority to apply the payment to any particular item.³⁴

²⁷ *Dallas v. Ferneau*, 25 Ohio St. 635, 637; *Fenn v. Early*, 113 Pa. St. 264, 6 Atl. 58. But, while this may

be true before they can be admissible as book entries, it is not necessarily true that the subject matter may not be treated as an account so far as the remedy is concerned; *Hilton v. Burley*, 2 N. H. 193; *Talbotton R. Co. v. Gibson*, 106 Ga. 229, 32 S. E. 151.

²⁸ *Black v. Chesser*, 12 Ohio St. 621; *Clark v. Clark*, 46 Conn. 586; *Lonsdale v. Oltman*, 50 Minn. 52, 52 N. W. 131.

²⁹ *Zell v. Dunkle*, 156 Pa. St. 353, 27 Atl. 38; *Bradfield v. Patterson*, 106 Ala. 397, 17 So. 536; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. 803 and note, 8 L. R. A. 217; note to *Webster v. Drinkwater*,

17 Am. Dec. 242-247; 4 *Elliott Railroads*, § 1693.

³⁰ *Spencer v. Hewett*, 20 Ga. 426; *Albertson v. Grier*, 4 Houst. (Del.) 541; *Atchison & C. R. Co. v. Wilkinson*, 55 Kans. 83, 39 Pac. 1043; *Sandeen v. Kansas City R. Co.*, 79 Mo. 278.

³¹ *Phillips Code Pl.*, § 472.

³² *Fitzpatrick v. Harris*, 8 Ala. 32; *Dougherty v. Knowlton*, 19 Ill. App. 283; *Bell v. Davidson*, 3 Wash. (U. S.) 328; *Green v. Glasscock*, 9 Rob. (La.) 119; but see *Marr v. Hyde*, 8 Rob. (La.) 13; *Moorhead v. Thompson*, 1 La. Ann. 283.

³³ *Hooper v. Hartwell*, 12 Colo. App. 161, 54 Pac. 864; *Hunt v. Mewis*, 17 Neb. 422, 23 N. W. 10.

³⁴ *Huffstater v. Hayes*, 64 Barb. (N. Y.) 573; *Allen v. Brown*, 11 Tex. 520.

§ 1604. **Burden of proof and evidence.**—The burden of proof is upon the plaintiff to establish the material allegations of his complaint;³⁵ but it has been held that he is not required to prove the correctness of each specific item of the account if the correctness of the account as a whole is otherwise established.³⁶ Thus, it may be established by an admission of the defendant that the account is correct,³⁷ and if a stated account³⁸ or an implied assent³⁹ is proved, it will generally be sufficient.⁴⁰ As a general rule, all evidence legitimately tending to show the correctness of the various items of account,⁴¹ on the one hand, or the non-existence or incorrectness of the plaintiff's claim,⁴² on the other hand, is admissible in such actions. And, although a special contract is not, ordinarily, the subject of a book account, yet if it has been executed or fully performed by the plaintiff, and the obligation to pay money rests upon the defendant

³⁵ *Carver v. Harris*, 19 La. Ann. 121; *Fluke v. Martin*, 26 La. Ann. 279; *Moore v. Joyce*, 23 Miss. 584; *Crawford v. McLeod*, 64 Ala. 240; so held in, *Rice v. Schloss*, 90 Ala. 416, 7 So. 802, where the distinction is also pointed out as to stated accounts casting the burden upon the defendant to impeach their correctness. On the plaintiff, items on book, debt denied: *Read v. Barlow*, Alf. (Vt.) 145; *Matthews v. Tower*, 39 Vt. 433; but see as to plea of payments, *Smith v. Woodworth*, 43 Vt. 39.

³⁶ *Pryor v. Johnson*, 32 Ala. 27; *Ward v. Wheeler*, 18 Tex. 249; *Baer v. Pfaff*, 44 Mo. App. 35. But, otherwise, the proof must go to the items. *Coats v. Gregory*, 10 Ind. 345.

³⁷ *Sullivan Timber Co. v. Brunsbager*, 111 Ala. 114, 20 So. 498; *Bonnell v. Mawha*, 37 N. J. L. 198; see also, *Stetson v. Godfrey*, 20 N. H. 227; *Hurly v. Roche*, 6 Fla. 746; *Chandler v. Meckling*, 22 Tex. 36; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Anderson v. Best*, 176 Pa. St. 498, 35 Atl. 194; *McCormack v. Sawyer*, 104 Mo. 36, 15 S. W. 998.

³⁸ *Rice v. Schloss*, 90 Ala. 416, 7

So. 802; *Duffy v. Hickey*, 63 Wis. 312, 23 N. W. 707; *Leiser v. McDowell*, 74 N. Y. 1021.

³⁹ *Ellwood Mfg. Co. v. Betcher*, 72 Minn. 103, 75 N. W. 113; *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *Quinn v. White*, 26 Nev. 42, 62 Pac. 995; *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Willis v. Jernegan*, 2 Ark. 251.

⁴⁰ We do not mean, however, that it will always be conclusive.

⁴¹ *Graham v. Harmon*, 84 Cal. 181, 23 Pac. 1097.

⁴² *Pawtucket etc. Co. v. Briggs*, 21 R. I. 457, 44 Atl. 595; *Glenn v. Salter*, 50 Ga. 170; *Price v. Combs*, 12 N. J. L. 216; *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829; but see, *Low v. Griffin*, (Tex. Civ. App.) 41 S. W. 73; *Wolff v. Matthews*, 39 Mo. App. 376; *Wonderly v. Christian*, 91 Mo. App. 158. Where the plaintiff denied signing a contract, which was claimed to be signed by his mark, evidence of experts as to the fair market price of the work called for by such writing, was held admissible on the question of the probability of such contract having been executed.

and is all that remains, there may be a recovery in assumpsit as upon an account and the plaintiff may prove his claim as laid.⁴³ In some states a verified account is, by statute, made prima facie proof of its correctness, but, in general the rules of evidence in actions on accounts are, in most respects, the same as in other similar cases. The subject of accounts and shop books as evidence is fully treated elsewhere,⁴⁴ and other matters relating to the evidence in actions on accounts are considered in the chapter on Assumpsit.⁴⁵

§ 1605. Accounts stated—Generally.—An account stated is “an agreement between parties, who have had previous transactions of a monetary character, that all items of the account representing such transactions are true, and also that the balance struck is correct, together with a promise, express or implied, for the payment of such balance.”⁴⁶ The assent of both parties or of their authorized agents must generally be shown,⁴⁷ and admissions to third persons do not

⁴³ Talbotten R. Co. Gibson, 106 Ga. 229, 32 S. E. 151; Lovell v. Earle, 127 Mass. 546; Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392; but see, Bennett v. Davis, 68 Me. 544; Stuckey v. Hardy, 15 Ind. App. 19, 41 N. E. 606; Emslie v. Leavenworth, 20 Kans. 562; Chesapeake &c. Canal Co. v. Knapp, 9 Pet. (U. S.) 565; Fairfax &c. Co. v. Chambers, 75 Md. 604, 23 Atl. 1024. Evidence of the contract price is usually admitted in such cases on the measure of the recovery. Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448; Stafford v. Sibley, 106 Ala. 189, 17 So. 324; Sands v. Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. 253, 260.

⁴⁴ See Vol. I, ch. XXI, §§ 454-475. See also, the following recent authorities: Trainor v. German-Am. &c. Asso. 204 Ill. 616, 68 N. E. 650; Place v. Baugher, 159 Ind. 232, 64 N. E. 852; and elaborate notes in 52 L. R. A. 545, 689, 833; and 53 L. R. A. 513.

⁴⁵ See post, ch. LXXXV, §§ 1717-

1735; see also, the subject of accounting and actions under the codes, post, §§ 1605, 1613.

⁴⁶ Am. & Eng. Ency. of Law (2d ed.) 437.

⁴⁷ Hoffar v. Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Chatham v. Niles, 36 Conn. 403; Tarbuck v. Bispham, 2 M. & W. 2; Hughes v. Thorpe, 5 M. & W. 656; Christian v. Hill, 122 Ala. 490, 26 So. 149; Louisville &c. Co. v. Asher (Ky.), 65 S. W. 133; Holmes v. Page, 19 Ore. 232, 23 Pac. 961; but see Leiser v. McDowell, 74 N. Y. S. 1021; as to who are authorized to assent, see, Rice v. Schloss, 90 Ala. 416, 7 So. 802; Heidenheimer v. Ellis, 67 Tex. 426, 3 S. W. 666; Southwestern &c. Co. v. Benson, 68 Ark. 283, 38 S. W. 341; Cady v. Kyle, 47 Mo. 346; Martyn v. Arnold, 36 Fla. 446, 18 So. 791; Burraston v. Bank, 22 Utah 328, 62 Pac. 425; Moody v. Thwing, 46 Minn. 511, 49 N. W. 229; Concord &c. Co. v. Alaska &c. Co., 78 Ill. App. 682; Trustee v. Cagger, 6 Barb. (N. Y.) 576; Lang-

constitute an account stated,⁴⁸ although it has been held that admissions to third persons that an account has been stated between the parties, and that a certain sum is due thereon, may be shown.⁴⁹ It must appear that there were previous dealings of a monetary character between the parties before the alleged statement of the account,⁵⁰ but the specific items need not be shown.⁵¹ These previous transactions may have consisted of mutual demands or only of a single item;⁵² but where the account stated is as to a single item, that item must be of such a character that it constitutes, or creates, a debt.⁵³ The account need not be in any particular form;⁵⁴ and the mere state-

ley v. Oxford, Amb. 17; *St. Louis &c. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038.

* *Thurmond v. Sanders*, 21 Ark. 255; *Huffar v. Dement*, 5 Gill (Md.) 132; *Breckton v. Smith*, 1 Ad. & El. 488; *Bates v. Townley*, 2 Exch. 152; *McMurtey v. Munro*, 14 U. C. Q. B. 166.

* *Bloomley v. Gruilton*, 1 U. C. C. P. 309; *Green v. Burtch*, 1 U. C. C. P. 313; *Wharton v. Cain*, 50 Ala. 468; see also, *Goodrich v. Coffin*, 83 Me. 324, 22 Atl. 165; as to admissions in the presence of the other party, *Forbes v. Wheeler*, 39 Misc. (N. Y. S.) 538, 80 N. Y. 373; *Lallande v. Brown*, 121 Ala. 513, 25 So. 997; see also, *Burraston v. Neplie &c. Bank*, 22 Utah 328, 62 Pac. 425.

* *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829; *Austin v. Wilson*, 11 N. Y. S. 565; *Truman v. Owens*, 17 Ore. 523, 21 Pac. 665; *Powers v. Insurance Co.*, 68 Vt. 390, 35 Atl. 331; *Clarke v. Webb*, 1 C. & M. 29; *Tones v. Sills*, 29 U. C. Q. B. 497.

* *Jacksonville &c. R. Co. v. Warner*, 35 Fla. 197, 16 So. 898; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 182; *Albrecht v. Gies*, 33 Mich. 389; *Gregory v. Bailey*, 4 Har. (Del.) 256; *American &c. Co. v. Berner &c. Co.*, 83 Ill. App. 446;

Knowles v. Michel, 13 East 249; but it is held that plaintiff may show items in certain cases. *Koegel v. Givens*, 79 Mo. 77; *Cape Girardeau &c. Co. v. Kimmel*, 58 Mo. 83; *Mead v. White* (Pa.), 8 Atl. 913; and on the other hand, that if any item is proved incorrect he cannot recover for that item, *Withers v. Sandlin*, 44 Fla. 253, 32 So. 829; *Poppers v. Schoenfeld*, 97 Ill. App. 477.

* *Knowles v. Michel*, 13 East 249; *Bartlett v. Emery*, 1 Term. R. 42, note; *Lane v. Hill*, L. R. 18 Q. B. 252, 83 E. C. L. 252; *Rutledge v. Moore*, 9 Mo. 537; *Weigel v. Hartman &c. Co.*, 51 N. J. L. 446, 20 Atl. 67; *Neyland v. Neyland*, 19 Tex. 423; *Cobb v. Arundell*, 26 Wis. 553.

* See, *Tucker v. Barrow*, 7 B. & C. 623, 14 E. C. L. 103; *Gough v. Findon*, 7 Exch. 48; *Lemere v. Elliott*, 6 H. & N. 656; *Wilson v. Marshall*, 2 Ir. C. L. 356; *Ware v. Dudley*, 16 Ala. 742; *Truman v. Owens*, 17 Ore. 525, 21 Pac. 665; *Kennedy v. Adams*, 15 N. Br. 162; *McKay v. Grinley*, 30 U. C. Q. B. 54.

* *Ogden v. Astor*, 4 Sandf. (N. Y.) 311; *Bevan v. Cullen*, 7 Pa. St. 281; *Tyke v. Cosford*, 14 U. C. C. P. 64; see also, *Graham v. Chubb*, 39 Mich. 417.

ment of a balance due, without the specific items, if accepted, may constitute a stated account;⁵⁵ but it should be something more than a mere partial account or memorandum which does not indicate that a final settlement is intended.⁵⁶ It is usually in writing, but it is not an essential requisite that it should be in writing⁵⁷ unless the case is one where writing is required by the statute of frauds.⁵⁸ The stating of an account is not strictly, and in every sense, the making of a new contract or the creation of a new debt,⁵⁹ but it is regarded at common law as creating an implied promise to pay the balance thus ascertained which is in the nature of a new promise, and the action is upon it and not upon the original items of account.⁶⁰ So, under the code, if the action is upon the account stated, it cannot be sustained by proof of the original transaction upon failure to prove an account stated,⁶¹

⁵⁵ *Robbins v. Downey*, 18 N. Y. 100, N. Y. St. 279; *May v. Kloss*, 44 Mo. 300.

⁵⁶ *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 108; *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Thomlinson v. Earnshaw*, 14 Ill. App. 593; see also, *Pickard v. Simpson*, 6 N. Y. S. 93; *Allen v. Woonsocket Co.*, 11 R. I. 288; *Burden v. McElmoyle*, *Balley Eq. (S. Car.)* 375; *Glasscock v. Ronengrant*, 55 Ark. 376, 18 S. W. 379; *McCarthy v. Wood*, (Ky.) 13 S. W. 792; *Bouslog v. Garrett*, 39 Ind. 338.

⁵⁷ *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300; *Lallande v. Brown*, 121 Ala. 513, 25 So. 997; *Gibson v. Sumner*, 6 Vt. 163; *Quinn v. White*, 26 Nev. 42, 62 Pac. 995; *Knowles v. Michel*, 13 East 249; *Pinchon v. Chilcott*, 3 Car. & P. 236, 14 E. C. L. 545; *McFarlane v. Sumner*, 1 Hawaii, 364; *Gross v. Bricker*, 18 U. C. Q. B. 410; but compare *Wood v. Gault*, 2 Md. Ch. 433; *Heath v. Doyle*, 18 R. I. 252, 27 Atl. 333; *Converse v. Scott*, 137 Cal. 239, 70 Pac. 13.

⁵⁸ See *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791; *Falmouth v. Thomas*, 1 C. & M. 89, 3 Tyrw. 26;

but compare, *Cosking v. Ward*, 1 C. B. 858. So, the fact that it is not in writing may, in some jurisdictions at least, have an important bearing upon the question as to whether the statute of limitation is a bar. *Chase v. Trafford*, 116 Mass. 529, 17 Am. 171.

⁵⁹ See and compare, *Chace v. Trafford*, 116 Mass. 529, 17 Am. R. 171; *McKinster v. Hitchcock*, 19 Neb. 100; *Laycock v. Pickles*, 4 B. & S. 497; *Going v. Patten*, 17 Abb. Pr. (N. Y.) 339, 340.

⁶⁰ *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Throop v. Sherwood*, 9 Ill. 92; *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34, Am. Dec. 293; *Holmes v. Page*, 19 Ore. 232, 23 Pac. 961; *Columbia Brewing Co. v. Berney*, 90 Mo. App. 96; *Foster v. Allanson*, 2 Term R. 479; *Arthur v. Dartch*, 9 Jur. 118.

⁶¹ *Volkening v. De Graff*, 81 N. Y. 268; *Saville v. Insurance Co.*, 8 Mont. 419, 20 Pac. 646; *Martin v. Beckwith*, 4 Wis. 239; *Auzerais v. Naglee*, 74 Cal. 64, 15 Pac. 371; *Phillips Code Pl.*, § 474; see also, *Christofferson v. Howe*, 57 Minn. 67, 58 N. W. 830; *Bartlett v. Emery*, 1 Term R. 42, note; *McCall v. Nave*.

but it has been held that if the original transaction is counted on, it is open to proof and disproof.⁶²

§ 1606. Questions of law or fact.—There is some apparent conflict among the authorities as to the exact province of the court and jury in cases of accounts stated, but it may, perhaps, be said that whether on a given state of facts the transaction constitutes a stated account is usually a question of law,⁶³ and if the evidence is without conflict and but one reasonable inference can be drawn from it the question would certainly seem to be one of law for the court. Where the transaction is in writing and is unambiguous, its construction and legal effect are both, as a rule, questions for the court.⁶⁴ But in other cases where the evidence is conflicting or it is a question of fact as to whether the parties assented, or the like, the question is for the jury⁶⁵ under proper instructions from the court.⁶⁶ It has been held in many cases that it is a question for the jury as to whether timely objection was made to an account rendered,⁶⁷ and the question as to the reasonableness of the time for which the account was held without objection, under the rule that assent is implied from un-

52 Miss. 494; McClelland v. West, 70 Pa. St. 183; Loventhal v. Morris, 103 Ala. 332, 15 So. 672.

* Phillips Code Pl., § 474; Greenfield v. Insurance Co., 47 N. Y. 430; Northern Line Packett Co. v. Platt, 22 Minn. 413; Cross v. Moore, 23 Vt. 482; but see, Rand v. Wright, 129 Mass. 50; Milward v. Ingram, 2 Mod. 43; Callander v. Howard, 10 C. B. 290, 70 E. C. L. 290.

* Lockwood v. Thorne, 11 N. Y. 170, 42 Am. Dec. 81; Talcott v. Chew, 27 Fed. 273; Bishop v. Chamber, 3 Car. & P. 55, 14 E. C. L. 207.

* Dobbs v. Campbell, 10 Kans. App. 185, 63 Pac. 289; Gem Chemical Co. v. Youngblood, 58 S. Car. 56, 36 S. E. 437; but see, where the settlement is ambiguous, Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859.

* Rosenfield v. Fortier, 94 Mich. 29, 53 N. W. 930; McClellan v. Crofton, 6 Me. 307; Fleischer v. Kubli, 20 Ore. 328, 25 Pac. 1086; Sharkey v.

Mansfield, 90 N. Y. 227, 43 Am. R. 161; Lockwood v. Thorne, 18 N. Y. 285; Meyer v. Marshall, 34 W. Va. 42, 11 S. E. 730; Hollenbeck v. Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. 306; Kronenberger v. Binz, 56 Mo. 121; Spellman v. Muehlfield, 166 N. Y. 245, 29 N. E. 817; see also, Warder & Co. v. Angell, 99 Wis. 298, 74 N. W. 789; Tassey v. Church, 4 W. & S. (Pa.) 141, 39 Am. Dec. 65; Bertrand v. Taylor, 32 Ark. 470; Bailey v. Bensley, 87 Ill. 556.

* Wiggins v. Burkham, 10 Wall. (U. S.) 129; Martyn v. Arnold, 36 Fla. 446, 18 So. 791; Ault v. Interstate Sav. & C. Asso., 15 Wash. 627, 47 Pac. 13; Sergeant v. Ewing, 36 Pa. St. 156; Davis v. Tierman, 2 How. (Miss.) 786.

* Peter v. Thickstun, 51 Mich. 589, 17 N. W. 68; Brevan v. Cullen, 7 Pa. St. 281, and authorities cited in next note below.

reasonable delay and failure to object, is undoubtedly a question for the jury in many cases, at least where there are circumstances making it a question of fact;⁶⁸ but where the facts are clear and undisputed and there are no peculiar circumstances, the question is one of law for the court.⁶⁹

§ 1607. Burden and manner of proving account stated.—In an action upon an account stated the burden of establishing a stated account is upon the plaintiff,⁷⁰ and so, on the other hand, when the defendant pleads and relies upon a stated account, the burden as to that fact or issue is upon him.⁷¹ Parol evidence has been held admissible to identify the transaction covered by a stated account in writing,⁷² and the fact of examination of books of account by the party sought to be charged,⁷³ or that a statement of the account was de-

⁶⁸ *Hollenbeck v. Ristine*, 105 Iowa 488, 75 N. W. 355, 67 Am. St. 306; *Miller v. Burns*, 41 Ill. 293; *Hutchinson v. Market Bank*, 48 Barb. (N. Y.) 307; *Austin v. Ricker*, 61 N. H. 97.

⁶⁹ *McLaughlin Co. v. United States*, 37 Ct. Cl. 150; *Long-Bell Lumber Co. v. Stump*, 86 Fed. 574; *Standard Oil Co. v. Van Elten*, 107 U. S. 325, 1 Sup. Ct. 178; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Fleischner v. Kubli*, 20 Ore. 328, 25 Pac. 1086.

⁷⁰ *Comer v. Way*, 107 Ala. 300, 19 So. 966, 54 Am. St. 93; *Truman v. Owens*, 17 Ore. 523, 21 Pac. 665; *Volkening v. De Graff*, 81 N. Y. 268; *McClellan v. Crofton*, 6 Me. 307. The burden of ultimately establishing his case, indeed, remains upon the plaintiff throughout, but on proof of a stated account he usually makes at least a prima facie case; and the burden in the sense of going forward with evidence or suffering defeat, may then be said to shift to the defendant.

⁷¹ *Clark v. Marbourg*, 33 Kans.

471, 6 Pac. 548; *Allen v. Woonsocket Co.*, 11 R. I. 288; *White v. Campbell*, 25 Mich. 463.

⁷² *Ferguson v. Davidson*, 147 Mo. 664, 49 S. W. 859; but where the settlement is reduced to writing, the written instrument is usually the best evidence, *Walker v. Driver*, 7 Ala. 679.

⁷³ *Raub v. Nisbett*, 118 Mich. 248, 76 N. W. 393; *Gibson v. Sumner*, 6 Vt. 163; *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *Kock v. Bonitz*, 4 Daly (N. Y.) 117; see also, *Brewer v. Wright*, 25 Neb. 305, 41 N. W. 159, presumption that he examined them; *Heartt v. Corning*, 3 Paige (N. Y.) 566. In the first case cited in this note it was proved that he examined the books and made no objections for years, and it was held that the books were admissible as in the nature of an admission. But the mere balancing of books without examination or assent by the other party does not prove an account stated. *Nostrand v. Dittmis*, 127 N. Y. 355, 28 N. E. 27.

livered⁷⁴ or mailed⁷⁵ to him may be shown in a proper case. It has also been held that the admission by a corporation of the account as stated may be shown by the approval of its authorized officers without the minutes or record entries of such action,⁷⁶ and that an answer of a garnishee in prior garnishment proceedings is competent to show the admission of a debt under a complaint on an account stated.⁷⁷ Promissory notes,⁷⁸ accepted bills of exchange,⁷⁹ due bills,⁸⁰ I. O. U.'s,⁸¹ and the like,⁸² are admissible in a proper case as evidence in an action upon an account stated. As elsewhere shown, while the mere rendering of an account is not sufficient of itself to establish

⁷⁴ *Truman v. Owens*, 17 Ore. 523, 21 Pac. 665; *May v. Kloss*, 44 Mo. 300; delivery held to stop the party that delivered the account, in the absence of fraud, mistake or undue advantage; *Fitzgerald v. First Nat. Bank*, 114 Fed. 474, 481, citing numerous authorities.

⁷⁵ *Ault v. Interstate &c. Co.*, 15 Wash. 627, 47 Pac. 13; *Darby v. Lastrapes*, 28 La. Ann. 605; *New York &c. Co. v. Crow*, 51 N. Y. S. 252.

⁷⁶ *Jacksonville &c. R. Co. v. Wariner*, 35 Fla. 197, 16 So. 398; see also, *St. Mary's Church v. Cagger*, 6 Barb. (N. Y.) 576; but see *Chatham v. Niles*, 36 Conn. 403.

⁷⁷ *American Brew. Co. v. Berner-Mayer Co.*, 83 Ill. 446.

⁷⁸ *Remsey v. Duke*, Morr. (Iowa) 385; *Maybury v. Berkery*, 102 Mich. 126, 60 N. W. 699; *McCormick v. Altneave*, 73 Miss. 86, 19 So. 198; *Seabury v. Bolles*, 51 N. J. L. 103, 16 Atl. 54; *Oden v. Bonner*, 93 Ala. 393, 9 So. 409; *Fairchild v. Dennison*, 4 Watts (Pa.) 258; *Story v. Atkins*, 2 Str. 719.

⁷⁹ *Anthony v. Savage*, 3 Utah 272, 3 Pac. 546; *Orr v. Hopkins*, 3 N. Mex. 45, 1 Pac. 181; *Emerson v. Gardiner*, 1 Allen (N. Br.) 451; but only between parties. *Stephens v. Berry*, 15 U. C. C. P. 548.

⁸⁰ *Frost v. Clark*, 82 Iowa 298, 48

N. W. 82; *Mills v. Geron*, 22 Ala. 669; *Highmore v. Primrose*, 5 M. & S. 65; *Lemere v. Elliott*, 6 H. & N. 656, 30 L. J. Ex. 350; *Wilson v. Wilson*, 14 C. B. 616, 78 E. C. L. 616.

⁸¹ *Curtis v. Rickards*, 1 M. & G. 46; *Fesenmayer v. Adcock*, 16 M. & W. 449; *Buck v. Hurst*, L. R. 1, C. P. 297; but see *Lemere v. Elliott*, 6 H. & N. 656.

⁸² *Barry v. White*, 59 Pa. St. 172; *Bull v. Brockway*, 48 Mich. 523, 12 N. W. 685; *Grant v. Young*, 23 U. C. Q. B. 387; *Palmer v. McLennen*, 22 U. C. C. P. 258, 565; awards in certain cases: *Bates v. Curtis*, 21 Pick. (Mass.) 247; *Gooding v. Hingston*, 20 Mich. 439; *Buschman v. Morling*, 30 Md. 384; *Montgomerie v. Ivers*, 17 Johns. (N. Y.) 38; but not a judgment: *Gooding v. Hingston*, 20 Mich. 439. See, however, *Hall v. Odber*, 11 East 118; nor where the strict rule prevails, an instrument under seal: *Middleditch v. Ellis*, 2 Ex. 623; *Baker v. Heard*, 5 Ex. 959, 2 L. J. Ex. 444; *Young v. Hill*, 67 N. Y. 162, 23 Am. R. 99; but see *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31; proved by pass book in defendant's possession in, *Ruck v. Fricke*, 28 Pa. St. 241; see also where bank book was balanced from month to month, *Nodine v. Bank*, 41 Ore. 386, 68 Pac. 1109.

an account stated,⁵³ yet it is generally an essential step, and when the account purporting to be in complete settlement is acquiesced in, this is usually sufficient to support a recovery. This assent may be either express or implied, and circumstantial evidence, as well as direct evidence, is admissible to show it.⁵⁴ As a general rule it may be said that all proper facts and circumstances may be shown that will aid in determining or explaining what occurred at the alleged settlement.⁵⁵ The defendant may also introduce proper evidence to explain and rebut his apparent assent from failure to object,⁵⁶ and, in general, to show that there was no stated account as claimed by the plaintiff.⁵⁷ But the fact that the account is stated to be subject to

⁵³ *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. R. 262; *Atkinson v. Burt*, 65 Ark. 316, 53 S. W. 404; *Robertson v. Wright*, 17 Gratt. (Va.) 534; *Guernsey v. Rexford*, 63 N. Y. 631; that it may be shown by circumstantial evidence, see *Hatch v. Van Taube*, 64 N. Y. S. 393; but it is said that after proof that the account was rendered, the burden is upon the one denying the existence of a stated account to show that objection was made within a reasonable time. *Ruffner v. Hewitt*, 7 W. Va. 585; *Townes v. Birchett*, 12 Leigh (Va.) 173.

⁵⁴ See generally for admissibility of evidence to show that the account was stated: *Chapman v. Lee*, 47 Ala. 143; *Sager v. Tupper*, 38 Mich. 258; *Albrecht v. Gies*, 33 Mich. 389; *Sergeant v. Ewing*, 36 Pa. St. 156; *Fitch v. Leitch*, 11 Leigh (Va.) 471; retention an unreasonable time without objection: *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178; *Freas v. Truitt*, 2 Colo. 489; *Knickerbocker v. Gould*, 115 N. Y. 533, 22 N. E. 573; *Eames & Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Christian & Co. v. Hill*, 122 Ala. 490, 26 So. 149; *Pierce v. Pierce*, 199 Pa. St. 4, 48 Atl.

689; *Willis v. Jernegan*, 2 Atk. 251; payments: *Samson v. Freedman*, 102 N. Y. 669, 7 N. E. 419; *Charlotte & Co. v. Hartog*, 85 Fed. 150; accepting money or check for balance due: *McCormick v. City*, 166 Mo. 315, 65 S. W. 1038; *Bank v. Busbey*, 45 Mich. 135, 7 N. W. 725; *Schuyler v. Ross*, 37 N. Y. St. 805, 13 N. Y. S. 944; evidence of usage: *Union Bank v. Bank*, 9 Gill & J. (Md.) 439, 31 Am. Dec. 113; but see as to partnership accounts, *Hughes v. Smither*, 49 N. Y. 115, 163 N. Y. 553, 57 N. E. 1112.

⁵⁵ *Mead v. White*, (Pa.) 8 Atl. 913; *Coffee v. Williams*, 103 Cal. 505, 37 Pac. 504; *Goodrich v. Coffin*, 83 Me. 324, 22 Atl. 217; *Walker v. Diver*, 7 Ala. 679; *Blanc v. Forgay*, 5 La. Ann. 695; see also, *Binford v. Miner*, 101 Ind. 147; *Koegel v. Givens*, 79 Mo. 77; *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829.

⁵⁶ *Lockwood v. Thorne*, 18 N. Y. 285; *Ault v. Interstate & Co. Asso.* 15 Wash. 627, 47 Pac. 13; *Miller v. Bank*, 6 Cush. (Miss.) 81; *Carpenter v. Nickerson*, 7 Daly (N. Y.) 424; *Wittowski v. Harris*, 64 Fed. 712; *Follansbee v. Parker*, 70 Ill. 11; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129.

⁵⁷ See *McCall v. Nave*, 52 Miss.

correction or contains the letters "E. and O. E." (errors and omissions excepted) does not prevent it from being considered as a stated account or from becoming such by assent implied from failure to object within a reasonable time.⁸⁸

§ 1608. **Presumptions in cases of accounts stated.**—As already seen, a presumption or implication of assent arises from proof of the retention of an account rendered and retained beyond a reasonable time without objection.⁸⁹ So, there is a presumption, frequently called a strong presumption, that all items that each party has against the other which are due at the time, are included in a settlement and stated account.⁹⁰ And where an account stated is proved there is also a presumption that it is correct, and this presumption is conclusive as between the parties unless fraud, mistake, or omission is shown.⁹¹ These are the most important presumptions that are at all

494; *Goodwin v. United States &c. Co.*, 64 Conn. 591; *Hill v. Durand*, 53 Wis. N. W. 160; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178; *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790; *Hawley v. Harran*, 79 Wis. 379, 48 N. W. 676; *Wakefield v. Farnum*, 170 Mass. 422, 49 N. E. 640; *Traitel v. Dwyer*, 61 N. Y. S. 1100; as to surcharging and falsifying the account, see post, § 1609.

* *Fleischner v. Kubli*, 20 Ore. 323, 25 Pac. 1086; *Marmon v. Waller*, 53 Mo. App. 610; *Wonderly v. Christian*, 91 Mo. App. 158; *Young v. Hill*, 67 N. Y. 162, 23 Am. R. 99; *Branger v. Chevallier*, 9 Cal. 353; *McKay v. Overton*, 65 Tex. 86; *Johnson v. Curtis*, 3 Bro. C. C. 266; but see *Ingraham v. Lukens*, 30 S. Car. 616, 19 S. E. 348; *Harden v. Gordon*, 11 Fed. Cas. No. 6047.

* *Hollenbeck v. Ristine*, 105 Iowa 438, 75 N. W. 355, 67 Am. St. 306; *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483; *Crawford v. Hutchinson*, 38 Ore. 578, 65 Pac. 84; *McLaughlin v. United States*, 36 Ct. Cl. 138, 37 Ct. Cl. 150; *Rich v. Eldredge*, 42

N. H. 153; *Lockwood v. Thorn*, 18 N. Y. 285; *Ellwood Mfg. Co. v. Betcher*, 72 Minn. 103, 75 N. W. 113; see as to effect of failure to object to account which is presented although not due, *Jugla v. Trouttet*, 120 N. Y. 21, 23 N. E. 1066.

* *Linville v. State*, 130 Ind. 210, 212, 29 N. E. 1129; and authorities there cited; *Taylor v. Thuring*, 21 Misc. (N. Y.) 76, 46 N. Y. 892; *Freeman v. Bolzell*, 63 Wis. 378, 23 N. W. 708; *Johnson v. Johnson*, 4 Call (Va.) 38; *Normandin v. Gratton*, 12 Ore. 505, 8 Pac. 653; but it is held that there is no such presumption as to the inclusion of an item not due or that it may be proved that the item was not due. *Beebe v. Smith*, 194 Ill. 634, 62 N. E. 856; *Dowling v. Blackman*, 70 Ala. 303.

* *Keller v. Keller*, 18 Neb. 366, 25 N. W. 364; *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Wonderly v. Christian*, 91 Mo. App. 158; *Freeman v. Bolzell*, 63 Wis. 378, 23 N. W. 708; see also, *Charlotte &c. Co. v. Hartog*, 85 Fed. 150; *Wharton v.*

peculiar to the subject now under consideration; but other presumptions may arise as in other cases, such, for instance, as the presumption of regularity of mails and that accounts duly mailed were received,⁹² in the absence of anything to the contrary.⁹³

§ 1609. **Impeachment of accounts stated.**—The burden is upon the party who seeks to impeach a stated account, and, as a general rule, it can only be impeached by showing fraud, omission, mistake, or undue advantage;⁹⁴ and even when there are omissions or mistakes, the courts are reluctant to open and set aside the entire settlement, and will usually merely allow the account to be surcharged or falsified.⁹⁵ It has been held, however, that, in order to impeach an account stated for errors or mistakes, it is not necessary that they should be mutual;⁹⁶ but it may be impeached in a proper case either at law or in equity for fraud or mistake, whether it is brought forward as a cause of action or a defense,⁹⁷ unless the settlement is in such form that, in

Anderson, 28 Minn. 301, 9 N. W. 860; Brown v. Van Dyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Camp v. Wilson, 97 Va. 265, 33 S. E. 591; Stagg v. St. Jean (Mont.), 74 Pac. 740, 741.

⁹² Darby v. Lastraper, 28 La. Ann. 605; Ault v. Interstate &c. Assn., 15 Wash. 627, 47 Pac. 13; New York &c. Co. v. Crow, 51 N. Y. S. 252; but see Rowland v. Donovan, 16 Mo. App. 554. For consideration of this presumption generally, see Vol. I, § 82.

⁹³ For other presumptions in this class of cases, see Brewer v. Wright, 25 Neb. 305, 41 N. W. 159; Ware v. Manning, 86 Ala. 238, 5 So. 682; Sergeant v. Ewing, 36 Pa. St. 156.

⁹⁴ Hoyt v. McLaughlin, 52 Wis. 280, 8 N. W. 893; Montgomery v. Fritz, 7 N. Dak. 348, 75 N. W. 266; Goodrich v. Coffin, 83 Me. 324, 24 Atl. 217; Freeland v. Heron, 7 Cranch (U. S.) 147; Stearns v. Page, 7 How. (U. S.) 819; Allen West Co. v. Patillo, 90 Fed. 628, 631; Fish v. Basche, 31 Ore. 178, 49 Pac. 981;

Dobbs v. Campbell, 10 Kans. (App.) 185, 63 Pac. 289; Brown v. Van Dyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Somers v. Cresce (N. J.), 13 Atl. 23; Chambers v. Goldwin, 9 Ves. 254; Pit v. Cholmondeley, 2 Ves. 565.

⁹⁵ Roberts v. Totten, 13 Ark. 609; White v. Walker, 5 Fla. 478; Brown v. Rowles, 21 Md. 21; Miller v. Chipewa County, 58 Wis. 630, 17 N. W. 535; Smith v. Marvin, 27 N. Y. 137; Carpenter v. Kent, 101 N. Y. 591; Rehill v. McTague, 114 Pa. St. 82, 60 Am. R. 341; Vernon v. Vawdry, 2 Atk. 119. The burden is upon the party seeking to surcharge or falsify; Cowan v. Jones, 27 Ala. 317; Phillips v. Belden, 2 Edw. (N. Y.) 1; Townsend v. French, 2 Mol. (Ir. ch.) 242.

⁹⁶ Conville v. Shook, 144 N. Y. 686; 39 N. E. 405; Eddie v. Eddie, 61 Ill. 134.

⁹⁷ Bank v. Allen, 100 Ala. 476, 14 So. 335, 338; Dewey v. Sloan, 11 Cin. Law Bul. (Ohio) 102; Colorado Fuel &c. Co. v. Chappell, 12

the particular jurisdiction it is necessary first to go into a court of equity. It has also been held that where the account has been settled and acquiesced in by the original parties, the right to impeach it cannot be assigned,⁹⁸ and that admissions by the assignor made after assignment of an account are not admissible to impeach it by showing errors.⁹⁹

§ 1610. **Accounting in equity—Before interlocutory decree.**—As a general rule, the plaintiff's right to an accounting must be established before a reference will be made for the purpose of taking the account;¹⁰⁰ and on the hearing before the interlocutory decree the question is usually as to such right and the evidence is then confined to such matters as tend to establish or disprove it.¹⁰¹ The evidence must make out a case for accounting under the allegations, and not a totally different case.¹⁰² The burden is upon the plaintiff to estab-

Colo. App. 385, 55 Pac. 606; *Stevens v. Saginaw*, 62 Mich. 579, 29 N. W. 492; *Clark v. Marbourg*, 33 Kans. 471, 6 Pac. 548; *Peddicord v. Connard*, 85 Ill. 102; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Carroll v. Paul*, 16 Mo. 226; *Perkins v. Hart*, 11 Wheat. (U. S.) 237; but see *Roach v. Gilmer*, 3 Utah 389, 4 Pac. 221; as to what may be shown generally, see *Christian v. Niagara &c. Co.*, 101 Ala. 634, 14 So. 374; *Madigan v. De Graff*, 17 Minn. 52; *Conville v. Shook*, 144 N. Y. 686, 39 N. E. 405; *Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607; *Schoonover v. Osborne*, 108 Iowa 453, 79 N. W. 263; *Boston &c. Co. v. Nashua &c. R. Co.*, 157 Mass. 258, 31 N. E. 1067; *Lee v. Reed*, 4 Dana (Ky.) 109; *Higman v. Harris*, 108 Ind. 246, 8 N. E. 255; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. R. 325.

⁹⁸ *Cross v. Sacramento Sav. Bank*, 66 Cal. 426, 6 Pac. 94; but see as to impeachment by assignee where the account is not stated, *Lawler v. Jennings*, 18 Utah 35, 55 Pac. 60.

⁹⁹ *State v. Jennings*, 10 Ark. 428.

¹⁰⁰ *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 71 Am. St. 26, 44 L. R. A. 632; *Safety &c. Co. v. Creamer*, 84 Hun (N. Y.) 570, 33 N. Y. S. 411; *Hunt v. Gordon*, 52 Miss. 194; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Sadler v. Whithurst*, 83 Va. 46, 1 S. E. 410; *Beale v. Hall*, 97 Va. 383, 34 S. E. 53.

¹⁰¹ *Law v. Hunter*, 1 Russ. 100; *Walker v. Woodward*, 1 Russ. 107; *Barrett v. Henry*, 85 N. Car. 321; *Morrison v. Horrocks*, 40 Hun (N. Y.) 428; *Ligare v. Peacock*, 109 Ill. 94; *Hudson v. Trenton &c.*, 16 N. J. Eq. 475; *Bradshaw v. Clark*, 31 N. J. Eq. 39; but see, *Standish v. Babcock*, 48 N. J. Eq. 386, 22 Atl. 734, 30 L. R. A. 604; *Ridenbaugh v. Burnes*, 14 Fed. 93; *Albright v. Albright*, 91 N. Car. 220.

¹⁰² *Crothers v. Lee*, 29 Ala. 337; *Hunt v. Stockton Lumber Co.*, 113 Ala. 387, 21 So. 454; *Matthews v. Wilson*, 27 Mo. 155; *Craig v. McKinney*, 72 Ill. 305; *Scott v. Gamble*, 9 N. J. Eq. 218; *Arnett v. Welch*, 46 N. J. Eq. 543, 20 Atl. 48; *Salter v.*

lish his right to an accounting;¹⁰³ but where a defendant pleads a stated account, or the like, it has been held that the burden as to such issue is upon him.¹⁰⁴ If a stated account is established it will constitute a bar to the suit for accounting unless it is impeached for fraud, mistake, or the like,¹⁰⁵ and the burden of impeachment is upon the party who seeks to open it.¹⁰⁶

§ 1611. Accounting in equity—After interlocutory decree.—

After the interlocutory decree for an accounting evidence is usually heard as to the state of the account. In most jurisdictions an order of reference is made to a master for this purpose, especially where the account is complicated, long and intricate,¹⁰⁷ but it has been held

Ham, 31 N. Y. 321; Manning v. Manning, 89 Hun (N. Y.) 471, 35 N. Y. 333; but see, Northern Grain Co. v. Pierce, 13 S. Dak. 265, 83 N. W. 256; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Brower v. Brower, 29 Fed. 485; Pierce v. Equitable &c. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. 433.

¹⁰³ Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. 26; Beale v. Hall, 97 Va. 383, 34 S. E. 53; Farrington v. Harrison (N. J.), 15 Atl. 8; Fidelity &c. Co. v. Weitzel, 152 Pa. St. 498, 25 Atl. 569; burden of explaining apparent laches also held to be on plaintiff in Sheldon v. Sheldon, 133 N. Y. 1, 30 N. E. 730.

¹⁰⁴ Allen v. Woonsocket Co., 11 R. I. 288; see also, Standish v. Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Stevens v. Ross (N. J.) 13 Atl. 225; Pratt v. Grimes, 48 Ill. 376.

¹⁰⁵ See authorities cited in the last note, *supra*; also, Vermillion v. Bailey, 27 Ill. 229; Craig v. McKinney, 72 Ill. 305; Welland v. Eklers, 107 Iowa 186, 77 N. W. 858; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Harrison v. Farrington, 40 N. J. Eq. 353, 3 Atl.

80; Dawson v. Dawson, 1 Atk. 1; Sumner v. Thorp, 2 Atk. 1; see also, Grant v. Bell, 87 N. Car. 34.

¹⁰⁶ Marsh v. Case, 30 Wis. 531; Redman v. Green, 38 N. Car. 54. So, where leave is granted to surcharge or falsify, and it is held that an account stated which is set up as a defense cannot be opened, surcharged, or falsified by the plaintiff where his bill merely seeks an accounting unless the bill is amended; Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 64; Costin v. Baxter, 41 N. Car. 197; McMahlill v. Jenkins, 69 Mo. App. 279; McNeel v. Baker, 6 W. Va. 153; McClane v. Shepard, 21 N. J. Eq. 76; Hoyt v. Clarkson, 23 Ore. 51, 31 Pac. 198; Barker v. Hoff, 52 How. Pr. (N. Y.) 382; Hutchinson v. Market Bank, 48 Barb. (N. Y.) 302; Weed v. Smull, 7 Paige (N. Y.) 573; Dawson v. Dawson, 1 Atk. 1; but see, Welland v. Ehlers, 107 Iowa 186, 77 N. W. 855, allowed under reply.

¹⁰⁷ Campbell v. Campbell, 8 N. J. Eq. 738, 743; St. Clombe v. United States, 7 Pet. (U. S.) 625; Bryan v. Morgan, 35 Ark. 113; Enesser v. Hudek, 169 Ill. 494, 48 N. E. 673; Barnebee v. Beckley, 43 Mich. 613, 5 N. W. 976. See also, generally as

that the court may hear the evidence without a reference, and this is sometimes done, where the account is short and simple and not complex or intricate.¹⁰⁸ The scope of the inquiry is determined by the order of reference and the pleadings,¹⁰⁹ and under the United States equity rule the parties must bring in their accounts in the form of debtor and creditor. Any of the parties not satisfied may then examine the accounting party viva voce, or on interrogatories, or by deposition, as the master may direct.¹¹⁰ This practice is also followed in many of the state courts;¹¹¹ and after the accounts are submitted, evidence is usually received only as to the matters thus shown to be in dispute.¹¹² The accounting party has the burden of discharging himself from any charge that appears against him on his own statement of account,¹¹³ and generally of proving any credit that he claims.¹¹⁴ He is also frequently required to produce vouchers;¹¹⁵ but,

to reference, *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Chicago &c. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336; *Western U. Tel. Co. v. American Bell Tel. Co.* 125 Fed. 342.

¹⁰⁸ *Bryan v. Morgan*, 35 Ark. 113; *Emery v. Mason*, 75 Cal. 222, 16 Pac. 894; *May v. May*, 19 Fla. 373; *Standish v. Babcock*, 48 N. J. Eq. 386, 22 Atl. 734; *Darby v. Gilligan*, 43 W. Va. 755, 28 S. E. 737; but see, *Moffett v. Hanner*, 154 Ill. 649, 39 N. E. 474; *Beale v. Beale*, 116 Ill. 292, 5 N. E. 540.

¹⁰⁹ *Calvert v. Carter*, 18 Md. 73; *Izard v. Bodine*, 9 N. J. Eq. 309; *Remsen v. Remsen*, 2 Johns Ch. (N. Y.) 495; *Phillips v. Belden*, 2 Edw. Ch. 1; *Purdy v. Rutter*, 3 W. Va. 262; but see, *Northern Grain Co. v. Pierce*, 13 S. Dak. 265, 83 N. W. 256.

¹¹⁰ *United States Eq. Rule* 79; 2 *Beach Mod. Eq. Pr.*, § 693; *Foot v. Silsby*, 3 Blatchf. (U. S.) 507, 9 Fed. Cas. No. 4920.

¹¹¹ *Patterson v. Johnson*, 113 Ill. 559; *Remsen v. Remsen*, 2 Johns Ch. (N. Y.) 492; *Kirkman v. Van-*

der, 7 Ala. 217; *Callender v. Colegrove*, 17 Conn. 1.

¹¹² *Myers v. Bennett*, 3 Lea (71 Tenn.) 184; see also, *Purdy v. Rutter*, 3 W. Va. 262; *Patterson v. Johnson*, 113 Ill. 559.

¹¹³ *Williamson v. Downs*, 34 Miss. 402; 2 *Dan. Ch. Pr.* 880, where the defendant required to account, occupies a fiduciary relation the burden is held to be upon him to show the performance of his trust; *Marvin v. Brooks*, 94 N. Y. 71, but no final decree can ordinarily be rendered unless the evidence shows that something is due; *Slater v. Arnett*, 81 Va. 432; *Peeler v. Lathrop*, 48 Fed. 780, and the burden of accounting is not always on the defendant; *Davenport v. Schutt*, 46 Iowa 510; *Pullman &c. Co. v. Central &c. Co.*, 34 Fed. 357.

¹¹⁴ *Thatcher v. Hayes*, 54 Mich. 184, 19 N. W. 946; *Crawford v. Norris* (Ark.), 12 S. W. 707; *New York Bay &c. Co. v. Buckmaster* (N. J.), 33 Atl. 819; *Silverthorne v. Brands*, 42 N. J. Eq. 703, 11 Atl. 328.

¹¹⁵ *Halstead v. Tyng*, 29 N. J. Eq. 86; *Davenport v. Davenport*, 1 Sim. 512.

unless he occupies a fiduciary relation, if entries in his own books are used to charge him, it has been held that he may use entries in the same book in his discharge.¹¹⁶ Objections to evidence taken before the master should be made before him.¹¹⁷ After he has made his report the case is usually heard by the court on such report, but it may be re-committed to him to be restated and even to hear further evidence,¹¹⁸ and it has been held that relevant evidence as to matters occurring after his report and before the final hearing is admissible on such hearing.¹¹⁹

§ 1612. Accounting in equity—Answer as evidence.—In equity a somewhat peculiar practice prevails in regard to the use of an answer under oath as evidence. When the bill calls for a discovery and answer as to the state of the account, without waiving oath, a responsive answer under oath is *prima facie* evidence of such matter therein contained, for, as well as against, the defendant.¹²⁰ But this is true only so far as the answer is responsive.¹²¹ The general rule in the Federal courts, and in most other jurisdictions as well, is that such an answer requires the allegations of the bill to which it is responsive, to be sus-

¹¹⁶ *Robertson v. Archer*, 5 Rand. (Va.) 319; *Jones v. Jones*, 4 H. & M. (Va.) 447; *Freeland v. Cocke*, 3 Munf. (Va.) 352; *Darston v. Earl of Oxford*, 1 Eq. Cas. Abr. 10; *Dolan v. Mitchell*, 57 N. Y. S. 157; but compare, *Wilson v. Dowse*, 140 Ill. 18, 29 N. E. 726; *White v. Lady Lincoln*, 8 Ves. 363; *Rewe v. Whittemore*, 11 Jur. N. S. 722.

¹¹⁷ *Callender v. Colegrove*, 17 Conn. 1; *Reed v. Winston*, 4 H. & M. (Va.) 450; *Remsen v. Remsen*, 2 Johns Ch. (N. Y.) 495; *Kirkman v. Vanlier*, 7 Ala. 217; but see as to reservation of such questions for the hearing on the report: *Rusling v. Bray*, 37 N. J. Eq. 174; *Welling v. Le Bau*, 32 Fed. 293; and compare, *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 40 Fed. 476, 478.

¹¹⁸ *Barnum v. Barnum*, 42 Md. 251; *Donnelly*, In re, 3 Phila. (Pa.) 18; see also, *Camac v. Francis*, 4 Fed. Cas. No. 2329; *Beale v. Beale*, 116

Ill. 292, 5 N. E. 540. Sometimes the court restates the account without recommitting it; *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636.

¹¹⁹ *Kendall v. New England & C. Co.*, 13 Conn. 383.

¹²⁰ *Dillard v. Ellington*, 57 Ga. 567; *May v. Barnard*, 20 Ala. 200; *Williamson v. Down*, 34 Miss. 402; *Baillie v. Baillie*, 166 Pa. St. 472, 31 Atl. 246; *Fidelity & C. Co. v. Weltzel*, 152 Pa. St. 498, 25 Atl. 569; *Dozier v. Edwards*, 3 Litt. (13 Ky.) 67; *Barksdale v. Hall*, 13 Rich. Eq. (S. Car.) 180; *Peeler v. Lathrop*, 48 Fed. 780.

¹²¹ *McNeal v. Glenn*, 4 Md. 87; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Donovan v. Haynie*, 67 Ala. 51; *Bradshaw v. Clark*, 31 N. J. Eq. 29, and authorities cited in last note *supra*; but see, *Davis v. Crockett*, 88 Md. 249, 41 Atl. 66, for what is responsive.

tained by the testimony of two witnesses or one witness and corroborating circumstances.¹²²

§ 1613. Accounting under the code.—An action for accounting under the code of civil procedure is essentially an equitable one, and the procedure and rules of evidence are in the main the same as in suits in equity for an accounting.¹²³ The fact that the same court usually has both law and equity jurisdiction and is empowered to give complete relief in the one proceeding¹²⁴ where it rightfully assumes jurisdiction, and the fact that there are different statutory provisions, will be found in some respects to vary the old system of procedure in equity. The general rule under the code is that the actual facts should be alleged, and such relief may then be granted, whether legal or equitable, as the allegations and proof justify.¹²⁵ It is not our purpose to treat of procedure generally, and, as decisions from code states are cited in considering the subject of accounting in equity, it is unnecessary to consider the subject at length in this connection.

¹²² *Peeler v. Lathrop*, 48 Fed. 780, 103 Cal. 550, 37 Pac. 504; *Williams v. Slote*, 70 N. Y. 601; *Dehority v. Nelson*, 56 Ind. 414; *Dougherty v. Gouff*, 23 Neb. 105, 36 N. W. 351; *Rippe v. Stogdill*, 61 Wis. 38, 20 N. W. 645; *Buist v. Melchers*, 44 S. Car. 46, 21 S. E. 449; *Dunn v. Johnson*, 115 N. Car. 249, 20 S. E. 390; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782; *Seattle Nat. Bank v. School Dist.*, 20 Wash. 368, 55 Pac. 317; *Bliss Code Pl.* (3d ed.), §§ 161, 162; 2 *Woolen Tr. Proc.* (Indiana), § 3178. It should be observed, however, that even under the code the complaint should proceed on a definite theory and that a total failure to prove that theory will generally prevent a recovery thereon.

¹²³ *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Garner v. Reis*, 25 Minn. 475.

¹²⁴ *Virginia &c. Co. v. Hale*, 93 Ala. 542, 9 So. 256; *Cook County v. Davis*, 143 Ill. 151, 32 N. E. 176; *Brooks v. Goodwin*, 70 N. H. 281, 47 Atl. 255; *Meyer v. Garthwaite*, 92 Wis. 571, 66 N. W. 704; *Alpaugh v. Wood*, 45 N. J. Eq. 153, 16 Atl. 576.

¹²⁵ *Kayser v. Mougham*, 8 Colo. 232, 6 Pac. 803; *Coffee v. Williams*,

103 Cal. 550, 37 Pac. 504; *Williams v. Slote*, 70 N. Y. 601; *Dehority v. Nelson*, 56 Ind. 414; *Dougherty v. Gouff*, 23 Neb. 105, 36 N. W. 351; *Rippe v. Stogdill*, 61 Wis. 38, 20 N. W. 645; *Buist v. Melchers*, 44 S. Car. 46, 21 S. E. 449; *Dunn v. Johnson*, 115 N. Car. 249, 20 S. E. 390; *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782; *Seattle Nat. Bank v. School Dist.*, 20 Wash. 368, 55 Pac. 317; *Bliss Code Pl.* (3d ed.), §§ 161, 162; 2 *Woolen Tr. Proc.* (Indiana), § 3178. It should be observed, however, that even under the code the complaint should proceed on a definite theory and that a total failure to prove that theory will generally prevent a recovery thereon.

CHAPTER LXXIX.

ADVERSE POSSESSION.

Sec.	Sec.
1614. Generally.	1620. Character and extent of possession.
1615. Burden of proof.	1621. Declarations.
1616. Question of law or fact.	1622. Reputation.
1617. Presumptions.	1623. Evidence to rebut or defeat.
1618. The possession.	
1619. The intent.	

§ 1614. **Generally.**—It is said by the Supreme Court of the United States that “where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title.”¹ The question of adverse possession, however, most often arises in regard to real property, and it is generally held that where adverse possession for the requisite period is shown, the title thus acquired is as effective, either in support of a cause of action or a defense, as a title by deed. In most jurisdictions color of title is unnecessary, but in nearly, if not all, claim of title is necessary, and color of title may have an important bearing upon the question of constructive possession and on the extent of the right acquired. So, in this connection, the question of good faith often becomes important. Ordinarily, however, the two essential elements are the possession and the intent; or, in other words, the possession must usually be hostile and exclusive, open, notorious, continuous for the requisite period, and under claim of right.²

¹ *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 211.

² See *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779, and numerous authorities cited; *Tyee Consol. Min. Co. v. Langstedt*, 121 Fed. 709, 712, and federal decisions cited, and note in 28 Am. St. 158-162. It is sometimes held, however, under statutes

of limitations, as in *Vanduyne v. Hepner*, 45 Ind. 589, that the true owner may be barred no matter whether the defendant's possession has been under claim of title and adverse or not, and there need be no express claim of title by word or mouth. See generally, leading article in 53 Cent. Law Jour. 482.

§ 1615. **Burden of proof.**—The burden of establishing adverse possession is upon the party who relies upon it.³ He must, ordinarily, show the existence of every element necessary to constitute adverse possession,⁴ and it has been held that this includes the burden of showing the extent of his possession.⁵ But where a *prima facie* case of adverse possession is made, in order to avoid it, the burden of going forward with evidence has been held to be upon the other party.⁶

§ 1616. **Question of law or fact.**—Adverse possession in most cases may be said to be a mixed question of law and fact, or, in other words, it is usually a question of fact for the jury under proper instructions from the court.⁷ It may be said to be a question of fact or a mixed question of law and fact in most cases because it is for the jury to determine, where there is dispute as to the facts,—whether the facts exist which are necessary to constitute adverse possession.⁸ But the question as to what is necessary in law to constitute adverse possession is a question of law, and where there is no dispute as to the facts and reasonable inferences, or if those most favorable to the claimant

³ *Beasley v. Howell*, 117 Ala. 499, 22 So. 989; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Kurz v. Miller*, 39 Wis. 426, 62 N. W. 182; *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776; *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731; *Nicklace v. Dickerson*, 65 Ark. 422, 46 S. W. 945; *Rowland v. Updike*, 28 N. J. L. 101; *Bryan v. Spivey*, 109 N. Car. 57, 13 S. E. 766; *Smith v. North Canyon &c. Co.*, 16 Utah 194, 52 Pac. 283; *Herman v. Stearns* (W. Va.) 27 S. E. 601; *Maxwell v. Cunningham*, 50 W. Va. 298, 40 S. E. 499.

⁴ *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797; *DeHaven v. Landell*, 31 Pa. St. 120; *Kennebeck Purchase v. Call*, 1 Mass. 483; *Robinson v. Allison*, 97 Ala. 596, 12 So. 382, 604; *Howard v. Howard*, 17 Barb. (N. Y.) 663; *Smith v. Estill*, 87 Tex. 264, 28 S. W. 801; *DeFrieze v. Quint*, 94 Cal. 653, 30 Pac. 1, 28 Am. St. 151; *Digman v. Nelson*, 26 Utah 186, 72 Pac. 936.

⁵ *Braxton v. Rich*, 47 Fed. 178; *Cantey v. Platt*, 2 McCord (S. Car.) 260.

⁶ *Shropshire v. Shropshire*, 7 Yerg. (Tenn.) 164; *Miller v. Bumgardner*, 109 N. Car. 413, 13 S. E. 935, avoidance on ground of disability; see also, *Margoan v. Davis*, 84 Me. 178, 24 Atl. 809; *Highstone v. Burdette*, 54 Mich. 329, 20 N. W. 64.

⁷ *Kennedy v. Townsley*, 16 Ala. 239; *Jackson v. Joy*, 9 Johns (N. Y.) 102; *Broxson v. McDougal*, 70 Tex. 64, 7 S. W. 591.

⁸ *Haney v. Breeden*, 100 Va. 781, 42 S. E. 916; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371; *Jangraw v. Mee*, 75 Vt. 211, 54 Atl. 189; *Harrison v. Spencer*, 90 Mich. 586, 51 N. W. 642; *Wheeler v. Laird*, 147 Mass. 421, 18 N. E. 212; *Hopkins v. Deering*, 71 N. H. 353, 52 Atl. 75; *Bradstreet v. Huntington*, 5 Peters (U. S.) 402, and authorities cited in following note.

are insufficient as a matter of law to constitute adverse possession, the court may decide the question without submitting it to the jury.*

§ 1617. **Presumptions.**—Presumptions frequently exert an important influence in cases involving the question of adverse possession. One of the most important is the presumption that the possession is in subordination to the title of the true owner.¹⁰ Similarly, as it is sometimes stated, where title is shown the true owner is presumed to be in possession until adverse possession is shown to have begun.¹¹ But as a general rule, one who enters under claim and color of title is presumed to occupy according to his title,¹² and he may thus have constructive possession of more than he actually occupies.¹³ So, the

* *Verdery v. Savannah &c. R. Co.*, 32 Ga. 675, 9 S. E. 1133; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *Herbert v. Hanrick*, 16 Ala. 581; *Washburn v. Cutter*, 17 Minn. 361; *Macklot v. Dudruil*, 9 Mo. 477, 43 Am. Dec. 550; *Harper v. Morse*, 114 Mo. 317, 21 S. W. 517; *Magee v. Magee*, 37 Miss. 138; *Johnson v. Townsend*, 77 Tex. 639, 14 S. W. 233; *Chandler v. Von Roeder*, 24 How. (U. S.) 224; but see, *Woods v. Montevallo &c. Co.*, 84 Ala. 560, 3 So. 475, 5 Am. St. 393; *Bennett v. Morrison*, 120 Pa. St. 390, 14 Atl. 264, 6 Am. St. 711.

¹⁰ *Buckley v. Taggart*, 62 Ind. 236, 238; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Heermans v. Schmaltz*, 10 Biss. (U. S.) 323; *Brown v. Cockerell*, 33 Ala. 38; *Barrs v. Brace*, 38 Fla. 265, 20 So. 991; *Bryan v. East St. Louis*, 12 Ill. App. 390; *Marr v. Gilliam*, 1 Coldw. (Tenn.) 488; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Sharp v. Daugney*, 33 Cal. 505; *Alexander v. Polk*, 39 Miss. 737; *Lund v. Parker*, 3 N. H. 49; *Cheney v. Ringgold*, 2 Har. & J. (Md.) 87;

Whittington v. Doe, 9 Ga. 23; but see, *Alexander v. Gibbon*, 118 N. Car. 796, 24 S. E. 748, 54 Am. St. 757; *Satcher v. Grice*, 53 S. Car. 126, 31 S. E. 3.

¹¹ *Altschul v. O'Neill*, 35 Ore. 202, 58 Pac. 95; *Miller v. Fraley*, 23 Ark. 735; *Summerall v. Thoms*, 3 Fla. 298; *Brooks v. Penn*, 2 Strobb. Eq. (S. Car.) 113; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350; *Brownsville v. Cavazos*, 100 U. S. 138; *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648.

¹² *Tappan v. Tappan*, 31 N. H. 41; *Lund v. Parker*, 3 N. H. 49; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293; see also, *Treece v. American Asso.*, 122 Fed. 598; *Chicago &c. R. Co. v. Wood*, 30 Ind. App. 650, 66 N. E. 923; *Reed v. Hackney*, 69 N. J. 27, 54 Atl. 229.

¹³ *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779; *Winters v. Hainer*, 107 Tenn. 337, 64 S. W. 44; *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. 674; note in 12 Am. Dec. 357-359; and note in 88 Am. St. 703-729. So, on the other hand, the presumption is that one in possession under a deed claims thereunder, and is limited thereby, although he is not necessarily precluded from showing

adverse character of the possession may be inferred from actual possession accompanied by the usual acts of ownership of property of the kind in question, which are inconsistent with ownership in another; and it is frequently said that the presumption is that such possession is adverse.¹⁴ Unexplained, continuous and exclusive possession for the requisite period gives rise to a similar presumption.¹⁵ So, where adverse possession is shown it is held in some jurisdictions that it will be presumed to continue until the contrary is shown,¹⁶ but in other jurisdictions it seems that there is no such presumption.¹⁷ The question of good faith is also important in some cases, and, in the absence of anything to the contrary, good faith is generally presumed.¹⁸ In the absence of anything to the contrary, possession by one tenant-in-common or co-owner is presumed to be the possession of all;¹⁹ but this is not a rule of law absolutely prohibiting adverse possession by one of them against the others.²⁰

adverse possession of a larger tract; *Maxwell Land &c. Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458.

¹⁴ *Alexander v. Wheeler*, 69 Ala. 332; *Black v. Tennessee &c. Co.*, 93 Ala. 109, 9 So. 537; *Hammond v. Crosby*, 68 Ga. 767; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Gillespie v. Jones*, 26 Tex. 343; see also, *Moore v. Hinkle*, 151 Ind. 343, 50 N. E. 822; *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Holtzman v. Douglas*, 168, 18 Sup. Ct. 65.

¹⁵ *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534; *Woollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919; *Bishop v. Bleyer*, 105 Wis. 330, 81 N. W. 413; *Alexander v. Gibbon*, 118 N. Car. 796, 24 S. E. 748, 54 Am. St. 757; *Green v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Swift v. Mulkcy*, 14 Ore. 59, 12 Pac. 76; *Heller v. Peters*, 140 Pa. St. 648, 21 Atl. 416; *Neel v. McElhenny*, 69 Pa. St. 300.

¹⁶ *Elyton Land Co. v. McElrath*, 53 Fed. 763; *Marston v. Rowe*, 43 Ala. 271; *Abbett v. Page*, 92 Ala. 571, 9 So. 332; *Clements v. Lampkin*, 34

Ark. 598; *Wilson v. Spring*, 38 Ark. 181.

¹⁷ *Lynde v. Williams*, 68 Mo. 360; *Atkinson v. Smith*, (Va.) 24 S. E. 901.

¹⁸ *Sexson v. Barker*, 172 Ill. 361, 50 N. E. 109; *Hilgenberg v. Northrup*, 134 Ind. 92, 33 N. E. 786; *Garrett v. Adrain*, 44 Ga. 274; *Hammond v. Crosby*, 68 Ga. 767; *Baxley v. Baxley*, 117 Ga. 60, 43 S. E. 436.

¹⁹ *Stevens v. Martin*, 168 Mo. 407, 68 S. W. 347; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Elder v. McClaskey*, 70 Fed. 529; *Brown v. McKay*, 125 Cal. 491, 57 Pac. 1001; *Roberts v. Morgan*, 30 Vt. 319; *Watson v. Gregg*, 10 Watts (Pa.) 239, 36 Am. Dec. 176; *Woodruff v. Roysden*, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. 905.

²⁰ *Van Dyke v. Van Buren*, 1 Cal. (N. Y.) 13, 84; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312; *Clymers v. Dawkins*, 3 How. (U. S.) 674; *Zellers v. Eckert*, 4 How. (U. S.) 289; *Trenouth v. Gilbert*, 86 Cal. 584, 25 Pac. 126; *Cummings v. Wyman*, 10 Mass. 465.

denced by declarations or acts, which are known or ought to be known to the true owner, is of no effect.³² The intent may be inferred from hostile acts of possession and use, such as those referred to in the preceding section,³³ or it may, in a proper case, be evidenced by declarations made in connection with the possession.³⁴

§ 1620. **Character and extent of possession.**—As a general rule any writing tending to show the nature and extent of the possession is admissible in a proper case.³⁵ Thus, deeds, even though defective or invalid, have often been admitted for that purpose.³⁶ So, the record

ver Creek &c. Co. v. Union &c. Co., 138 Ind. 297, 35 N. E. 125, the possession in the former case being held adverse because of the intention to so claim, and held not adverse in the latter because the intention was to claim only to the true line. Colvin v. Republican Land &c. Co., 23 Neb. 75, 36 N. W. 361, 8 Am. St. 114; Preble v. Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, and note; Watrous v. Morrison, 33 Fla. 261, 14 So. 805; Scheible v. Hart, (Ky.) 12 S. W. 628; Haffendorfer, Gault, 84 Ky. 124; Miller v. Mills Co., 111 Iowa 654, 82 N. W. 10, 38; see also, Smeberg v. Cunningham, 96 Mich. 378, 56 N. W. 73, 35 Am. St. 613; Hudson v. Putney, 14 W. Va. 561; Jackson v. Huntington, 5 Pet. (U. S.) 439; Price v. Hall, 140 Ind. 314, 39 N. E. 941, 49 Am. St. 196; Brown v. Cockerell, 33 Ala. 45; Winn v. Abeles, 35 Kans. 85, 57 Am. R. 138; Allen v. Holton, 20 Pick. (Mass.) 458; and article in 53 Cent. Law Jour. 482.

³² East Tenn. &c. R. Co. v. Davis, 91 Ala. 615, 8 So. 349, party who took possession cannot testify as to his uncommunicated motives or claim in so doing; Rowland v. Williams, 23 Ore. 515, 32 Pac. 402; Blake v. Shriver, (Wash.) 68 Pac. 330; Smeberg v. Cunningham, 96

Mich. 378, 56 N. W. 73, 35 Am. St. 613; Comstock v. Eastwood, 108 Mo. 41, 18 S. W. 39; Gage v. Downey, 94 Cal. 241, 29 Pac. 635; Myers v. McMillan, 4 Dana (Ky.) 485; French v. Pearce, 8 Conn. 440, 21 Am. Dec. 680; Culver v. Rhodes, 87 N. Y. 348.

³³ Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Wilbur v. Cedar Rapids &c. Co., 116 Iowa 15, 89 N. W. 101; Conyers v. Kenan, 4 Ga. 308, 48 Am. Dec. 226; Hill v. Coal Valley &c. Co., 103 Ill. App. 41.

³⁴ Blakely v. Morris, 89 Va. 717, 17 S. E. 126; Patterson v. Reigle, 4 Pa. St. 201, 45 Am. Dec. 684; and post, § 1621.

³⁵ Branch v. Baker, 70 Tex. 190; Halbert v. Martin (Tex. Civ. App.), 30 S. W. 388; Mullans Admr. v. Carper, 37 W. Va. 215, 16 S. E. 527; Hitchcox v. Morrison, (W. Va.) 34 S. E. 993; Wade v. Garrett, 109 Ga. 270, 34 S. E. 572; Wright v. Stice, 173 Ill. 571, 51 N. E. 71; Brind v. Gregory, 122 Cal. 480, 55 Pac. 250; Avera v. Williams, (Miss.) 33 So. 501; Elder v. McClaskey, 70 Fed. 529; Texas Pac. R. Co. v. Smith, 159 U. S. 66, 15 Sup. Ct. 994; note in 88 Am. St. 701-729.

³⁶ Skipworth v. Martin, 50 Ark. 141, 6 S. W. 514; Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. 299, void tax deed; Murphy v.

of a former suit in which the real owner recovered possession, is admissible to show adverse possession.³⁷ Evidence of a conveyance or mortgage of the property by the adverse claimant has likewise been held admissible.³⁸ So, evidence of the payment of the taxes by the adverse claimant is also admissible;³⁹ and it may be said with little if any qualification, that all acts on the part of the occupant tending to show a claim of ownership and characterize his possession as adverse, may be shown in evidence.⁴⁰

§ 1621. **Declarations.**—Declarations of the party in possession are generally admissible to explain the character and extent of his claim

Doyle, 37 Minn. 113, 33 N. W. 220; *Pillow v. Roberts*, 13 How. (U. S.) 472; *Irey v. Markey*, 132 Ind. 546, 32 N. E. 309; *Erdman v. Corse*, 87 Md. 506, 40 Atl. 107. Many other authorities might be cited to the same effect, although there is considerable conflict as to whether a deed void on its face constitutes color of title. See, for extensive review of authorities, notes in 88 Am. St. 701-729; 9 L. R. A. 772, and 10 L. R. A. 387.

* *Faulcon v. Johnston*, 102 N. Car. 364, 9 S. E. 394, 11 Am. St. 737; see also, *Unger v. Roper*, 53 Cal. 39; *Barron v. Barron*, 122 Ala. 194, 25 So. 55; *Hickman v. Link*, 97 Mo. 482, 7 S. W. 12; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 714. So it has been held that the prosecution of actions against trespassers by the claimant in possession, whether successful or not, may be shown; *Hollister v. Young*, 42 Vt. 403; see also, *Morrison v. Chapin*, 97 Mass. 72.

* *House v. Williams*, 16 Tex. Civ. App. 122, 40 S. W. 414; *Noyes v. Dyer*, 25 Me. 468; *Elder v. McClaskey*, 70 Fed. 529. The last case cited also contains other illustrations of acts tending to show an adverse possession. See also, *Stiff v. Cobb*, 126 Ala. 381, 28 So. 402.

* *Holtzman v. Douglas*, 168 U. S. 278, 18 Sup. Ct. 65; *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Wheeler v. Gorman*, 80 Minn. 462, 83 N. W. 442; *Carter v. Clark*, 92 Me. 225, 42 Atl. 398; *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Pasley v. Richardson*, 119 N. Car. 449, 26 S. E. 32; *Elwell v. Hinckley*, 138 Mass. 225; but compare, *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333; *Jay v. Stein*, 49 Ala. 514; *Archibald v. New York &c. R. Co.*, 157 N. Y. 574, 52 N. E. 567; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866.

* *Frick v. Sinon*, 75 Cal. 337, 17 Pac. 439; *Barron v. Barron*, 122 Ala. 194, 25 So. 55; *Bradshaw v. Mayfield*, 18 Tex. 21, receipt of rents; *Metz v. Metz*, 48 S. Car. 472, 26 S. E. 787; *Jacob Tomb Inst. v. Crothers*, 87 Md. 596, 40 Atl. 261, performing work on land by grantor; *Lick v. Diaz*, 44 Cal. 479; see also, *Sailor v. Hertzogg*, 10 Pa. St. 296; *Fellows v. Fellows*, 37 N. H. 75; *Comins v. Comins*, 21 Conn. 413; *Stockton v. Geissler*, 43 Kans. 612, 23 Pac. 619; *Durel v. Tennison*, 31 La. Ann. 538; *Zellin v. Rogers*, 21 Fed. 103; as to declarations, see next section.

and possession, and this rule applies to declarations tending to show that his possession is hostile.⁴¹ But declarations as to the source of his title which are not explanatory of the possession and not part of the *res gestæ* are not admissible.⁴² So, while declarations by a party in possession have been held admissible after his death, as evidence of the character of the possession, they are not competent for the purpose of sustaining or destroying the record title.⁴³ It has also been held that possession cannot be proved by declarations of the grantee that he owned the property, as such declarations are only admissible to characterize the possession and not to prove it without other evidence.⁴⁴ Declarations out of the presence of the grantor made by a grantee who has never had possession are not admissible;⁴⁵ and declarations made to a stranger by one who entered under another and set up title by disseisin, are not admissible to show that he held adversely to the true owner.⁴⁶

§ 1622. **Reputation.**—The existence of a fact cannot, ordinarily, be proved by reputation or notoriety, and it is therefore held that the fact of possession, ownership or title in the claimant cannot be shown

⁴¹ *Stockton Sav. Bank v. Staples*, 69 Tex. 670, 7 S. W. 510; *Morrill v. 98 Cal. 189*, 32 Pac. 936; *Cannon v. Titcomb*, 8 Allen (Mass.) 100; *Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Ward v. Cochran*, 71 Fed. 127; *Blakey v. Morris*, 89 Va. 717, 17 S. E. 126; *Youngs v. Cunningham*, 57 Mich. 153, 23 N. W. 626; *Lamoreux v. Huntley*, 68 Wis. 24, 31 N. W. 331; *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917; *Rand v. Huff*, 59 Kans. 777, 53 Pac. 483; *Lochhausen v. Laughter*, 4 Tex. Civ. App. 291, 23 S. W. 513; *Doe v. Pettett*, 5 B. & Ald. 223, 7 E. C. L. 129; *Shields v. Ivey*, 52 N. J. L. 280, 19 Atl. 261; *Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 53 Conn. 478, 4 Atl. 246; *Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 523.

⁴² *Jones v. Pelham*, 84 Ala. 208, 4 So. 22, 23; *McBride v. Thompson*, 8 Ala. 650; *Dodge v. Trust Co.*, 93 U. S. 379; *Sutton v. Casselleggi*, 5 Mo. App. 111; *Morring v. McBride*, 62 Tex. 309; see also, *Gilbert v. Odum*,

69 Tex. 670, 7 S. W. 510; *Morrill v. Titcomb*, 8 Allen (Mass.) 100; *Swerdferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153; *Martin v. Martin*, 174 Ill. 371, 66 Am. St. 290, 51 N. E. 691; *Crawford v. Crawford*, 60 Kans. 126, 55 Pac. 842.

⁴³ *Decker v. Decker* (Neb.), 89 N. W. 795, 798; see also, *Osgood v. Coates*, 1 Allen (Mass.) 77; *Watson v. Bissell*, 27 Mo. 220; *Hays v. Hays*, 66 Tex. 606.

⁴⁴ *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912; see also, *Thomas v. De-graffenreid*, 17 Ala. 602; *Comins v. Comins*, 21 Conn. 413; *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 253.

⁴⁵ *Parrott v. Baker*, 82 Ga. 364; see also, *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917; *Ware v. Brookhouse*, 7 Gray (Mass.) 454.

⁴⁶ *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Oakes v. Marcy*, 10 Pick. (Mass.) 195; *Jones v. Pelham*, 84 Ala. 208, 4 So. 22.

by evidence that the land was reputed to be his.⁴⁷ But, that fact being otherwise proved, such evidence is admissible, in a proper case, to show notoriety and thus charge the real owner with notice.⁴⁸ It has also been held competent for the claimant to prove that particular landmarks, such as trees, streams or lines, according to general report, constituted parts of his boundary.⁴⁹ There is, however, some apparent conflict among the authorities upon the general subject and especially upon the last two propositions.⁵⁰

§ 1623. **Evidence to rebut or defeat.**—Evidence that the possession was not exclusive or of such a nature as to sustain the claim of adverse possession is admissible to rebut or defeat such claim.⁵¹ So, evidence showing an interruption of the right or a break in the necessary continuity of possession,⁵² or an abandonment of possession before the necessary time has run,⁵³ or a recognition of the owner's

⁴⁷ *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443; *Woods v. Montevallo Coal Co.*, 84 Ala. 560, 3 So. 475, 5 Am. St. 393; *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912; *Howland v. Crocker*, 7 Allen (Mass.) 153; see also, *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130.

⁴⁸ *Tennessee Coal &c. Co. v. Linn*, 123 Ala. 112, 26 So. 245; *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93; *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306; *Klinkner v. Schmidt*, 114 Iowa 695, 87 N. W. 661; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458.

⁴⁹ *Shaffer v. Gaynor*, 117 N. Car. 15, 23 S. E. 154.

⁵⁰ In the following cases evidence of reputation was held inadmissible: *Atwood v. Canrike*, 86 Mich. 99, 48 N. W. 950; *Beecher v. Galvin*, 71 Mich. 391, 39 N. W. 469; *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912; *Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *Preston v. Hilburn* (Tex. Civ. App.), 44 S. W. 698.

⁵¹ *Jennings v. Gorman*, 19 Mont.

545, 48 Pac. 1111; *Collins v. Lynch*, 167 Pa. St. 635, 31 Atl. 921; *Roggen-camp v. Converse*, 15 Neb. 105, 17 N. W. 361; *Mobile &c. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138, to show that possession was permissible. Thus it is admissible to show that other persons used the property. *Bracken v. Union Pac. R. Co.*, 56 Fed. 447.

⁵² *Johnston v. Fitz George*, 50 N. J. L. 470, 14 Atl. 762; *Doe v. Eslava*, 11 Ala. 1028; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219; *Smith v. Steele*, 17 Pa. St. 30; *Turner v. Baker*, 64 Mo. 218, 27 Am. R. 226.

⁵³ *Louisville &c. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 837; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177; *Hickman v. Link* (Mo.), 7 S. W. 12; *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620, 46 Am. St. 896, and note; *Trustees &c. v. Short*, 58 L. J. P. C. 4, 13 App. Cas. 793. It is not meant, however, that mere interruption or temporary abandonment of actual possession will in all cases defeat the claim of adverse possession. We are here dealing only with

title,⁵⁴ is likewise admissible. Evidence of attempts to purchase or lease the land from the other party during the statutory period, is generally admissible,⁵⁵ but there is some conflict on this subject, and the purchase or attempt to purchase an outstanding title, claim or interest is not always held sufficient to defeat the claim of adverse possession.⁵⁶ Declarations made by the claimant tending to show that his possession was not hostile are also admissible,⁵⁷ and the same has been held as to declarations of a former occupant under whom the adverse possessor claims, showing that he entered without claim of title.⁵⁸

the question of the admissibility of evidence and not with the question as to its effect without other evidence.

⁵⁴ *Zweibel v. Myers* (Neb.), 95 N. W. 597; *Bradford v. Guthrie*, 4 Brewst. (Pa.) 351; *Jones v. Williams*, 108 Ala. 282, 19 So. 317; *Sample v. Reeder*, 107 Ala. 227, 18 So. 214; *Calkins v. Isbell*, 20 N. Y. 147; *Free v. Fine* (Tenn. Ch.), 59 S. W. 384; *Millay v. Millay*, 18 Me. 387; *Daveis v. Collins*, 43 Fed. 31; *Williams v. Scott*, 122 N. Car. 545, 29 S. E. 877.

⁵⁵ *Zweibel v. Myers*, (Neb.) 95 N. W. 597, 599; *Baldwin v. Temple*, 101 Cal. 369, 35 Pac. 1008; *Horton v. Davidson*, 135 Pa. St. 186, 19 Atl. 934; *Chicago &c. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088; *Russell v. Erwin*, 38 Ala. 44; *Croan v. Joyce*, 3 Bush (Ky.) 454; *Gay v. Moffit*, 2 Bibb (Ky.) 506, 5 Am. Dec. 633; *Litchfield v. Sewell*, 97 Iowa 247, 66 N. W. 104.

⁵⁶ *Webb v. Thiele*, 56 Neb. 752, 77 N. W. 56; *McAllister v. Hartzell*, 60

Ohio St. 69, 53 N. E. 715; *Tobey v. Secor*, 60 Wis. 310, 19 N. W. 99; *Bannon v. Brandon*, 34 Pa. St. 263, 75 Am. Dec. 655; *Headrick v. Fritta*, 93 Tenn. 270, 24 S. W. 11; see also, *Walbrum v. Ballen*, 68 Mo. 164; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Chapin v. Hunt*, 40 Mich. 595; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060.

⁵⁷ *Kirkland v. Trott*, 66 Ala. 417; *Beasley v. Howell*, 117 Ala. 499, 22 So. 989; *Dillon v. Center*, 68 Cal. 561, 10 Pac. 176; *Critchlow v. Beaty*, (Ky.) 23 S. W. 960; *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Wade v. Johnson*, 94 Ga. 348, 21 S. E. 569; see also, *Williams v. Rand*, 9 Tex. Civ. App. 631, 30 S. W. 509; *Hale v. Silloway*, 1 Allen (Mass.) 21; *Leger v. Doyle*, 11 Rich. L. (S. Car.) 109, 70 Am. Dec. 240; *Daveis v. Collins*, 43 Fed. 31.

⁵⁸ *Keener v. Kauffman*, 16 Md. 296; see also, *Coffrin v. Cole*, 67 Vt. 226, 31 Atl. 313, that he was so informed by his grantor.

CHAPTER LXXX.

AGENCY.

Sec.	Sec.
1624. Generally—Scope of chapter.	1634. Course of dealing—Acts of agent in other transactions.
1625. Burden of proof—Scope of evidence.	1635. Circumstantial evidence.
1626. Question of law or fact.	1636. Declarations and admissions of agent.
1627. Evidence of agency.	1637. Admissions of principal.
1628. Authority—How proved.	1638. Agency not provable by general reputation.
1629. When corporation is principal.	1639. Ratification.
1630. Authority in writing.	1640. Parol evidence.
1631. Agency inferred from relation of parties.	1641. Revocation and termination of agency.
1632. Extent of agency.	
1633. Habit and course of dealing.	

§ 1624. **Generally—Scope of chapter.**—It is not proposed in this chapter to consider the substantive law of agency any farther than seems absolutely necessary to a full understanding of the rules and principles of evidence treated herein. The rights, duties and liabilities of the principal and of the agent, as between themselves and as between either or both of them and a third person, are matters that belong to the substantive law rather than to the law of evidence. But the manner of showing the relation and its extent, the kind of evidence necessary and proper to show it, or to show ratification, and the like, are matters governed, in the main at least, by rules of evidence. So, questions as to the burden of proof and the relative provinces of the court and jury, if not strictly within the domain of the law of evidence, are on the border line and will be treated in this chapter.

§ 1625. **Burden of proof—Scope of evidence.**—The burden of proof is, ordinarily, upon the party who seeks to establish the relation of agency;¹ and it is sometimes said that the proof or evidence

¹ *Russ v. Telfener*, 57 Fed. 973; 36 Pac. 820; *McCarty v. Straus*, 21 *Anderson v. Rasmussen*, 5 Wyo. 44, La. Ann. 592; *Wooding v. Bradley*,

must be clear.² This is said to be particularly true where the agent relies upon parol or implied authority to charge real estate.³ In a recent case it is held that the employment or agency must be shown before statements of the alleged agent or employé are admissible against the master, and that in an action against a railroad company for the alleged wrongful act of an employé, it must be shown that the person who committed the injury was an employé. The difficulty of making such proof will not obviate the necessity of doing so, although it may, perhaps, permit of slighter evidence than might otherwise be required.⁴ In another recent case it was held that, in an action for damages caused by the defendant's vehicle colliding with that of the plaintiff, proof that the defendant's vehicle has his name on it satisfies an allegation that it was driven by his agent, and casts the burden upon the defendant to show that the driver was not his agent.⁵ It has also been held that, under an allegation of a contract by the principal, evidence of a contract through his authorized agent is admissible.⁶

§ 1626. **Question of law or fact.**—As a general rule, the question as to whether an agency exists, and the authority of the agent, when the facts are in dispute, is a mixed question of law and fact, or a question of fact for the jury, under proper instructions from the

76 Va. 614; *Duncan v. Hartman*, 143 Pa. St. 595, 24 Am. St. 570; *Quinlan v. Providence &c. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645; *Kelly v. Strong*, 68 Wis. 152, 31 N. W. 121; *Mechem Agency*, § 276; but see, *Sears v. Daly*, 43 Ore. 346, 73 Pac. 5; *Montgomery v. Pacific &c. Bureau*, 94 Cal. 284, 29 Pac. 640, 28 Am. St. 122; agent acting as such, where he claims he was not agent has burden of rebutting the presumption, *Romans v. State*, 51 Ohio St. 528, 37 N. E. 1040.

² *Stadleman v. Fitzgerald*, 14 Neb. 290, 15 N. W. 234; *Barrett v. Franklin*, 14 R. I. 241; *Hood v. Adams*, 128 Mass. 207; *Taylor v. Merrill*, 55 Ill. 52; *Hodge v. Combs*, 1 Black (U. S.) 192. But it would seem that in a general sense whatever evi-

dence has a tendency to prove the agency, if otherwise proper, is admissible, and though it may not be entirely clear and satisfactory the question ought usually to be left to the jury. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661.

³ *Union Mut. Life Ins. Co. v. Masten*, 3 Fed. 881; *Challoner v. Bouck*, 56 Wis. 652.

⁴ *Axtell v. Northern Pac. R. Co.*, (Idaho) 74 Pac. 1075.

⁵ *Vonderhorst Brewing Co. v. Amrhine*, (Md.) 56 Atl. 833; see also, *Ryan v. Baltimore &c. R. Co.*, 60 Ill. App. 612.

⁶ *Hare v. Winterer*, (Neb.) 96 N. W. 179.

court.⁷ But it is for the court to decide whether there is any legal evidence to establish agency,⁸ and where the facts are undisputed, or the question depends entirely on the construction of an unambiguous written contract, the question is usually one of law for the court.⁹ And in one case it is said: "If the facts constituting the agency are in dispute, so as to leave the question as to whose agent he is in doubt, then an admission may serve to assist in solving the doubt and bind the party making it. But when the facts are established, the law determines whether or not there is an agency, and no admission can change it."¹⁰

§ 1627. **Evidence of agency.**—The appointment of an agent may be either express or implied, and the evidence of agency is either direct or indirect. Agency is directly proved by express words of appointment, whether oral or contained in some writing. It may be indirectly established by, or may be implied from, evidence of the relative situation of the parties, or of their habit and course of dealing and intercourse; or it may be deduced from the nature of the employment or from subsequent ratification.¹¹

§ 1628. **Authority—How proved.**—As a general rule, it may be laid down that the authority of an agent may be proved by parol evidence, either by words spoken, or by writing not under seal, or by

⁷ *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *Hankinson v. Lambard*, 25 Ill. 572, 79 Am. Dec. 348; *Lovell v. Williams*, 125 Mass. 439; *Thomas v. Wells*, 140 Mass. 517; *Roberts v. Pepple*, 55 Mich. 367; *Commercial Un. Ins. Co. v. Elliott*, (Pa. St.) 13 Atl. 970; *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. 768; *Durrell v. Evans*, 1 H. & C. 174, 31 L. J. Exch. 337; *New England Mfg. Co. v. Gray*, 33 Fed. 636, ratification is for the jury where there is evidence tending to prove it; *Drakely v. Gregg*, 8 Wall. (U. S.) 242.

⁸ *McClung v. Spotswood*, 19 Ala. 165; *Lamb v. Irwin*, 69 Pa. St. 436; *Coe v. Johnson*, 6 Houst. (Del.) 9; *Bank v. Baltimore Nat. Bank*, 36

Md. 5; *Louisville &c. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. 654, 655.

⁹ *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; see also, *Supreme Tribe v. Hall*, 24 Ind. App. 316, 328, 56 N. E. 780; *Saving Fund Soc. v. Saving Bank*, 36 Pa. St. 498, 78 Am. Dec. 390.

¹⁰ *Howe v. Provident Fund Soc.*, 7 Ind. App. 586, 591, 34 N. E. 830.

¹¹ *Starkie Ev.*, §§ 55-58; *Story Agency*, § 45; 2 Kent Comm. 612, 613; *Paley Agency*, § 2; *Fouck v. Wilson*, 59 Ind. 93; *Kaufman v. Farley Mfg. Co.*, 78 Iowa 679, 46 N. W. 312, 16 Am. St. 462; *Duncan v. Hartman*, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. 570; *Hansen v. Flint &c. R. Co.*, 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791.

acts and implication.¹² But to this rule there are some exceptions. Thus, when an act is required to be done under seal, the authority of the agent to do it must also generally be proved by an instrument under seal.¹³ A writing without seal will not be sufficient at common law to give validity to a deed, though a court of equity might, in a proper case, compel the principal to confirm and ratify the deed.¹⁴ The principle of this exception, however, is not entirely followed out even in the common law; for an authority to execute a written instrument not required to be under seal, as to fill in blanks or sign or indorse promissory notes, may often be proved by mere oral communications, or by implication;¹⁵ and even where the statute of frauds requires an agreement to be in writing, the authority of an agent to sign it may be verbally conferred.¹⁶

¹² Story Agency, § 47; 3 Chitty Comm. & Man., p. 5; Coles v. Trecothick, 9 Ves. 250; Drumright v. Philpot, 16 Ga. 424.

¹³ Elliott v. Stock, 67 Ala. 336; Watson v. Sherman, 84 Ill. 263; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255; Berkeley v. Hardy, 5 B. & C. 355; 11 E. C. L. 251; Mechem Agency, § 93. But, as remarked by Mr. Mechem, this rule, though well settled, is highly technical, and the modern tendency is to do away with many of the distinctions founded upon the use of a seal.

¹⁴ Story Agency, § 49; Harrison v. Jackson, 7 Term R. 207; Paley Agency (by Lloyd), 157, 158. If the deed is executed in the presence of the principal, no other authority is necessary: Story Agency, § 51. Though a power of attorney not under seal may not be a sufficient authority to execute an instrument under seal, yet it is not for that reason absolutely void. If it authorizes a sale of land, the sale may be valid, and if the purchaser under such a sale pays his money for the land, he thereby acquires an equita-

ble title to the land, and a court of equity will enforce this title, either by compelling the vendor to make out sufficient deeds and conveyances of the land, or by enjoining process of law brought to eject the vendee when he is in possession: Watson v. Sherman, 84 Ill. 263; see also, Groff v. Ramsay, 19 Minn. 44; Morrow v. Higgins, 29 Ala. 448; Baker v. Freeman, 35 Me. 485. Where a statute makes it indispensable to a good conveyance of land that the deed shall be witnessed by two subscribing witnesses, a power of attorney to convey lands under such statute has been held not good, unless witnessed by two subscribing witnesses: Gage v. Gage, 30 N. H. 420.

¹⁵ Story Agency, § 50; Angle v. Northwestern Mut. Life Ins. Co., 92 U. S. 331; Rice v. Gove, 22 Pick. (Mass.) 158, 33 Am. Dec. 124; Handyside v. Cameron, 21 Ill. 588, 74 Am. Dec. 119.

¹⁶ Maclean v. Dunn, 4 Bing. 722; Coles v. Trecothick, 9 Ves. 250; Emerson v. Heelis, 2 Taunt. 38; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Story Agency,

§ 1629. When corporation is principal.—It was formerly held that the authority of the agent of a corporation aggregate could be proved only by deed, under the seal of the corporation. But this rule is now very much relaxed both in England and America; and in all matters of daily necessity, within the ordinary powers of its officers, or touching its ordinary operations, the authority of agents may be proved as in the case of private persons.¹⁷ So, where a deed is signed by one as the agent of a corporation, if the seal of the corporation is affixed thereto, it will be presumed, in the absence of contradictory evidence, that the agent was duly authorized to make the conveyance.¹⁸

§ 1630. Authority in writing.—If the authority of the agent is in writing, the writing must be produced; and if, from the nature of the transaction, the authority must have been in writing, parol testimony will not be admissible to prove it, unless as secondary evidence,

§ 50. If an instrument, executed by an agent, be one which, without seal, would bind the principal, it will bind him, if it be under seal: *Wood v. Auburn &c. R. Co.*, 8 N. Y. 160; see, *Wheeler v. Nevins*, 34 Me. 54. Although authority to make a written contract to sell and convey land need not itself be in writing, but may be made orally, yet it is held that a mere authority to sell will not authorize the agent to sign a written contract for conveyance; *Milne v. Kleb*, 44 N. J. Eq. 378; *Lindley v. Keim*, 54 N. J. Eq. 418, 34 Atl. 1073.

¹⁷ *Story Agency*, § 53; *East London &c. Co. v. Bailey*, 4 Bing. 283; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299-305; *Smith v. Birmingham Gas &c. Co.*, 1 Ad. & El. 526; *Bank of the U. S. v. Dandridge*, 12 Wheat. (U. S.) 67-75; *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Dunn v. St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Perkins v. Washington Ins. Co.*, 4 Cowp. (N. Y.) 645; *Troy Turnpike v. McChesney*, 21 Wend. (N. Y.) 296; *Reg. v. Bigg*, 3 P. Wms. 427; *Mel-*

ledge v. Boston Iron Co., 5 Cush. (Mass.) 179; *Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *Indiana &c. R. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5; *Painter v. Industrial Life Asso.*, 131 Ind. 68, 30 N. E. 876. In a recent case in Maine, it was held that it is not necessary that the agent of a corporation should be authorized by instrument under seal, or even by formal vote, when the act or acts which he is to perform do not involve the affixing of a seal to any written instrument: *Fitch v. Steam Mill Co.*, 80 Me. 34. The modern rule is that a seal is no more essential to authorize one to act as agent for a corporation than for an individual: *Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176; *Cook Corporations*, § 721; *Clark Corporations*, §§ 19, 156; *Bank of Columbia v. Patterson*, Admr., 7 Cranch (U. S.) 299.

¹⁸ *Flint v. Clinton Co.*, 12 N. H. 430; *Jinwright v. Nelson*, 105 Ala. 399; *Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836; *Gorder v. Plattsmouth Co.*, 36 Neb. 548.

subject is so fully considered in the place to which reference is made in the last note that further discussion is unnecessary. It may be well, however, in this connection, to refer to a recent case in which declarations of an agent were held inadmissible.⁵⁸ In that case it was said, that the declarations, in order to bind the principal, must be made within the scope of his authority at the time of the transaction, and be a part of the *res gestae*; and that if made after the transaction is completed, they are in the nature of hearsay and are mere narratives of a past transaction. It was also held that written declarations of the agent of an acrimonious character, and not relating to the matter in controversy, were inadmissible. But an agent cannot object to his own declarations being shown against himself even though they were made by him as agent, and not in his own behalf.⁵⁹

§ 1637. **Admissions of principal.**—The principal may, of course, in a proper case testify to the existence or non-existence of the agency as a fact, just as the agent may. So, the acts and admissions of the principal properly tending to show the existence of the agency and the authority of the agent are admissible against himself.⁶⁰ But it has been held that admissions of the principal generally as to the agency of a person are not proof of the agency at a particular time,⁶¹

There must, however, first be some evidence of agency. See, *Coon v. Gurley*, 49 Ind. 199; *Mattis v. Hosmer*, 37 Ore. 523, 62 Pac. 17; *Cliquot's Champagne*, 3 Wall. (U. S.) 114; *Southern Ex. Co. v. Todd*, 56 Fed. 104; *Schoenhofen Brewing Co. v. Wengler*, 57 Ill. App. 184; *Porter v. Robertson*, 34 Ill. App. 74; *Long v. North British Ins. Co.*, 137 Pa. St. 335, 20 Atl. 1041, 21 Am. St. 879; *McCormick v. Roberts*, 36 Kans. 552, 13 Pac. 827. Unless the court, in its discretion, admits the evidence out of its usual order on promise to connect or the like: *Woodbury v. Lerner*, 5 Minn. 339. Subsequent proof of agency may cure the error. *Rowell v. Klein*, 44 Ind. 290, 15 Am. R. 235; *McCormick v. Roberts*, 36 Kans. 552, 13 Pac. 827.

81; see also, the following recent cases for declaration or admissions of agents held inadmissible: *St. Louis & C. R. Co. v. Carlisle* (Tex. Civ. App.), 78 S. W. 553; *Axtell v. Northern Pac. R. Co. (Idaho)*, 74 Pac. 1075.

⁵⁸ *Leyner v. Leyner* (Iowa), 98 N. W. 628, 629.

⁵⁹ *Phleger v. Ivins*, 5 Har. (Del.) 118; *Haughton v. Maurer*, 55 Mich. 323; *Wild v. New York & C. Co.*, 59 N. Y. 644; *Wallace v. Nodine*, 57 Hun (N. Y.) 239, 32 N. Y. St. 657, 10 N. Y. S. 919; *Haughton v. Maurer*, 55 Mich. 323; *Arthur v. Gard*, 3 Colo. App. 133; *Steel v. Solid Silver & C. Co.*, 13 Nev. 486; *Mix v. Osby*, 62 Ill. 193; *Norton v. Richmond*, 93 Ill. 367.

⁶⁰ *Irwin v. Buckaloe*, 12 S. & R. (Pa.) 35.

⁶¹ *Hogan v. Kelly*, (Mont.) 75 Pac.

whereas the admissions of an agent, as already shown, are not, ordinarily, at least, receivable against the principal until the existence of the agency has otherwise been shown.

§ 1638. Agency not provable by general reputation.—The fact of agency and the authority of an alleged private agent to represent his principal cannot be established by evidence of general reputation.⁶² Where the agency may be shown by parol, one having knowledge of the fact of agency may testify to the fact, in so far at least as it is a fact, but mere general reputation is not actual knowledge of the fact.⁶³ It has been said, however, by some authorities that general reputation may be shown in connection with the facts.⁶⁴

§ 1639. Ratification.—The general rule upon the subject of ratification of the acts of an agent, or alleged agent, is laid down as follows: "One may ratify the previous unauthorized doing by another in his behalf, of any act which he might then and still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done."⁶⁵ Where the agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must usually be evidence of previous knowledge on the part of the principal of all the material facts.⁶⁶ When the principal is once fully

⁶² *Saussey v. South Florida R. Co.*, 22 Fla. 327; *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568; *Blevins v. Pope*, 7 Ala. 371; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523; *Clark v. Farmers' Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256.

⁶³ *Central &c. Co. v. Smith*, 76 Ala. 572, 52 Am. R. 353.

⁶⁴ *Abbott Tr. Ev.* 41; *Litchfield Iron Co. v. Bennett*, 7 Cowp. (N. Y.) 234.

⁶⁵ *Mechem Agency*, § 112; *O'Conner v. Arnold*, 53 Ind. 205; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96. See also, generally, on the subject of this section, "Ratification in the Law of Agency," 57 Cent. Law Jour. 463; notes in 5 Am. St. 109-114; and 5 Am. St. 618-621; and in 79 Am. Dec. 387-389.

⁶⁶ *Owings v. Hull*, 9 Pet. (U. S.) 607; *Bell v. Cunningham*, 3 Pet. (U. S.) 81; *Courteen v. Touse*, 1 Campb. 43, n.; see also, *Wilson v. Tummon*, 6 Scott N. R. 894; *Nixon v. Palmer*, 4 Seld. (N. Y.) 398; *Cram v. Sickel*, 51 Neb. 828; *Golinsky v. Allison*, 114 Cal. 458; *Halsey v. Monteiro*, 92 Va. 581; *Moyle v. Congregational Soc.*, 16 Utah, 69; *Sherrill v. Weisiger &c. Co.*, 114 N. Car. 436; *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098; *Haynes v. Railroad Co.*, 7 Wash. 211, 34 Pac. 922; *Egglestone v. Mason*, 84 Iowa, 630, 51 N. W. 1; but not necessarily of the law: *Kelly v. Railroad Co.*, 141 Mass. 496; the burden of proof is on the party alleging knowledge and ratification: *Moore v. Ensley*, 112 Ala. 228, 20 So. 744; *Cravens v.*

informed of what has been done in his behalf, at least where the relationship of principal and agent existed before the act, he is bound, if dissatisfied, to express his dissatisfaction within a reasonable time, and if he does not, his assent will be presumed.⁶⁷ But where the act of the agent was by deed, the ratification also must, according to the common law, be by deed.⁶⁸ Or, to state the rule in general terms, whenever the adoption of any particular form or mode is necessary to confer the authority in the first instance, the same mode must be pursued in the ratification.⁶⁹ The acts and conduct of the principal, evincing an assent to the act of the agent, are generally interpreted liberally in favor of the latter, and slight circumstances may suffice to raise the presumption of a ratification, which becomes stronger in proportion as the conduct of the principal is inconsistent with any other supposition.⁷⁰ Thus, where goods are sold without authority, if the owner receives the price, or pursues his remedy for it by action at law against the purchaser, or if any other act be done in behalf of one, who afterwards claims the benefit of it, this will usually constitute a ratification.⁷¹ Payment of a loss, upon a policy subscribed

Gillilan, 63 Mo. 28; Schellhamer v. Rometsch, 26 Ore. 394, 38 Pac. 344; Nebraska Wesleyan U. v. Parker, 52 Neb. 453, 72 N. W. 470.

⁶⁷ Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Bredig v. Dubarry, 14 S. & R. (Pa.) 27; Amory v. Hamilton, 17 Mass. 103; Ward v. Evans, 2 Salk. 442; Farmers' &c. Bank v. Farmers' Bank, 49 Neb. 379; Litchfield v. Brown, 36 U. S. App. 130; Jones v. Atkinson, 68 Ala. 167; Alexander v. Jones, 64 Iowa, 207. If he assents while ignorant of the facts, he may generally disaffirm when informed of them: Copeland v. Merchants' Ins. Co., 6 Pick. (Mass.) 198; Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84.

⁶⁸ Blood v. Goodrich, 9 Wend. (N. Y.) 68, 12 Wend. (N. Y.) 525; Story Agency, § 252; Attorney-General v. Murphy, 1896, 1 Ir. 65; but see, Bless v. Jenkins, 129 Mo. 647;

McIntyre v. Park, 11 Gray (Mass.) 102; Holbrook v. Chamberlin, 116 Mass. 155. The modern tendency is to do away with the requirement of a seal.

⁶⁹ Despatch Line, &c. v. Bellamy Man. Co., 12 N. H. 205; Spofford v. Hobbs, 29 Me. 148; Boyd v. Dodson, 5 Humph. (Tenn.) 37; Kozel v. Dearlove, 144 Ill. 23, 2 N. E. 542; Hammond v. Hammin, 21 Mich. 374; otherwise it may be parol; Goss v. Stevens, 32 Minn. 472; Taylor v. Connor, 41 Miss. 722.

⁷⁰ Story Agency, § 253; Ward v. Evans, 2 Salk. 442.

⁷¹ Peters v. Ballistier, 3 Pick. (Mass.) 495; Henry v. Heeb, 114 Ind. 275, 16 N. E. 606; Sims v. Smith, 99 Ind. 469; but if the action is discontinued or withdrawn, on discovering that the remedy is misconceived, it may not be ratification, and acceptance of benefits of an act within the authority of the agent will not ordinarily be

by an agent, is evidence that he had authority to sign it.⁷² Proof that one was in the habit of signing similar policies in the name and as the agent of another, and with his knowledge, is also evidence of his authority to sign the particular policy in question;⁷³ and if the principal has been in the habit of paying the losses upon policies so signed in his name, this has been held sufficient proof of the agency, though the authority was not conferred by an instrument in writing.⁷⁴ And an authority to sign a policy has been held sufficient evidence of authority to adjust the loss.⁷⁵ Where the principal, in an action against him on a policy signed by the agent, used the affidavit of the agent to support a motion to put off the trial, in which the agent stated that he subscribed the policy for and on account of the defendant, this was held a ratification of the signature.⁷⁶ So, where a city had paid for work on its streets, done under the direction of the city marshal, this was held sufficient to show that the work was authorized by the city, and it was held liable for injury to a traveler because of the negligent manner in which the work was done.⁷⁷ Long acquiescence of the principal, after knowledge of the act done for him by another, will also, in many cases, be sufficient evidence of a ratification. If no agency actually existed, the silence or mere acquiescence of the principal may well be taken as proof of a ratification, although it is not every case in which silence alone will be sufficient. If the silence of the principal is either contrary to his duty, or has a tendency to mislead the other side, it is generally conclusive. Such, it is said, is the case among merchants, when notice of the act done is given by a letter which is not answered in a reasonable time. Whether

construed as a ratification of acts outside the scope of the agent: *Robinson, &c. Co. v. Nipp*, 20 Ind. App. 156, 50 N. E. 408; see also, *Lent v. Padelord*, 10 Mass. 230p; but see *Episcopal Ch. Soc. v. Episcopal Ch. in Dedham*, 1 Pick. (Mass.) 372; *Kupfer v. Augusta*, 12 Mass. 185; *Odiorne v. Maxcy*, 13 Mass. 178; *Herring v. Polley*, 8 Mass. 113; *Pratt v. Putnam*, 13 Mass. 361; *Fisher v. Willard*, 13 Mass. 379; *Copeland v. Merchant's Ins. Co.*, 6 Pick. (Mass.) 198.

⁷² *Courteen v. Touse*, 1 Campb. 43, n. 2 Stark. Cas. 368.

⁷³ *Neal v. Erving*, 1 Esp. 61; see also, *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32, 50 Atl. 286, 55 L. R. A. 408.

⁷⁴ *Haughton v. Ewbank*, 4 Campb. 88; see also, as to bills of exchange: *Hoe v. Oxley*, 1 Wash. 19, 23; but compare, *Farmer's Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342.

⁷⁵ *Richardson v. Anderson*, 1 Campb. 43, n.; see also, 2 Kent. Comm. 614, 615.

⁷⁶ *Johnson v. Ward*, 6 Esp. 47.

⁷⁷ *Goshen v. Alford*, 154 Ind. 58, 55 N. E. 27.

a mere voluntary intermeddler, without authority, is entitled to the benefit of the principal's silence, is not clearly agreed, but the better opinion, it is said, is, that "where the act was done in good faith for the apparent benefit of the principal, who has full notice of the act, and has done nothing to repudiate it, the agent is entitled to the benefit of his silence as a presumptive ratification."⁷⁸

§ 1640. **Parol evidence.**—The subject of the admissibility of parol evidence to show the agency and extent thereof, has already been considered in this chapter, and other phrases of the general subject have been considered in another volume.⁷⁹ It may be well, however, to refer to a few recent authorities. In a late text book it is said that while extrinsic evidence is generally inadmissible to vary or contradict the contents of a written instrument, yet "such evidence is always admissible to charge with liability an undisclosed principal, or one who, though disclosed, is not named in the instrument."⁸⁰ And in a recent case it is held that an action on a contract, apparently signed by one person as principal and another as witness, parol evidence is admissible to show that the former had no real interest but merely signed for the accommodation of the latter, who did not want to appear as a party, and that the latter was the real party in interest.⁸¹ So, in another recent case, it is held that although a note executed by the directors of a corporation imports a personal liability, it may be shown by parol, on an issue of reformation, that the intention of all parties was to execute an instrument binding the corporation alone.⁸²

⁷⁸ 2 Greenleaf Ev., § 67, citing, *Story Agency*, §§ 255-258; *Amory v. Hamilton*, 17 Mass. 103; *Kingman v. Pierce*, 17 Mass. 247; *Frothingham v. Haley*, 3 Mass. 70; *Erick v. Johnson*, 6 Mass. 193; see also, *Union & Co. v. Rocky Mt. Bank*, 2 Colo. 248, 259. There is a stronger presumption of knowledge where an agent has merely exceeded his authority than there is where the act was performed by one who was not an agent before the act: *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891. An affirmative ratification is held necessary in such a case in: *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 384.

⁷⁹ See Vol. 1, § 616.

⁸⁰ *Rheinard Agency*, § 223; see also, *Ford v. Williams*, 21 How. (U. S.) 289; *Exchange Bank v. Hubbard*, 62 Fed. 112, 10 C. C. A. 295; *Byington v. Simpson*, 134 Mass. 169, 45 Am. R. 314; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. R. 617; *Higgins v. Senior*, 8 M. & W. 834.

⁸¹ *Curran v. Holland*, 141 Cal. 437, 75 Pac. 46. This certainly could not be the rule, however, in all cases, at least when persons in good faith were misled to their prejudice without fault on their part.

⁸² *Western & C. Scraper Co. v. McMillen* (Neb.), 99 N. W. 512; see also, Vol. 1, § 616; *Keidan v.*

§ 1641. **Revocation and termination of agency.**—The proof of agency to charge the principal may be rebutted by showing that his authority was revoked and due notice thereof given or had, prior to the act in question.⁸² But if he was constituted by writing, and the written authority was left in his hand subsequent to the revocation, and he afterwards exhibits it to a third person, who deals with him on the faith of it without notice of the revocation, or the knowledge of any circumstances sufficient to have put him on his guard, the act of the agent, within the scope of the written authority, will bind the principal.⁸⁴ And, generally, where notice is not given to third persons and the circumstances are such that they have a right to rely on the continuance of the agency until notified, the acts of the agent within the scope of his apparently continuing authority will usually bind the principal.⁸⁵ Where the agency is not coupled with an interest, and there is nothing else to prevent a revocation, it may be express or implied, and may be by parol even where the authority was in writing.⁸⁶

Winegar, 95 Mich. 430, 54 N. W. 501, 20 L. R. A. 705, and note; *Western &c. Scraper Co. v. Stickleman*, 122 Iowa 396, 98 N. W. 139; 4 *Thompson Corp.*, § 5141.

⁸² *Gunter v. Stuart*, 87 Ala. 196; *Clark v. Mullenix*, 11 Ind. 532; *Johnson v. Youngs*, 82 Wis. 107, 51 N. W. 1095. Notice may be given by the agent, and may also be implied: *Vail v. Judson*, 4 E. D. Smith (N. Y.) 165; *Williams v. Birbeck*, Hoff. Ch. (N. Y.) 359.

⁸³ *Beard v. Kirk*, 11 N. H. 397; but see, where notice was given: *Clark v. Mullenix*, 11 Ind. 582.

⁸⁴ *Insurance Co. v. McCain*, 96 U. S. 84; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87; *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23; *Quinn v. Dresbach*, 75 Cal. 159, 7 Am. St. 138; *Foellinger v. Leh*, 110 Ind. 238, 11 N. E. 289; *Fellows v. Hartford &c. Co.*, 38 Conn. 197; *Anonymous v. Harrison*, 12 Mod. 346. So, if, under such circum-

stances, one properly makes a payment to the agent, the principal can not hold the person making it liable therefor: *Ulrich v. McCormick*, 66 Ind. 243; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Meyer v. Hehmer*, 96 Ill. 400.

⁸⁵ *Brookshire v. Brookshire*, 8 Ired. L. (N. Car.) 74, 47 Am. Dec. 341; *Rochester v. Whitehouse*, 15 N. H. 468; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198. As to revocation or termination by death, disposition of the property or subject matter, and the like, see *McClaskey v. Barr*, 50 Fed. 712; *Lincoln v. Emerson*, 108 Mass. 87; *Johnson v. Wilcox*, 25 Ind. 182; *Galt v. Galloway*, 4 Pet. (U. S.) 332, 344; *Companari v. Woodburn*, 15 C. B. 400, 80 E. C. L. 400; *Simonton v. Minneapolis &c. Bank*, 24 Minn. 216; *Walker v. Denison*, 86 Ill. 142; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135.

CHAPTER LXXXI.

ALIENATING AFFECTIONS.

Sec. 1642. Generally. 1643. Burden of proof. 1644. Question of law or fact. 1645. Presumptions. 1646. The intent. 1647. Admissions. 1648. Declarations and letters. 1649. Res gestae.	Sec. 1650. Partial alienation. 1651. Adultery. 1651a. Alienation and criminal conversation. 1651b. Consent as a bar. 1652. Damages. 1653. Measure of damages.
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§ 1642. **Generally.**—The right of a husband to recover damages from a third party for alienating the affections of his wife has long existed at common law; and as early as 1747 we find a decision which clearly recognizes this right.¹ But there are no cases in the long line of English decisions at common law where the wife has been able to maintain an action against one alienating the affections of her husband. This is explained by the fact that the wife was under certain disabilities as a result of coverture under the common law. It would have been necessary under the common law for the husband to have joined in the action, and all damages, if collected during the lifetime of the husband, would have been the property of the husband. The wrongdoer would thus have reaped a profit from his wrongdoing.²

¹ *Winsmore v. Greenbank*, Willes 121 Mass. 236; *Rinehart v. Billa*, 82 577; *Berthon v. Cartwright*, 2 Esp. Mo. 534, 52 Am. R. 385; *Higham v. Vanosdol*, 101 Ind. 160; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Ramsey v. Ryerson*, 24 Abb. N. Cas. (N. Y.) 114; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Edgell v. Francis*, 66 Mich. 303; *Gilchrist v. Bale*, 8 Watts (Pa.) 354, 34 Am. Dec. 469.

² *Hodge v. Wetzler*, (N. J.) 55 Atl. 49; *Bassett v. Bassett*, 20 Ill. App. 544.

Although no woman has ever recovered in an action of this kind at common law, and it is not until 1861 that we find any allusion to the existence of such a right of action in favor of the wife, in the decisions and treatises upon the common law,³ yet there are many American decisions holding that independent of any enabling statute, still a substantive right exists and that such an action could be maintained according to the rules of common law.⁴ The rule, sustained by the weight of authority, however, is that by reason of the disability of coverture the right of action remains in abeyance and cannot be presented by the feme covert in her own name, where the common law prevails. But where the law of coverture has been removed by

³*Lynch v. Knight*, 9 H. L. Cases 577; as reviewed in *Hodge v. Wetzler*, 55 Atl. 49; 3 Blackstone Comm. 143; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553.

⁴The right is denied in the following cases: *Lonstorf v. Lonstorf* (Wis.), 95 N. W. 961; *Duffles v. Duffles*, 76 Wis. 374, 45 N. W. S. 22, 8 L. R. A. 420, 20 Am. St. 79; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. 499; *Logan v. Logan*, 77 Ind. 559; *Mulford v. Clewell*, 21 Ohio St. 191; *Van Arnam v. Ayers*, 67 Barb. (N. Y.) 544; *Morgan v. Martin*, 92 Me. 190, 42 Atl. 345; *Crocker v. Crocker* (U. S.), 98 Fed. 702; *Mehrhoff v. Mehrhoff* (U. S.), 26 Fed. 13; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. 468. Among the decisions holding that the right existed are the following: *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. 258, it is stated: "Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in law in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society—the husband to the wife all that the wife owes to him. Upon principle, this right

in the wife is equally valuable to her as property as is that of the husband to him. Her right being the same in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him." *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Price v. Price*, 91 Iowa 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. 360; *Lockwood v. Lockwood* 67 Minn. 476, 70 N. W. 784; *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. 646; *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Westlake v. Westlake*, 34 Ohio St. 821, 32 Am. R. 397; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. 468; *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Waldron v. Waldron*, (U. S.) 45 Fed. 315; *Haynes v. Nowlin*, 129 Ind. 584, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. 213; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. 838; *Bassett v. Bassett*, 20 Ill. App. 543.

only show that it was wrongfully brought about. The right of the parents to advise their children is carefully guarded and the parent is presumed to act from honest motive until the contrary is proved. The *quo animo* is an important consideration when the action is against a parent and must always be proved.¹² Where the defendant is a stranger and intended to cause a separation, the burden of proof, in one sense, is upon the defendant to give a proper explanation for inducing the wife (or husband) to leave. If the advice was given honestly and for the best welfare of the parties, the defendant must show this fact.¹³

§ 1644. **Question of law or fact.**—In order to recover in an action for alienating affections it is necessary to show the intent of the defendant or his motive in causing the separation and it is therefore a question of fact and for the jury to determine whether the defendant acted from improper motives. Any explanation upon the part of the defendant can only be weighed by the jury, and they are the sole judges of whether the defendant acted from honest motives.¹⁴ Where

34 Ohio St. 621, 32 Am. R. 397; *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Burnett v. Burkhead*, 21 Ark. 77; *Tasker v. Tasker*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Smith v. Lyke*, 13 Hun (N. Y.) 204, 20 N. Y. S. 204; *Payne v. Williams*, 4 Bax. (Tenn.) 583; *Love v. Love*, 73 S. W. 225, 98 Mo. App. 562; *Brown v. Brown*, 124 N. Car. 19, 32 S. E. 320, says: "The malice necessary to be proved is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove to the satisfaction of the young, that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose; the law pre-

suming malice from such conduct in actions of this nature."

¹² *Eagon v. Eagon*, 60 Kans. 697, 57 Pac. 942; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. 396; *Tasker v. Tasker*, 153 Mass. 148, 10 L. R. A. 468; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; *Modisett v. McPike*, 74 Mo. 636; *Gerner v. Gerner*, 185 Pa. St. 2333, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. 646.

¹³ *Johnson v. Allen*, 100 N. Car. 131, 5 S. E. 666; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Higham v. Vanosdol*, 101 Ind. 100.

¹⁴ *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *Higham v. Vanosdol*, 101 Ind. 160; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. R. 397; *Modisett v. McPike*, 74 Mo.

the conduct of the defendant is unjustifiable and actually causes the alienation and is so determined by the jury, malice in law may be implied from such conduct, and the court should so instruct.¹⁵

§ 1645. Presumptions.—Direct formal proof need not be produced to prove that the parties are married, but if a man and woman cohabit and live together as man and wife, the presumption, in an action for alienating affections, is that they are married.¹⁶ Where the husband and wife are not living together and the defendant denies that there is a separation, for the purpose of this action, the law will generally presume that the domicile of the husband is the domicile of the wife and that the husband and wife are living and cohabiting together.¹⁷ A different rule is enforced concerning the presumption of the motive, or *quo animo*, when the action is against a parent, from that which obtains when it is against a stranger.¹⁸ The motive of the parent is presumed to be good until the contrary is proved, but where the alienation is caused by a stranger, the defendant must generally show that his conduct was actuated by proper motives. The reason for this is that the law recognizes the right of the parent to advise the son or daughter, even if married; and the presumption is that the parent will protect his child from trouble and distress. The law will not assume that the parent would do anything to destroy the happiness of the child, but that the parent will always counsel and advise for the child's best interests.¹⁹ A stranger causing an alienation would not naturally be impelled by such motives. The law also presumes that the husband and wife have affection for each other, and if the defendant desires to question that fact, either by way of a justification or to mitigate damages, he must prove the contrary.²⁰

636; *Hartpence v. Rogers*, 143 Mo. 623, 43 S. W. 650; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. S. 804.

¹⁶ *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. R. 397.

¹⁷ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; *Abbott Tr. Ev.* (1st ed.) 681; ante, Vol. 1, § 123.

¹⁸ *Jonas v. Hirshburg*, 18 Ind. 581, 48 N. E. 656.

¹⁹ *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; *Higham v. Vanosdol*, 101

Ind. 160; *Johnson v. Allen*, 100 N. Car. 131, 5 S. E. 666; *Huling v. Huling*, 32 Ill. App. 522; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955; *Pollock v. Pollock*, 9 Misc. (N. Y.) 82; *Rath v. Rath*, (Neb.) 89 N. W. 612.

²⁰ *Bennett v. Bennett*, 21 Ark. 77; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; and authorities cited in preceding note.

²¹ *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am.

§ 1646. **The intent.**—The intent or motive is the material point of inquiry in an action for alienating affections and should always be shown; or, where the intent cannot be directly proved, such a state of facts or actions upon the part of the defendant should be shown that the intent may be reasonably implied. If the conduct of either the husband or wife has been such as to justify the other party in leaving, this will be a complete defense to one who aids or receives the wife, if it can be shown that the assistance²¹ was rendered, not for an evil purpose, or in bad faith to the plaintiff, but from motives of justice and humanity. Giving advice to a husband or wife, which induces either to leave the other, is not actionable if given honestly with a view of the welfare of both parties, by one who has no special influence or authority.²² Again there is a distinction as between a parent and stranger. To recover against a parent there should be much stronger evidence of improper motives than where the action is against a stranger.²³ There can, ordinarily, be no recovery against the parents for harboring a child against the will of the child's husband, unless there is clear proof that the defendant acted with malice. Mere acts of humanity by the parents toward their daughter are no grounds for an action for alienating affections, and the parent may show the motive and that the advice was given honestly.²⁴ A stranger must explain his motive, and when he can show that he acted in good

St. 98; *Lewis v. Hoffman*, 54 App. Div. 620, 66 N. Y. S. 428; *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341.

²¹ *Fratini v. Caslini*, 66 Vt. 273, as reported in 44 Am. St. on page 850; *Van Olinda v. Hall*, 68 N. Y. St. 611, 34 N. Y. S. 777; *Higham v. Vanosdol*, 101 Ind. 160; *Commonwealth v. Damon*, 136 Mass. 441; *Snow v. Palne*, 114 Mass. 520; *Campbell v. Carter*, Abb. Pr. N. S. (N. Y.) 151; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Schuneman v. Palmer*, 4 Barb. (N. Y.) 225; *Smith v. Lyke*, 13 Hun (N. Y.) 204; *Tasker v. Stanley*, 153 Mass. 148; 26 N. E. 417; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. R. 791.

²² *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

²³ *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196; *Rath v. Rath*, (Neb.) 89

N. W. 612; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638; *Johnson v. Allen*, 100 N. Car. 131, 5 S. E. 666; *Huling v. Huling*, 32 Ill. App. 522; *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833; *Tucker v. Tucker*, 74 Miss. 93, 19 So. 955.

²⁴ *Zimmerman v. Whitely*, 95 N. W. 989, 10 Det. Leg. N. 383; *Campbell v. Carter*, 6 Abb. Pr. N. S. (N. Y.) 151; 3 Daly (N. Y.) 165; *Fratini v. Caslini*, 66 Vt. 273, as reported in note 4 of 44 Am. St. on page 850; *Tasker v. Stanley*, 153 Mass. 148; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Smith v. Lyke*, 13 Hun (N. Y.) 204; *Rath v. Rath*, (Neb.) 89 N. W. 612.

faith upon the wife's complaint of her husband's ill-treatment, he may lawfully aid and shelter her. The mere fact that a stranger or third party did not drive her from his home, will not sustain an action, and these facts may be shown in defense.²⁵ Whenever there is a deliberate intention of causing a separation of the husband and wife and doing a grievous wrong, without legal justification or excuse, malice or evil intent may be implied, as the very essence of malice is a disposition or willingness to do a wrongful act injuring another; and in an action of this kind the specific motive need not be proved.²⁶

§ 1647. **Admissions.**—Admissions of defendant, either by letters, acts or declarations, explaining the improper relation of defendant with plaintiff's wife may be shown in evidence, tending to prove the illegal motive of defendant or that he is wilfully responsible for the alienation. Admission of the defendant that the plaintiff and consort were married is sufficient proof that they were married, and such admissions may be used against the defendant.²⁷ Admissions of the plaintiff that he was guilty of improper relations with other women might also be used against him to mitigate damages. Evidence may be introduced that plaintiff had made inquiries as to the wealth of defendant and his statements may be used as admissions that the action was brought for purely mercenary motives.²⁸

§ 1648. **Declarations and letters.**—For the purpose of inquiring into the relations of the husband and wife with each other prior to the interference of the defendant, it is proper to admit evidence of declarations or letters made or written by one to the other. Declarations or letters tending to show the temper or conduct of either party may also be shown. Declarations or letters having reference to a separation or contemplated separation may be admitted for the purpose of showing what caused the separation.²⁹ Declarations or letters tending

²⁵ *Barnes v. Allen*, 30 Barb. (N. Y.) 663; *Schuneman v. Palmer*, 4 Barb. (N. Y.) 225. *v. Derham*, 125 Mich. 109, 116, 83 N. W. 1005.

²⁶ *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614.

²⁷ *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485.

²⁸ *Zimmerman v. Whiteley*, 16 Det. Leg. N. 383, 95 N. W. 989; *Derham*

²⁹ *Roesner v. Darrah*, 65 Kans. 599, 70 Pac. 597; *Perry v. Lovejoy*, 49 Mich. 530, 14 N. W. 485; *McKenzie v. Lautenschlager*, 113 Mich. 171, 71 N. W. 489; *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. 843; *Williams*

to show the feeling existing between the plaintiff's consort and the defendant may be shown, but it must first be shown that defendant was responsible for the affection manifested for him.³⁰ Mere declarations, however, are rarely admitted to show what defendant's conduct was. When these declarations are used, it may be necessary to prove that they were made prior to the existence of anything calculated to excite suspicion of misconduct and before there existed grounds to suspect collusion.³¹ Declarations or letters of the wife, when the husband is plaintiff, relating to the words or acts of the defendant and tending to prove the wilful interference of the defendant, cannot be used against the defendant, as they are merely hearsay and would be dangerous because of possibility of collusion between husband and wife.³² There seems to be one exception to this rule of not allowing declaration of plaintiff's wife, and that is where the defendant is a parent. In this case the evidence is regarded as explanatory of her relation with her parents and is the only means, except calling her as a witness, and is generally admitted.³³ Where several parties are charged with having conspired together to entice away the plaintiff's wife, "the declarations of any one of the conspirators are admissible to show that he was a member of such conspiracy, but they are not evidence against the others, unless the fact of conspiracy is proved to the satisfaction of the jury and such declarations are in furtherance of the conspiracy."³⁴ In an action against a husband alone where it is shown that he and his wife acted together to alienate affections and that each is responsible for what was done, as the hus-

v. Williams, 20 Colo. 51, 37 Pac. 614; Baker v. Baker, 16 Abb. N. Cas. (N. Y.) 302; Sessions v. Little, 9 N. H. 271; Tenney v. Evans, 14 N. H. 350.

³⁰ Childs v. Muckler, 105 Iowa 279, 75 N. W. 100; White v. Ross, 47 Mich. 172, 10 N. W. 188; Edgell v. Francis, 66 Mich. 303, 33 N. W. 501.

³¹ Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252, and reported in notes of 44 Am. St. 843; 1 Phillips Ev. 182; 1 Greenleaf Ev., § 102; 1 Wharton Ev., § 225.

³² Fratini v. Caslini, 66 Vt. 273, as reported in 44 Am. St. on page 848; Preston v. Bowers, 13 Ohio St.

1, 82 Am. Dec. 430; Sanborn v. Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864; Winsmore v. Greenbank, Willes 577; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. R. 397; Higham v. Vanosdol, 101 Ind. 160; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; White v. Ross, 47 Mich. 172, 10 N. W. 188.

³³ Edgell v. Francis, 66 Mich. 303, 33 N. W. 501; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; White v. Ross, 47 Mich. 172, 10 N. W. 188.

³⁴ Preston v. Bowers, 13 Ohio St. 1, 82 Am. Dec. 430; Fratini v. Caslini, 66 Vt. 273, as reported in notes of 44 Am. St. 848.

band is liable for the torts of the wife, the declarations of the wife may be admitted as evidence against the husband.³⁵ In an action where the parents are defendants, evidence of the declaration of plaintiff's wife concerning the statements and acts of defendants may be admitted to explain the motive of the parents in interfering and why the wife resides with her parents. This is hearsay evidence, but it is admitted upon the ground that the alienation is a continuing act and can only be explained by daily conduct and declarations, and most of this evidence can only be obtained by examining the wife herself or giving evidence of her explanation for remaining with her parents.³⁶ It is the daily conduct explained by concurrent declarations.

§ 1649. *Res Gestae*.—Declarations of the wife, made immediately before and at the time she left her husband, of his cruel and inhuman treatment of her, are competent evidence for the defendant, as such declarations are so closely related with the leaving that they form a part of the *res gestae*.³⁷ But declarations made in the absence of the defendant as to the cause of abandoning or putting away the consort are not admissible, as they are hearsay and do not form a part of the *res gestae*.³⁸ Yet when the declarations are made in connection with an act, as the exhibition of injuries upon the person, such declarations, if explanatory of the manner or if they show who inflicted them, may be received in an action of this kind.³⁹ Whatever throws light upon the cause and motive, whether from "the conduct of kinsman or stranger" is, ordinarily, a matter of legitimate inquiry and should be admitted.⁴⁰ Such declarations or letters must be received with great

³⁵ *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501.

³⁶ *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501; *White v. Ross*, 47 Mich. 172, 10 N. W. 188.

³⁷ *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469; *Palmer v. Crook*, 7 Gray (Mass.) 420; *Coleman v. White*, 43 Ind. 430; *Rudd v. Bounds*, 64 Vt. 432, 25 Atl. 438; *Glass v. Bennett*, (5 Pickle) 89 Tenn. 478; *Palmer v. Crook*, 7 Gray (Mass.) 418; *Cattison v. Cattison*, 22 Pa. St. 275.

³⁸ *Sanborn v. Gale*, 162 Mass. 412,

38 N. E. 710, 26 L. R. A. 864; *Huling v. Huling*, 32 Ill. App. 519; *Winsmore v. Greenbank*, Willes 577; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. R. 397; *Adams v. Cosby*, 48 Ind. 153; *Higham v. Vanosdol*, 101 Ind. 160.

³⁹ *Gilchrist v. Bale*, 8 Watts (Pa.) 355; *Berdell v. Berdell*, 80 Ill. 604; *Cattison v. Cattison*, 22 Pa. St. 275; *Aveson v. Lord Kinnauld*, 6 East 188; *Higham v. Vanosdol*, 101 Ind. 160.

⁴⁰ *Clow v. Chapman*, 125 Mo. 101, 46 Am. St. 468, 475; *Bassett v. Bas-*

care and caution and not allowed unless it is made to appear affirmatively that they were made before the wife came under the influence of her paramour.⁴¹ Declarations made by a wife within a few days after the marriage, expressing her desire to remain with her husband as his wife and not there under restraint, are admissible as part of the *res gestae*.⁴²

§ 1650. Partial alienation.—A husband or wife may maintain an action for the partial alienation of affections. It is not necessary for the plaintiff to show that there was affection and that defendant had completely alienated it; for although the plaintiff's wife (or husband, as the case may be) has no affection for the plaintiff, a third party has no right to interfere or cut off any chance of an affection springing up in the future. Evidence offered by the defendant for the purpose of proving that there had existed no affection between the husband and wife will not be heard as a bar.⁴³

§ 1651. Adultery.—In an action for alienating affections it is not necessary to prove adultery; and this fact cannot ordinarily be proved unless it is specially pleaded.⁴⁴ The action for seducing the wife away from the husband is "by no means confined to improper or

sett, 20 Ill. App. 543; *Baker v. Baker*, 16 Abb. N. Cas. (N. Y.) 293.

"*Price v. Price*, 91 Iowa 693, 51 Am. St. 360; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; *Gilchrist v. Bale*, 8 Watts (Pa.) 355; *Cattison v. Cattison*, 22 Pa. St. 275; *Palmer v. Crook*, 7 Gray (Mass.) 418; *Glass v. Bennett*, 5 Pickle (Tenn.) 478; *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 24 Am. St. 843; *Dickerman v. Graves*, 6 Cush. (Mass.) 308, 53 Am. Dec. 41.

"*Bennett v. Smith*, 21 Barb. (N. Y.) 439.

"*Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. 843; *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489; *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Warfield*,

Ex parte, 40 Tex. Cr. App. 413, 50 S. W. 933, 76 Am. St. 727.

"*Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; in *Adams v. Main*, 3 Ind. App. 235, 29 N. E. 792, 50 Am. St. 266, the court says: "One who by improper means, alienates a wife's affections from her husband, although she neither leaves him nor yields her person to the seducer, injures the husband in that to which he is entitled, brings unhappiness to the domestic hearth, renders her mere services less efficient and valuable, and inflicts on him a damage in the nature of slander . . . so that for the redress of his wrong an action is maintainable." See also, 1 Bishop Mar. and Div. § 1361; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. R. 385.

adulterous relations, but it extends to all cases of wrongful interference in the family affairs of others, whereby the wife is induced to leave her husband" or to do such things as destroy the comfort or happiness of the married life.⁴⁵ The injury consists in the alienation with malice or improper motives. Debauchery and elopement, when they are present, are only what may be naturally expected from the wrong. If adultery did not take place, it is not due to the defendant's implied intent when the defendant is not a parent, but to the "wife's prudent reflection and laudable reputation." The alienation of a wife's affection may be complete and she may never leave the roof of her husband; and it has been held that such action on the part of the wife, after the alienation has been affected, contributes to aggravate the injury rather than otherwise and that an elopement would afford relief.⁴⁶ The proof of adultery, where it is alleged, may, however, tend to prove alienation.

§ 1651a. Alienation and criminal conversation.—There is a distinction between an action for the alienation of a wife's affections, that is, the loss of her comfort, society and assistance, and an action by the husband for seducing and debauching his wife. In the first instance the plaintiff bases his damages upon the alienation of his wife's affections with malice or improper motives, while in the other case the plaintiff seeks to recover because of the criminal conversation, and if the plaintiff fails to prove adultery, he cannot recover for the loss of his wife's society.⁴⁷

§ 1651b. Consent as a bar.—The consent of the husband to the acts of the defendant may be proved, and if proved, acts as a complete bar.⁴⁸ No one can maintain an action for a wrong to which he has consented. Where the plaintiff had reason to know of the improper conduct of his wife and suspected it, but did not take any means to

⁴⁵ *Callis v. Merrieweather*, (Md.) 57 Atl. 201; *Heermance v. James*, 47 Barb. (N. Y.) 123; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. R. 385.

⁴⁶ *Rinehart v. Bills*, 82 Mo. 534, 52 Am. R. 385; *Heermance v. James*, 47 Barb. (N. Y.) 120, 32 How. Pr. (N. Y.) 142.

⁴⁷ *Wood v. Mathews*, 47 Iowa 409;

Rinehart v. Bills, 82 Mo. 534, 52 Am. R. 385; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. 848.

⁴⁸ *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 37 Atl. 731; *Peek v. Traylor*, (Ky.) 34 S. W. 705; *Van Olinda v. Hall*, 88 Hun (N. Y.) 452; *Coleman v. White*, 43 Ind. 429; *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

prevent it, this may be shown by the defendant and will tend to mitigate the damages.⁴⁹

§ 1652. **Damages.**—An action for alienating affections is based on the loss of the consortium, and it is not necessary to prove actual pecuniary loss. Loss of support caused by the alienation does not necessarily enter into the question, but it is proper to show mortification, injury to feelings and mental anguish caused by such alienation. The marriage relation is not entered into for the purpose of labor and support alone. This relationship gives to each the right to the affection, companionship and society of the other, and whoever wrongfully deprives either of that right may be held responsible in damages.⁵⁰ The evidence of the unhappy relation existing between the husband and wife prior to the alienation may be admitted for the purpose of reducing damages.⁵¹ It may be proved that they were wanting in affection for each other and the unkind treatment of the husband for his wife may always be shown. Any misconduct of either

* *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Smith v. Masten*, 15 Wend. (N. Y.) 273, holds: "If the plaintiff was in the habit of improper intimacy with any other than her husband, her sense of moral propriety and regard for chastity could not be much offended by the loss of virtue of her husband. The guilt of defendant is not diminished, but plaintiff has sustained less damages. . . . All the circumstances which diminish the merits of the plaintiff or enhance the other are proper subjects for their consideration."

⁵⁰ *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. R. 397; *Bennett v. Bennett*, 116 N. Y. 584; *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 28 Am. St. 213; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. 597; *Foot v. Card*, 58 Conn. 1, 18 Am. St. 258; *Warren v. Warren*, 89 Mich. 123; *Cooley Torts*, § 288; *Rice v. Rice*, 91 Iowa 693, 62 N. W. 833,

51 Am. St. 360; *Bowersox v. Bowersox*, 115 Mich. 24, 72 N. W. 986; *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 78 Am. St. 303; *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266; *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. R. 385; *Reading v. Gazzam*, 200 Pa. St. 70, 49 Atl. 889; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553.

⁵¹ *Love v. Love*, 98 Mo. App. 562, 73 S. W. 225; *Higham v. Vanosdol*, 101 Ind. 165; *Hadley v. Heywood*, 121 Mass. 236; *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Smith v. Masten*, 15 Wend. (N. Y.) 270; *Coleman v. White*, 43 Ind. 529; *Peek v. Traylor*, (Ky.) 34 S. W. 705; *Smith v. Masten*, 15 Wend. (N. Y.) 270.

husband or wife which would show a lack of affection may be shown to reduce the damages.⁵² That the husband failed to support his wife and that he lived apart from her may be evidenced in mitigation of damages.⁵³ That the wife was a lewd or immoral woman might be used by the defendant to mitigate damages, and the fact that the husband was of loose morals may be used to show that he cared but little for the wife and was not damaged to any great extent. But regardless of the character of plaintiff's wife, defendant cannot introduce evidence of it, to justify his acts. He may use such evidence only to reduce the damages. The fact that a divorce has been obtained may be considered in mitigation of damages, but the evidence given in a divorce proceeding, previously obtained by one of the parties, is not admissible in an action for alienating affections.⁵⁴ The pecuniary circumstances of the defendant may be proved to aid in assessing the damages and to show the weight and effect of the property inducements held out to induce the husband or wife to leave the other.⁵⁵ Either party may show plaintiff's occupation and perhaps social position as bearing on the value of the consortium.⁵⁶ For the purpose of reducing damages and to show the relation existing between the plaintiff and his wife, the defendant may show that plaintiff had made inquiries as to the wealth of his wife's parents and that he had only married her from mercenary motives.⁵⁶

§ 1653. **Measure of damages.**—The measure of damages in an action for alienating affections is the value of the conjugal society,

⁵² *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; *Churchill v. Lewis*, 17 Abb. N. Cas. (N. Y.) 226; *Schorn v. Berry*, 63 Hun (N. Y.) 110; *Peek v. Traylor*, (Ky.) 34 S. W. 705; *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578; *Bassett v. Bassett*, 20 Ill. App. 543.

⁵³ *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 747.

⁵⁴ *Waldron v. Waldron*, 45 Fed. (U. S.) 315; *Derham v. Derham*, 123 Mich. 457, 83 N. W. 1005; *Mead v. Randall*, 111 Mich. 268, 69 N. W. 506; *Croze v. Rutledge*, 81 Ill. 266.

⁵⁵ *Love v. Love*, 73 S. W. 255, 98

Mo. App. 562; *Waldron v. Waldron*, 45 Fed. (U. S.) 315; *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075; *Price v. Price*, 91 Iowa 693, 60 N. W. 202, 51 Am. St. 360, 29 L. R. A. 150; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Johnson v. Allen*, 100 N. Car. 131, 5 S. E. 666; contra doctrine is held in *Bailey v. Bailey*, 94 Iowa 598, 63 N. W. 341, which says:

"The wealth, rank, social position or condition of defendant was wholly immaterial." *Stanley v. Stanley*, 73 Pac. 596, 32 Wash. 489.

⁵⁶ *Bailey v. Bailey*, 94 Iowa 898, 63 N. W. 341.

⁵⁶ *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005.

affection and assistance, that the husband and wife would render each other, less, in the one case, the value of the performance of the husband's duty to support, clothe, cherish and care for the wife.⁵⁷ Injury to the feelings, disgrace and dishonor may be proved to help in fixing the damages, but this is left more to the jury to infer than for evidence.⁵⁸ Where the injury is wilful and malicious the plaintiff may prove these facts in order to recover exemplary damages, but exemplary damages cannot be given unless these facts are fully established.⁵⁹

⁵⁷ Sutherland Dam., § 1285; Rudd v. Rounds, (Vt.) 25 Atl. 438; Prettyman v. Williamson, 1 Pen. (Del.) 224, 39 Atl. 731; Hartpence v. Rogers, 143 Mo. 623; Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. 843; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Rinehart v. Bills, 82 Mo. 534, 52 Am. R. 385; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; Adams v. Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266.

⁵⁸ Hartpence v. Rogers, 143 Mo. 623.

⁵⁹ Waldron v. Waldron, 45 Fed. (U. S.) 315; Prettyman v. Williamson, 1 Pen. (Del.) 224, 39 Atl. 731; Lindblom v. Sontelle, 10 N. Dak. 140, 86 N. W. 357; Jonas v. Hirshburg, 18 Ind. App. 581, 48 N. E. 656; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Warner v. Miller, 17 Abb. N. Cas. (N. Y.) 221.

CHAPTER LXXXII:

ARBITRATION AND AWARD.

Sec.	Sec.
1654. Generally.	1662. Demand.
1655. Presumptions.	1663. Performance.
1656. Burden of proof.	1664. Parol evidence.
1657. Selecting form of action.	1665. Defenses.
1658. Evidence of submission and authority.	1666. Revocation.
1659. Umpire.	1667. Disability.
1660. Execution of the award.	1668. Award as evidence in other proceedings.
1661. Notice—Publication or delivery.	

§ 1654. **Generally.**—It is now the policy of the law to favor the voluntary submission of a controversy between parties to arbitrators or judges of their own selection by whose judgment or award they agree to be bound.¹ A submission to arbitration may be by parol, with mutual promises to perform the award; or by deed; or by rule of the court;² or by any mode pointed out by statute. In the first case,

¹ *Groat v. Pracht*, 31 Kans. 656, 3 Pac. 274; *Jensen v. Deep Creek &c. Co.*, (Utah) 74 Pac. 427; see, *Edmundson v. Wilson*, 108 Ala. 118, 19 So. 367; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510, and note. As to the agreement of submission being a contract and as to when the award is a judgment or in the nature of a judgment, see, first case above cited, also, *Dist. of Columbia v. Bailey*, 171 U. S. 161, 18 Sup. Ct. 868; *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. R. 486; *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Meyer v. Ludeling*, 40 La. Ann. 640, 4 So. 583; *Story v. Elliott*,

8 Cow. (N. Y.) 27, 18 Am. Dec. 423; *Johnson v. Maxey*, 43 Ala. 521; *Crook v. Chambers*, 40 Ala. 239. As to regular judge acting as arbitrator, see, *Banigan v. Nelms*, 106 Ga. 441, 32 S. E. 337; *Strite v. Reiff*, 55 Md. 92.

² *Buccleuch v. Metropolitan Board*, L. R. 5 Exch. 221; for history and development of this subject. The power of a court, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law: *Newcomb v. Wood*,

and in some jurisdictions in other cases as well, the remedy may be by an action of assumpsit, upon the promise to perform the award;³ in the second, it may be by debt for the penalty of the arbitration bond,⁴ or by covenant, upon the agreement or indenture of submission; in the third case, it may be by attachment, or by judgment and execution upon the judgment entered up pursuant to the rule of court or the statute; and in any case it may be by an action of debt upon the award.⁵ An award duly made and performed may also be pleaded in bar of any subsequent action for the same cause.⁶ And, while the general rule is that a mere agreement to submit to arbitration, an award in pursuance of the submission may sometimes be specifically enforced in equity.⁷

§ 1655. Presumptions.—As a general rule, all reasonable presumptions and intendments are made in favor of awards.⁸ Thus, it has been held that in the absence of clear proof to the contrary, an award will be presumed to be fair and correct.⁹ And it has been held again and

97 U. S. 581. The submission and the award may both be by parol: *Greer v. Canfield*, 38 Neb. 169; unless it is with reference to the title to land: *Fort v. Allen*, 110 N. Car. 183; or unless it is under a statute requiring a writing: *Manhattan Life Ins. Co. v. McLaughlin*, 80 Pa. St. 53. The law, unless by some statutory provision requires no particular form to establish a valid submission.

³ *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. R. 486; *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661.

⁴ *Pass v. Critcher*, 112 N. Car. 405, 17 S. E. 9; *McCargo v. Crutcher*, 23 Ala. 575.

⁵ *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Holmes v. Smith*, 49 Me. 242; *Duren v. Getchell*, 55 Me. 241; but see, as to waiver by making it a rule of court: *Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609; *Koerner v. Leathe*, 149 Mo. 361, 51 S. W. 96, and Indiana authority there cited.

⁶ The tendency of modern author-

ity is to give conclusive effect to all awards, where there is no corruption or misconduct on the part of referees, and where no deception has been practiced: *Kendrick v. Tarbell*, 26 Vt. 416; *Ebert v. Ebert*, 5 Md. 353; *Hartford & Co. v. Bonner Merc. Co.*, 15 U. S. App. 134, 56 Fed. 378, 5 C. C. A. 524; *Patton v. Garrett*, 116 N. Car. 847, 24 S. E. 679.

⁷ *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768; *Witz v. Tregallas*, 82 Md. 351, 33 Atl. 718; *Caldwell v. Dickinson*, 13 Gray (Mass.) 365; *Page v. Foster*, 7 N. H. 392; *Davis v. Havard*, 15 S. & R. (Pa.) 165, 16 Am. Dec. 537; *Perkins v. Giles*, 50 N. Y. 228; *Thompson v. Deans*, 59 N. Car. 22; *Hawksworth v. Brammall*, 5 Myl. & Cr. 281, 46 Eng. Ch. 281.

⁸ *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661, 663; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510.

⁹ *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510; *Jensen*

again that an award under a general submission, where there is no indication to the contrary, will be presumed to be in conformity with the submission as to the matters passed upon, and that it will be presumed that all such matters were duly considered by the arbitrators and covered by the award.¹⁰

§ 1656. Burden of proof.—In an action on an award the burden is upon the plaintiff to show the submission and the award in conformity therewith.¹¹ And in a recent case, which was an action on an award under a parol submission, the rule in such cases was more fully stated to be that the burden is upon the plaintiff to show that there was a mutual and concurrent agreement between the parties to submit the matters in dispute to arbitrators selected pursuant to such agreement, and to abide by their award made pursuant thereto; that the arbitrators were chosen in accordance with such agreement; and that they actually made the alleged award, for the amount specified, pursuant to and in conformity with the agreement of submission.¹² So, on the other hand, where a party seeks to impeach and set aside an award the burden is upon him, and it is generally said that the evidence must be clear and strong.¹³ And even in an action on an award, where an apparently binding submission has been shown and the award was made in pursuance thereof, there is a presumption that the arbitrators did their duty, and in favor of their award, which

v. Deep Creek &c. Co., (Utah) 74 Pac. 427.

¹⁰ *Jensen v. Deep Creek &c. Co., (Utah) 74 Pac. 427; Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; New York &c. Co. v. Schnieder, 119 N. Y. 475, 24 N. E. 4; compare also, Stearns v. Cope, 109 Ill. 340; Sides v. Brendlinger, 14 Neb. 491, 17 N. W. 113; Haynes v. Forskoll, 31 Me. 112; Bixby v. Whitney, 5 Greenl. (Me.) 192; Martin v. Thornton, 4 Esp. 180; Webster v. Lee, 5 Mass. 334; Gaylord v. Norton, 130 Mass. 74; Strong v. Strong, 9 Cush. (Mass.) 560.*

¹¹ *Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; Gay v. Waltman, 89 Pa. St. 453; Anderson v. Miller, 108*

Ala. 171, 19 So. 302; Boots v. Canine, 58 Ind. 450; Williams v. Williams, 11 Sm. & M. (Miss.) 393; Peterson v. Ayre, 15 C. B. 724, 80 E. C. L. 724.

¹² *Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.*

¹³ *Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510; Hardin v. Almand, 64 Ga. 582; Witz v. Tregallas, 82 Md. 351, 33 Atl. 718; Liverpool &c. Ins. Co. v. Goehring, 99 Pa. St. 13; Bond v. Olden, 4 Yeates (Pa.) 243; Mosness v. German-Am. Ins. Co., 50 Minn. 341, 52 N. W. 932; Atkinson v. Townley, 1 N. J. L. 444; Young v. Kinney, 48 Vt. 22; Bridgeport v. Eisenman, 47 Conn. 34.*

casts the burden in one sense of the term upon the defendant who undertakes to assail it in defense.¹⁴

§ 1657. **Selecting form of action.**—At common law it was of much importance to select the right form of action. The action of debt on the award itself was often considered preferable to any other form of action, inasmuch as, under that form of action, “if judgment goes by default, it is final in the first instance, the sum to be recovered being ascertained through the medium of the award; whereas in debt on the bond, breaches must be suggested and a hearing had pursuant to statutes; and in assumpsit, and in covenant, the judgment by default is but interlocutory.”¹⁵ But this is only where the award is for a sum of money; for if it is to do any other thing, the remedy should be sought in some other mode.” Where the submission is by deed, with a penalty, the best form of action would seem to be debt for the penalty; for by declaring on the award, the plaintiff has the burden of proving a mutual submission; but, by declaring on the bond, it seems that he transfers the burden to the defendant, on whom it will then lie to discharge himself of the penalty, by showing a performance of the conditions.¹⁶

§ 1658. **Evidence of submission and authority.**—In proving an award, it must appear that there was a submission, and that the arbitrators had sufficient authority to make the award.¹⁷ If the agreement of submission was in writing, it must usually be produced, and its exe-

¹⁴ *Fooks v. Lawson*, 1 Marv. (Del.) 115, 40 Atl. 661; *Jensen v. Deep Creek &c. Co.*, (Utah) 74 Pac. 427, and authorities cited in last note supra; but see, *Baltimore &c. R. Co. v. Canton Co.*, 70 Md. 405, 17 Atl. 594.

¹⁵ *Stephens* N. P. 180.

¹⁶ *Ferrer v. Oven*, 7 B. & C. 427, per Bayley, J.

¹⁷ *Antram v. Chase*, 15 East 209; *Chicago &c. R. Co. v. Peters*, 45 Mich. 636, 8 N. W. 584; *Boots v. Canine*, 58 Ind. 450; *Grayson v. Meredith*, 17 Ind. 357; but see, *Sadler v. Olmstead*, 79 Iowa 121, 44 N. W. 292; if the arbitrators are not

named the submission is void: *Greiss v. State Inv. Co.*, 98 Cal. 241; *Northwestern Guar. Co. v. Channell*, 53 Minn. 269, 55 N. W. 121; an attorney has been held to no authority to refer on behalf of an infant plaintiff: *Biddell v. Dowse*, 6 B. & C. 255; see *German-Am. Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; so it has been held that one partner has no authority to bind the firm: *Stead v. Salt*, 3 Bing. 101; proof of the submission has been held necessary even after the lapse of forty years: *Burghardt v. Turner*, 12 Pick. (Mass.) 534.

cution by all the parties to the submission proved.¹⁸ Thus, where four persons, being co-partners, agreed to refer all matters in difference between them, or any two of them, to certain arbitrators, and the arbitrators made an award in which they found several sums due to and from the partnership, and also private balances due among the partners from one to another, the action being between two of them upon the award to recover one of these private balances, it was held necessary to prove the execution of the deed of submission by them all; the execution of each being presumed to have been made upon the condition that all were to be bound equally with himself.¹⁹ Where the submission was by rule of court, an office copy of the rule was held sufficient proof of the judge's order.²⁰ But if the agreement of submission is attested by witnesses, and its execution is denied, the rule or order by which the agreement was made a rule of court is not the proper evidence of the signature of the agreement, for it must be proved, when possible, by the attesting witness.²¹ A recital of submission in the award has been held insufficient,^{21*} and it has also been held that a submission under rule of court cannot be proved by an arbitrator;^{21**} but he is competent to prove a parol submission.^{21***} If the submission was by parol, it is generally material to prove that the promises were concurrent and mutual; for otherwise each promise may be but nudum pactum.²²

¹⁸ *Ferrer v. Oven*, 7 B. & C. 427; *Fortune v. Killebrew*, 86 Tex. 173, 23 S. W. 976; it has been held that the submission and award must be in writing in all cases where a contract in relation to the subject matter is required to be in writing, but an oral submission and award on the question of how much rent is due for the past occupation of a building is not such a question involving an interest in land as need be in writing under the statute of frauds: *Peabody v. Rice*, 113 Mass. 31.

¹⁹ *Antram v. Chase*, 15 East 209; see also, *Brazier v. Jones*, 8 B. & C. 124.

²⁰ *Still v. Halford*, 4 Campb. 17; *Gisborne v. Hart*, 5 M. & W. 50.

²¹ *Berney v. Read*, 9 Jur. 620, 7 Ad.

& El. (N. S.) 79, 53 Eng. C. L. 79; see also, *Tyler v. Stephens*, 7 Ga. 278; *Spooner v. Payne*, 56 C. L. 328.

^{21*} *Stokely v. Robinson*, 34 Pa. St. 315; *Collins v. Freas*, 77 Pa. St. 493.

^{21**} *Lloyd v. Seal*, 5 Har. (Del.) 250.

^{21***} *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. 334; *Allen v. Miles*, 4 Har. (Del.) 234.

²² *McMahan v. Spinning*, 51 Ind. 187; *Gaffy v. Hartford & Co.*, 42 Conn. 143; *Allen-Bradley & Co. v. Anderson & Co.*, 99 Ky. 311, 35 S. W. 1123; *Reade v. Dutton*, 2 Gale 228; 2 M. & W. 62; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Livingston v. Rogers*, 1 Cal. (N. Y.) 583; *Kingston v. Phelps, Peake Cas.* 299; *Somerville v. Dickerman*, 127 Mass. 272. But an express promise to be bound

§ 1659. **Umpire.**—Arbitrators have, ordinarily, no authority to appoint an umpire, unless it is given by the submission or by agreement of parties. If the award was made by an umpire, his appointment must also be proved.²³ A recital of his authority in the award signed by himself and the arbitrators is not sufficient.²⁴ He cannot be selected by the arbitrators by lot, without consent of the parties.²⁵ But appointment may be good, though made before the arbitrators enter on the business referred to them;²⁶ and they may join with him in making the award.²⁷ So, although the arbitrators appoint an umpire without authority, or the appointment is otherwise irregular, yet if the parties with knowledge thereof, appear and are heard before him without objection, this will constitute a ratification of his appointment.²⁸

§ 1660. **Execution of the award.**—The next matter is the execution of the award, which must be proved, as in other cases, by the subscribing witness, if there be any, and if not, then usually by evidence of the handwriting of the arbitrators.²⁹ If the award does not pursue

by it need not always be proved: *Dilks v. Hammond*, 86 Ind. 563.

²³ The appointment of an umpire must be authorized by the parties: *Gaffy v. Hartford &c. Co.*, 42 Conn. 143; *McMahan v. Spinning*, 51 Ind. 187; *Allen-Bradley Co. v. Anderson &c. Co.*, 99 Ky. 311, 35 S. W. 1123. They must also have notice of his appointment and an opportunity to appear before him: *Coons v. Coons*, 95 Va. 434, 28 S. E. 885. For the distinction between an umpire and an arbitrator, see, *Hartford &c. Co. v. Bonner &c. Co.*, 15 U. S. App. 134, 56 Fed. 378.

²⁴ *Still v. Halford*, 4 Campb. 18; nor is such recital necessary: *Rison v. Berry*, 4 Rand. (Va.) 275.

²⁵ *Grening*, matter of, 74 Hun (N. Y.) 62, 26 N. Y. S. 117; *Young v. Miller*, 3 B. & C. 407; *Wells v. Cooke*, 2 B. & A. 218; *Harris v. Mitchell*, 2 Vern. 485; *Cassell*, In re, 9 B. & C. 624; *overruling, Neale v. Ledger*, 16 East 51; *Ford v. Jones*, 3 B. & A.

248; *Hart v. Kennedy*, 47 N. J. Eq. 51, 20 Atl. 29; but when the parties agreed to a selection by lot, it was held good: *Tunno*, In re, 5 B. & A. 488.

²⁶ *Roe d. Wood v. Doe*, 2 Term R. 644; *Bates v. Cooke*, 9 B. & C. 407; *Bryan v. Jeffreys*, 104 N. Car. 247, 10 S. E. 167; *Dudley v. Thomas*, 23 Cal. 365; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *Chandos v. American &c. Co.*, 84 Wis. 184, 54 N. W. 390; but see, *Christenson v. Carleton*, 69 Vt. 91; *Sickel v. Keach*, 2 Walk. (Pa.) 535.

²⁷ *Soulsby v. Hodgson*, 3 Bur. 1474, 1 W. Bl. 463; *Beck v. Sargent*, 4 Taunt. 232; *Bryan v. Jeffrey*, 104 N. Car. 242, 10 S. E. 167.

²⁸ *Matson v. Trower*, Ry. & M. 17; *Norton v. Savage*, 1 Fairf. (Me.) 456; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510; *Knowlton v. Homer*, 30 Me. 552.

²⁹ *Tyler v. Stephens*, 7 Ga. 278;

the submission, it is not binding.⁸⁰ If, therefore, the submission is to a number of arbitrators jointly, without any authority in the majority to decide, and the award is not made or signed by all, it is bad.⁸¹ And though a majority has power to decide, yet, in an award by a majority only, it must usually appear that all the arbitrators heard the parties, both those who did not, and those who did concur in the de-

Spooner v. Payne, 56 E. C. L. 328; but the award may be oral in many cases: *Skrable v. Pryne*, 93 Iowa 691, 62 N. W. 21.

* *Palmer v. Van Wyck*, 92 Tenn. 397, 21 S. W. 761; *Leslie v. Leslie*, 50 N. J. Eq. 103, 52 N. J. Eq. 332, 31 Atl. 724; acceptance by the parties, it has been held, gives no validity to an award which does not pursue the submission: *Hubbell v. Bissell*, 13 Gray (Mass.) 298; see also, *Anderson v. Miller*, 108 Ala. 171, 19 So. 302.

⁸⁰ *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Baltimore Tpk. Case*, 5 Bin. (Pa.) 481; *Byard v. Harkrider*, 108 Ind. 376, 9 N. E. 294; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494; *United Kingdom Asso. v. Houston*, 1896, L. R. 1 Q. B. 567; *Quimby v. Melvin*, 28 N. H. 250; *Hubbard v. Great Falls &c. Co.*, 80 Me. 39, 12 Atl. 878; *Liavitt v. Windsor Land Co.*, 54 Fed. 439; but statutes frequently provide for an award by a majority: *Short v. Pratt*, 6 Mass. 496; *Walker v. Melcher*, 14 Mass. 148; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Curtis*, in re, 64 Conn. 501, 30 Atl. 769, 42 Am. St. 200; *Palmer v. Van Wyck*, 92 Tenn. 397, 31 S. W. 761; *Kent v. French*, 76 Iowa 187, 40 N. W. 713. In *Bulson v. Lohnes*, 29 N. Y. 291, where the submission was to three arbitrators, with a provision that the award should be in writing, signed by the three, "or any two of them," and ready for delivery by a certain

day fixed, it is said: "There can be no doubt that, at common law, before the Revised Statute, under such a submission two arbitrators might lawfully meet, and hear the proofs and allegations of the parties, where the third had notice and refused to attend and take part in the proceedings; and that an award made by the two who heard the matters submitted, under such circumstances, was a valid and binding award. This was settled in England, at an early day, and upon full deliberation: *Goodman v. Sayres*, 2 Jac. & Walk. 261; *Dalling v. Matchett*, Will. 215, Barnes 57; *Sallow v. Girling*, Cro. Jac. 278; *Watson Arbitration* 115; *Kyd Awards*, 106, 107; *Green v. Miller*, 6 Johns. (N. Y.) 39; *Crofoot v. Allen*, 2 Wend. (N. Y.) 495. It was held that, by the latter clause of the submission, the entire authority was disjoined, so as to make it a submission to the lesser number to hear, as well as to determine." But upon a rehearing, if one of the arbitrators refuses to attend, it has been held that the others are competent to reaffirm the former award: *Peterson v. Loring*, 1 Greenl. (Me.) 64; though not to revise the merits of the case, *Cumberland v. North Yarmouth*, 4 Greenl. (Me.) 459; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Clement v. Comstock*, 2 Mich. 359; *Witz v. Tregallas*, 82 Md. 351, 33 Atl. 718; but see, *Cary v. Bailey*, 55 Iowa 60, 7 N. W. 410.

cision; or at least it must not appear that some of them did not hear the parties and had no opportunity to do so.

§ 1661. **Notice—Publication or delivery.**—If the submission requires that notice of the award should be given to the parties, this is the next point to be proved; but if it was not required by the submission, both the averment and the proof are unnecessary.³² It is essential, however, to allege, and therefore to prove, that the award was published,³³ if the submission requires it, and it has been held that an award is published whenever the arbitrator gives notice that it may be had on payment of his charges.³⁴ If the agreement is that the award shall be ready to be delivered to the parties by a certain day, this is satisfied by proof of the delivery of a copy of the award, if it be accepted without objection on that account;³⁵ and if it be only read to the losing party, who thereupon promises to pay the sum awarded, this is evidence of a waiver of his right to the original or a copy, even though it was afterwards demanded and refused.³⁶

§ 1662. **Demand.**—It is not necessary to allege or prove a demand for payment, except where the obligation is to pay a collateral sum upon request, as where the defendant promised to pay a certain sum upon demand, or the like, if he failed to perform an award.³⁷ "In

³² Russell v. Smith, 87 Ind. 457; McClure v. Shroyer, 13 Mo. 104; Thompson v. Mitchell, 35 Me. 281; Parson v. Aldrich, 6 N. H. 264; Juxon v. Thornhill, Cro. Car. 132; Child v. Horden, 2 Bulstr. 144.

³³ Kingsley v. Bill, 9 Mass. 198; Thompson v. Mitchell, 35 Me. 281; see also, Anderson v. Miller, 108 Ala. 171, 19 So. 302; but it is held unnecessary where the submission does not require it: Parson v. Aldrich, 6 N. H. 264; Denman v. Bayless, 22 Ill. 300; see also, New York Lumber &c. Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4.

³⁴ Macarthur v. Campbell, 5 B. & Ad. 518; Musselbrook v. Dunkin, 9 Bing. 605; see also, Munro v. Alaire, 2 Cal. (N. Y.) 320; New York Lumber Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4.

³⁵ Sellick v. Adams, 15 Johns. (N.

Y.) 197; Low v. Nolte, 16 Ill. 475; Gidley v. Gidley, 65 N. Y. 169; the copy must be delivered when stipulated: Anderson v. Miller, 108 Ala. 171, 19 So. 302; in strictness, to constitute the proper service of an award, so as to authorize an attachment for not performing it, a copy must not only be delivered, but the original must also be shown to the party: Lloyd v. Harris, 8 M. G. & Sc. 63; see also, Low v. Nolte, 16 Ill. 475; Anderson v. Anderson, 65 Ind. 196.

³⁶ Perkins v. Wing, 10 Johns. (N. Y.) 143; see also, Gidley v. Gidley, 65 N. Y. 169; Tracy v. Herrick, 25 N. H. 381; Rundell v. La Fleur, 6 Allen (Mass.) 480; 2 Greenl. Ev., § 75.

³⁷ See, Hugg v. Collins, 18 N. J. L. 294; Knight v. Carey, 1 Coul. (N. Y.) 39.

other cases, where the award is for money which is not paid, the burden of proof is on the defendant to show that he paid the sum awarded, the bringing of the action being a sufficient request.³⁸ The averment of a promise to pay will be supported by evidence of an agreement to abide by the decision of the arbitrators."³⁹

§ 1663. **Performance.**—Where the thing to be done by the defendant depends on a condition precedent, to be performed by the plaintiff, the latter cannot enforce the award until he has performed, or offered to perform his own part, and such performance must usually be averred and proved by the plaintiff.⁴⁰ And if, by the terms of the award, acts are to be done by both parties on the same day, as where one is to convey land, and the other to pay the price, then, in an action for the money, the plaintiff must aver and prove a performance, or an offer to perform, on his part, or he cannot recover; for in such a case the conveyance, or the offer to convey, is precedent to the right to the price.⁴¹ The same rule applies where the award directs conveyance in an exchange of lots,⁴² or the execution of mutual releases.⁴³ But where the acts to be performed by each party are entirely distinct and independent, so that one is in no way a condition precedent to the other,⁴⁴ or where the defendant has repudiated the award and rendered an offer to perform by the plaintiff fruitless,⁴⁵ performance on the part of the plaintiff is not, ordinarily, required to be shown.

³⁸ *Birks v. Trippet*, 1 Saund. 32, 33, and n. 2, by Williams; *Scearce v. Scearce*, 7 Ind. 286; *Russell v. Smith*, 87 Ind. 457; if the reference is general, and the arbitrator directs the payment to be made at a certain time and place, this direction may be rejected as surplusage, *Rees v. Waters*, 4 D. & L. 167, 16 M. & W. 263; but see, *Doyley v. Burton*, 1 Ld. Raym. 533.

³⁹ *Efner v. Shaw*, 2 Wend. (N. Y.) 567.

⁴⁰ *Gray v. Reed*, 65 Vt. 178, 26 Atl. 526; see also, *Comer v. Thompson*, 54 Ala. 265; *Comery v. Howard*, 81 Me. 421, 17 Atl. 318; *Commonwealth v. Pejepsent*, 7 Mass. 399; *Parrish v. Elginbotham*, (Ore.) 65 Pac. 984; *Huggs v. Collins*, 18 N. J. L. 294.

⁴¹ *Huy v. Brown*, 12 Wend. (N. Y.) 591.

⁴² *Jessee v. Cater*, 25 Ala. 351.

⁴³ *Dudley v. Thomas*, 23 Cal. 365; *McNeil v. Magee*, 5 Mason (U. S.) 244, 16 Fed. Cas. No. 8,915.

⁴⁴ *Jessee v. Cater*, 25 Ala. 351; *Jones v. Pennsylvania R. Co.*, 143 Pa. St. 374, 22 Atl. 883; see also and compare, *Gray v. Reed*, 65 Vt. 178, 26 Atl. 526; *Pomroy v. Gold*, 2 Metc. (Mass.) 500; *Groat v. Pracht*, 31 Kans. 656, 3 Pac. 274.

⁴⁵ *Duren v. Getchell*, 55 Me. 241; *Collier v. White*, 97 Ala. 615, 12 So. 385; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762; *Fargo v. Reighard*, 13 Ind. App. 39, 30 N. E. 888; *Cobb v. Dolphin &c.*

§ 1664. **Parol evidence.**—A clear and unambiguous written submission or award is the best evidence of its contents, and parol evidence is not, ordinarily admissible to vary or control its terms or the intent and meaning of the parties or arbitrators.⁴⁶ But parol or extrinsic evidence is often admissible to explain uncertain and ambiguous terms, and to determine just what was in controversy and the like,⁴⁷ where it cannot otherwise be determined; and, upon a proper showing, secondary evidence of the contents of a lost award is admissible.⁴⁸ So, parol evidence is admissible in a proper case to show that an award is absolutely void,⁴⁹ and, in general, where an award is attacked in a proper proceeding for an extrinsic matter for which it may properly be avoided in such proceeding, parol or extrinsic evidence thereof is admissible to show such facts.⁵⁰ The rule excluding parol evidence to vary or contradict a written submission or award applies to the testimony of arbitrators themselves,⁵¹ and, indeed, public

Co., 108 N. Y. 463, 15 N. E. 438; *Doke v. James*, 4 N. Y. 568; *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *Parker v. Parker*, 103 Mass. 167; *Cobb v. Dortch*, 52 Ga. 548; *May v. Miller*, 59 Vt. 577, 7 Atl. 818; *Holgate v. Killick*, 7 H. & N. 418, 31 L. J. Exch. 7; *Doe v. Preson*, 1 Saund. & Co., 77; *Gordon v. Mitchell*, Moore C. P. 241, 4 E. C. L. 548; the transcript of evidence given before the arbitrators is admissible, in an action to recover the amount awarded, to show that all matters submitted were considered and adjudicated: *Jensen v. Deep Creek &c. Co.*, (Utah) 74 Pac. 427.

⁴⁶ *Leslie v. Leslie*, 52 N. J. Eq. 332, 31 Atl. 724; *Baltes v. Bass Foundry &c. Works*, 129 Ind. 185, 28 N. E. 319; *Brazill v. Isham*, 12 N. Y. 9; *Odum v. Rutledge*, 94 Ala. 488, 10 So. 222.

⁴⁷ *Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195; *Carter v. Shibles*, 74 Me. 273; *Bennett v. Pierce*, 28 Conn. 314; *Shackleford v. Pucket*, 2 A. K. Marsh (Ky.) 435, 12 Am. Dec. 422; *Leonard v. Root*, 15 Gray (Mass.) 553; *Converse v. Colton*, 49

Pa. St. 346; *Huckestein v. Kaufman*, 173 Pa. St. 199, 33 Atl. 1028; *Burton v. Howard*, 38 Ind. 109; *Faw v. Davy*, 1 Cranch (U. S.) 89, 440; *Brown v. Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 282; parol evidence is admissible to identify a written award: *Saunders v. Heaton*, 12 Ind. 20.

⁴⁸ *Callier v. Watley*, 120 Ala. 38, 23 So. 796; *Brown v. East*, 5 T. B. Mon. (Ky.) 405. But the foundation must first be laid: *Burke v. Voyles*, 5 Blatchf. (Ind.) 190.

⁴⁹ *Strong v. Strong*, 9 Cush. (Mass.) 560; *Shulte v. Hennessy*, 40 Iowa 352; *Lord v. Lord*, 5 E. & Bl. 404, 85 E. C. L. 404; see also, *Brown v. Harness*, 11 Ind. App. 426, 38 N. E. 1098.

⁵⁰ *Bridgeport v. Eisenman*, 47 Conn. 34; *Stalworth v. Inna*, 2 D. & L. 428; *Lord v. Lord*, 5 El. & B. 404, 84 E. C. L. 404; see also, *Brown v. Harness*, 11 Ind. App. 426, 38 N. E. 1098; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398.

⁵¹ *Doke v. James*, 4 N. Y. 568; *Cobb v. Dolphin*, 108 N. Y. 463, 15 N. E. 438; *Bigelow v. Maynard*, 4 Cush.

policy would, ordinarily, require the rejection of testimony of one of the arbitrators to impeach his own award by showing his own fraud or misconduct.⁵² But an arbitrator may be called in a proper case to sustain an award,⁵³ and may testify as to when it was made.⁵⁴ It has also been held that he may testify as to other matters arising in connection with the award, such as what was submitted and considered,⁵⁵ where the submission and award do not show it; and, in some instances he may testify to show an excess of jurisdiction or authority, or a mistake.⁵⁶ But testimony of arbitrators as to the grounds of their decision and what they intend to decide is not, ordinarily, admissible;⁵⁷ and there are some authorities to the effect that they cannot, ordinarily, testify as to what matters were submitted and considered.⁵⁸

(Mass.) 317; *King v. Jemison*, 33 Ala. 499; *Alexander v. McNear*, 28 Fed. (U. S.) 403; *Cobb v. Dortch*, 52 Ga. 548; *Wifwall v. Hall*, Quincy (Mass.) 27; *Hubbell v. Russell*, 2 Allen (Mass.) 196.

⁵² *Overby v. Thrasher*, 47 Ga. 10; *Elison v. Weathers*, 78 Mo. 115; *Kankakee &c. R. Co. v. Alfred*, 3 Ill. App. 511; *Tucker v. Page*, 69 Ill. 179; *Claycomb v. Butler*, 36 Ill. 100; *Elmaker v. Buckley*, 16 S. & R. (Pa.) 72; *French v. New*, 20 Barb. (N. Y.) 481; *Doke v. James*, 4 N. Y. 568; but see, *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 85; *King v. Armstrong*, 25 Ga. 264; *National Bank v. Derragh*, 30 Hun (N. Y.) 9, to the effect that one who refuses to join in the award may testify as to misconduct on the part of others. Where an affidavit of an arbitrator was used in support of an award, it was held that the court might permit him to be orally examined by the party impeaching the award: *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. 713.

⁵³ *Stone v. Atwood*, 28 Ill. 80; *Elison v. Weathers*, 78 Mo. 115; *Robertson v. McNeill*, 12 Wend. (N. Y.) 548.

⁵⁴ *Woodbury v. Northy*, 3 Me. 85, 4

Am. Dec. 214; see also, *Porter v. Dugat*, 12 Mart. O. S. (La.) 245.

⁵⁵ *Hale v. Huse*, 10 Gray (Mass.) 99; *Evans v. Clapp*, 123 Mass. 165, 25 Am. R. 52; *Spurck v. Crook*, 19 Ill. 415; *Stevens v. Gray*, 2 Har. (Del.) 347; *Converse v. Colton*, 49 Pa. St. 346; *Hammond v. Deehan*, 78 Me. 399, 6 Alt. 3; *Jensen v. Deep Creek &c. Co.*, (Utah) 74 Pac. 427, to sustain the award; *Brown v. Brown*, 49 N. Car. 123; *Buccleuch v. Metropolitan Board*, L. R. 5 Exch. 221, affirmed in L. R. 5 H. 418, 41 L. J. Exch. 137.

⁵⁶ *Barrows v. Sweet*, 143 Mass. 316, 9 N. E. 665; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. 834; *King v. Armstrong*, 25 Ga. 264.

⁵⁷ *Parker v. Parker*, 103 Mass. 167; *Cobb v. Dolphin &c. Co.*, 108 N. Y. 463, 15 N. E. 438; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Aldrich v. Jessiman*, 8 N. H. 516.

⁵⁸ *Ruckman v. Ramson*, 35 N. J. L. 565; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *State v. Stewart*, 12 Gill & J. (Md.) 458; see also, *Glade v. Schmidt*, 20 Ill. App. 157, affirmed in 126 Ill. 485; *Whitewater Valley Canal Co. v. Henderson*, 3 Ind. 3; *Rundell v. La Fleur*, 6 Allen (Mass.) 480; *De Long v. Stanton*, 9 Johns.

A valid oral submission, and its terms may, of course, be shown by parol evidence.⁵⁹ It has also been held that a recital in an award to the effect that the submission was in writing will not exclude parol evidence that it was oral, and then, to prove its terms.⁶⁰ So, when there is nothing in the submission or the law to forbid, the award may be oral, and in such cases, parol evidence is admissible to establish it and show its terms.⁶¹

§ 1665. **Defenses.**—"In defense of an action on an award, or for not performing an award, the defendant may avail himself of any material error or defect, apparent on the face of the award;" such as excess of power by the arbitrators,⁶² defect of execution of power, as by omitting to consider a matter submitted,⁶³ or submitting it to another and taking his opinion without exercising his own judgment,^{63*} or want of sufficient certainty;⁶⁴ and the same has been

(N. Y.) 38; *Shelling v. Farmer*, 1 Str. 646.

⁵⁹ *Boots v. Canine*, 58 Ind. 450, 456; *Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317; *Blackwell v. Goss*, 116 Mass. 394; *Torrence v. Graham*, 18 N. Car. 284; *Tucker v. Gordon*, 7 How. (Miss.) 306; *Birbeck v. Burrow*, 2 Hall (N. Y.) 51.

⁶⁰ *Boots v. Canine*, 94 Ind. 408.

⁶¹ *Smith v. Stewart*, 5 Ind. 220; *Mand v. Patterson*, 19 Ind. App. 619, 49 N. E. 974; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805, 4 Am. St. 834; *Boughton v. Seamans*, 9 Hun (N. Y.) 392.

⁶² *Clark v. Goit*, 1 Kans. App. 345, 41 Pac. 214; *Morgan v. Mather*, 2 Ves. 18; *Fisher v. Pimbley*, 11 East 189; *Macomb v. Wilber*, 16 Johns. (N. Y.) 227; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; see also, *Commonwealth v. Pejepscut Props.*, 7 Mass. 399; *Stearne v. Cope*, 109 Ill. 340; *Amos v. Buck*, 75 Iowa 651, 37 N. W. 118.

⁶³ *Mitchell v. Staveley*, 16 East 58; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Clark v. Goit*, 1 Kans. App. 345, 41 Pac. 214; but not unless the omis-

sion is material to the award: *Davy v. Faw*, 7 Cranch. (U. S.) 171; *Har-ker v. Hough*, 2 Halst. (N. J.) 428; *Doe v. Horner*, 8 Ad. & El. 235.

^{63*} *Harley Co. v. Barnefield*, (R. I.) 47 Atl. 544.

⁶⁴ *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Herbst v. Hagenauers*, 137 N. Y. 290, 33 N. E. 315; *Flannery v. Sahagian*, 134 N. Y. 85, 31 N. E. 319; *Mather v. Day*, 106 Mich. 371, 60 N. W. 198; *Clark v. Burt*, 4 Cush. (Mass.) 396; *Ross v. Clifton*, 9 Dowl. Prac. Cas. 360. An award defining a boundary may be defeated by proof that there were no such monuments as were referred to in the award. But a want of certainty in the award in this respect alone will not necessarily affect another portion of the same award determining that one party had trespassed upon the land of the other, and awarding to the latter party his damages and costs, though the trespass was upon the same land to which the disputed boundary had reference: *Gidding v. Hadaway*, 28 Vt. 342; award is not valid which provides for the payment, by one of

held as to a plain mistake of law, as allowing a claim of freight, where the ship had never broken ground,⁶⁵ and the like. As to corruption, or other misconduct or mistake of the arbitrators in making their award, the common law seems not to have permitted these matters to be shown in bar of an action at law for non-performance of the award; and the remedy was required to be pursued in equity.⁶⁶ But in this country, in those states where the jurisdiction in equity is not general, and does not afford complete relief in such cases, and under the codes which permit all defenses, whether legal or equitable, to be interposed, it has often been held that, if arbitrators act corruptly, or commit gross errors or mistakes in making their award, or take into consideration matters not submitted to them, or omit to consider matters which were submitted; or if the award be obtained by any fraudulent practice or suppression of evidence by the prevailing party, the defendant may plead and prove any of these matters in bar of an action at law to enforce the award.⁶⁷ And, although, as already shown,

the parties to the submission, of a certain sum, after making deductions therefrom of sums not fixed by, or capable of being ascertained from, the award: *Fletcher v. Webster*, 5 Allen (Mass.) 566. In *Waite v. Barry*, 12 Wend. (N. Y.) 377, it is said, "It is essential to the validity of an award that it should make a final disposition of the matters embraced in the submission, so that they may not become the subject or occasion of future litigation between the parties. It is not indispensable that the award should state, in words or figures, the precise amount to be paid. If nothing remains to be done, in order to render it certain and final, but a mere ministerial act, or an arithmetical calculation, it will be good:" see also, *Wakefield v. Llanelly & Co.*, Jur. (N. S.) 456; *Tidswell*, In re, 33 Beav. 213; *Ellison v. Bray*, 9 L. T. (N. S.) 730; see also, *Parker v. Dorsey*, 68 N. H. 181, 38 Atl. 785.

**Kelly v. Johnson*, 3 Wash. (U. S.) 45; see also, *Gross v. Zorger*, 3

Yeates (Pa.) 521; *Ross v. Overton*, 3 Call (Va.) 309; but see, *Carson v. Earlywine*, 14 Ind. 256.

**Hough v. Beard*, 8 Blackf. (Ind.) 158; *Shephard v. Watrous*, 3 Cal. (N. Y.) 166; *Barlow v. Todd*, 3 Johns. (N. Y.) 367; *Cranston v. Kenny*, 9 Johns. (N. Y.) 61; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Sherron v. Wood*, 5 Halst. (N. J.) 7; *Newland v. Douglass*, 2 Johns. (N. Y.) 62; *Hartford & Co. v. Bonner Merc. Co.*, 44 Fed. (U. S.) 151, 11 L. R. A. 623; *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, 21 So. 958; *Thorburn v. Barnes*, L. R. 2 C. P. 384.

**Bean v. Farnam*, 6 Pick. (Mass.) 269; *Brown v. Bellows*, 4 Pick. (Mass.) 183; *Parson v. Hall*, 3 Greenl. (Me.) 60; *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Williams v. Paschall*, 3 Yeates (Pa.) 564; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Lincoln v. Taunton Copper Mfg. Co.*, 8 Cush. (Mass.) 415; *Leavitt v. Comer*, 5 Cush.

arbitrators are not, ordinarily, bound to disclose the ground of their award,⁶⁸ yet it has been held that they may be examined to prove that no evidence was given upon a particular subject;⁶⁹ or, that certain matters were or were not examined, or acted on by them, or that there is mistake in the award;⁷⁰ and likewise as to the time and circumstances under which the award was made,⁷¹ and as to facts which transpired at the hearing.⁷² It is also said that fraud in obtaining

(Mass.) 129; French v. Richardson, 5 Cush. (Mass.) 450; Thornton v. McCormick, 75 Iowa 285; Hyeronimus v. Allison, 52 Mo. 102; Leitch v. Miller, 40 Mo. App. 180; Downey v. Atchison & C. R. Co., 60 Kans. 499, 57; Briggs v. Smith, 20 Barb. (N. Y.) 409; Hiscock v. Harris, 80 N. Y. 402; French v. New, 20 Barb. (N. Y.) 481; Taylor v. Sayre, 4 Zab. (N. J.) 647; Tracy v. Herrick, 25 N. H. 381; see also, Morgan v. Smith, 9 M. & W. 427; Angus v. Redford, 11 M. & W. 69; an award made in pursuance of a reference under a rule of court will not be set aside for alleged mistakes of law on the part of the referees, unless they have themselves been misled, or unless they refer questions of law to the court: Fairchild v. Adams, 11 Cush. (Mass.) 549; Bigelow v. Newell, 10 Pick. (Mass.) 348; when all claims and demands between the parties are submitted to arbitration, it will be intended that the arbitrators have decided all matters submitted to them, although they do not so state in their award, unless the contrary appears: Tallman v. Tallman, 5 Cush. (Mass.) 325; Clement v. Comstock, 2 Mich. 359; an award made twelve years after the submission is invalid, unless sufficient reason is shown for the delay: Hook v. Philbrick, 23 N. H. 288; the refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set

aside his award: Phipps v. Ingram, 3 Dowl. 669; Halstead v. Seaman, 82 N. Y. 27; McDonald v. Lewis, 18 Wash. 300; so, it seems, if he refuses to hear any relevant evidence: Hurdle v. Stallings, 109 N. Car. 6, 13 S. E. 720; but there must be an actual offer of evidence: Stemmer v. Scottish Ins. Co., 53 Ore. 33, 65 Pac. 498.

⁶⁸ Ante, § 1664; Henry v. Hilliard, 120 N. Car. 479, 27 S. E. 130.

⁶⁹ Martin v. Thornton, 4 Esp. 180.

⁷⁰ Roop v. Brubacker, 1 Rawle (Pa.) 304; Alder v. Savill, 5 Taunt. 454; Zeigler v. Zeigler, 2 S. & R. (Pa.) 286; if, upon a submission of "all matters in difference," the parties omit to call the attention of the arbitrator to a matter not necessarily before him, they can not object to the award on the ground that he has not adjudicated upon it: Rees v. Waters, 16 M. & W. 263.

⁷¹ Woodbury v. Northy, 3 Greenl. (Me.) 85; Lincoln v. Taunton Mfg. Co., 8 Cush. (Mass.) 415; ante, § 1664, note 54.

⁷² Gregory v. Howard, 3 Esp. 113; they may testify to any facts tending to show that the award is void for legal cause: Strong v. Strong, 9 Cush. (Mass.) 560; as that they did not suppose the reference was final: Huntsman v. Nichols, 116 Mass. 521; the testimony of referees is admissible to identify matters submitted to them, and to show that they acted on them; but a written submission

the submission may be given in evidence under the plea of non assumpsit, or nil debet, by the common law.⁷³ Where the action is assumpsit upon a submission by parol, the plea of non assumpsit, where it is not otherwise restricted by rules of court, puts in issue every material averment of the declaration. "Under this issue, therefore," it is said, "the defendant may not only show those things which affect the original validity of the submission, or of the award, such as infancy, coverture, want of authority in the arbitrators, fraud, revocation of authority, intrinsic defects in the award, and, if there is no other mode of relief, extrinsic irregularities also, such as want of notice and the like; but he may also show anything which at law would defeat and destroy the action, though it operate by way of confession and avoidance, such as a release, payment, or performance."⁷⁴ So, in debt on an award the general issue of nil debet puts in issue every material allegation of the declaration.⁷⁵ "And sometimes, where assumpsit has been brought upon the original cause of action, either party has been permitted to show the submission and award under the general issues, as evidence of a statement of accounts and an admission of the balance due, or of a mutual adjustment of the amount in controversy."⁷⁶ It has also been held that, while the submission must, ordinarily, be proved in an action upon an award, where the party against whom the

or award cannot be varied or explained by parol: *Buck v. Spofford*, 35 Me. 526; declarations by an arbitrator, some days after making and publishing his award, are incompetent to impeach it: *Hubbell v. Bissell*, 2 Allen (Mass.) 196; it has been held that an award may be binding though the arbitrators meet outside the state: *Edmundson v. Wilson*, 108 Ala. 118, 19 So. 367, and that it is not binding where the arbitrators strike an average between their opinions as to the amount due: *Luther v. Medbury*, 18 R. I. 141, 26 Atl. 37.

⁷³ *Sackett v. Owen*, 2 Chitty 39.

⁷⁴ See and compare, *Rice v. Loomis*, 28 Ind. 389.

⁷⁵ 2 Greenleaf Ev. § 81; *Stephen* Pl. pp. 179-182 (Am. ed. 1894); *Taylor v. Coryell*, 12 S. & R. (Pa.) 243, 251; *Allen v. Watson*, 16 Johns. (N. Y.) 203; see also, *Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. R. 486; *Woodbury v. Northy*, 3 Me. 85, 149 Am. Dec. 214; *Abbott v. Skinner*, 11 U. C. C. P. 309.

⁷⁶ *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Ott v. Schroepel*, 3 Barb. (N. Y.) 56; *Blood v. Bates*, 31 Vt. 147; *Turner v. Alway*, 5 U. C. Q. B. (O. S.) 45; but compare, *Connecticut & Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118.

⁷⁷ 2 Greenleaf Ev. § 81; *Keen v. Batshore*, 1 Esp. 194; *Kingston v. Phelps*, Peake Cas. 228.

award is sought to be used admits it in his pleadings, he also in effect admits the submission, and further evidence thereof is unnecessary.⁷⁷

§ 1666. **Revocation.**—The defendant may also, in most jurisdictions, show that the authority of the arbitrators was revoked before the making of the award,⁷⁸ unless it is made under a rule of court and no leave is granted to revoke it.^{78*} And the death of either of the parties to a submission at common law, before the award is made, will amount to revocation;⁷⁹ unless it is otherwise clearly provided in the submission.⁸⁰ Whether bankruptcy is a revocation, is not clearly settled.⁸¹ Where the submission is at common law, and in some instances, even where it is under the statute, but is not yet made a rule of court, it seems that either party may revoke the authority of the arbitrators; though he may render himself liable to an action for so doing.⁸² But if the submission is by two, a revocation by one only has been held to be void.⁸³

⁷⁷ *Sadler v. Olmstead*, 79 Iowa 121, 44 N. W. 292.

⁷⁸ *Harrison v. Hartford Fire Ins. Co.*, 112 Iowa 77, 83 N. W. 820; *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275; 9 Am. St. 532; *Boston & C. R. Co. v. Nashua & C. R. Co.* 139 Mass. 463, 31 N. E. 751; *Butler v. Green*, 49 Neb. 280, 68 N. W. 496; but not afterwards: *Coon v. Allen*, 156 Mass. 113, 30 N. E. 83; *Connecticut & C. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118; in a few cases a submission has been held irrevocable: *McKenna v. Lyle*, 155 Pa. St. 599, 26 Atl. 777, 35 Am. St. 910; *McCune v. Lytle*, 197 Pa. St. 404, 47 Atl. 190; *Guild v. Atchison & C. R. Co.*, 57 Kans. 70, 45 Pac. 82, 33 L. R. A. 77.

^{78*} *Bash v. Christian*, 77 Ind. 290; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *California Academy v. Fletcher*, 99 Cal. 207, 33 Pac. 855.

⁷⁹ *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Edmund v. Cox*, 2 Tidd Pr. 877, 3 Doug. 406, 2 Chitty 422; *Cooper v. Johnson*, 2 B. & A. 394; *Potts v. Ward*, 1 Marsh. (U. S.) 366; but

compare, *Citizens' Ins. Co. v. Colt*, 12 Ind. App. 161, 39 N. E. 766; *Michigan & C. Church v. Hearson*, 41 Ill. App. 89; *Chapman v. Seccomb*, 36 Me. 102; *Toussaint v. Hartop*, 7 Taunt. 571; so held where one refuses to act: *Wolf v. Augustine*, 181 Pa. St. 576, 37 Atl. 574; but if the submission is under a rule of court, and the action survives, it is not revoked by death: *Bacon v. Crandon*, 15 Pick. (Mass.) 79; see also, *Bash v. Christian*, 77 Ind. 290.

⁸⁰ *Macdougall v. Robertson*, 2 Y. & J. 11, 4 Bing. 435; *Mooers v. Allen*, 35 Me. 276, 58 Am. Dec. 700; *Bailey v. Stewart*, 3 W. & S. (Pa.) 560.

⁸¹ *Marsh v. Wood*, 9 B. & C. 659; *Andrews v. Palmer*, 4 B. & A. 250; *Kemshead, Ex parte*, 1 Rose 149.

⁸² *Skee v. Coxon*, 10 B. & C. 483; *Milne v. Gratrix*, 7 East 608; *Clap-*

⁸³ *Robertson v. McNeill*, 12 Wend. (N. Y.) 578; see also, *Lewis Appeal*, 91 Pa. St. 359; *Wilde v. Vinor*, 1 Brownl. 62, and compare, *Brown v. Leavitt*, 26 Me. 251.

§ 1667. **Disability.**—It has been said that the defendant may also show, in defense, that one or more of the parties to the submission was a minor, or a feme covert, and that therefore the submission was void for the want of mutuality.⁸⁴ So, he may show that the arbitrators, before making their award, declined that office, and thereupon they ceased to be arbitrators;⁸⁵ or that the arbitrators, unknown to him in time to object, were incompetent and disqualified.⁸⁶ But it has been held that an objection that some of the parties had no capacity to contract is not available to those who have such capacity.⁸⁷

ham v. Higham, 1 Bing. 87, 7 Moore 703; *Greenwood v. Misdale*, 1 McCl. & Y. 276; *Brown v. Tanner*, 1 McCl. & Y. 464, 1 Car. & P. 651; *Warburton v. Storr*, 4 B. & C. 103; *Vynior Case*, 8 Coke 162; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Fisher v. Pimbley*, 11 East 187; *Peters v. Craig*, 6 Dana (Ky.) 307; *Marsh v. Bulteel*, 5 B. & A. 507; *Grazebrook v. Davis*, 5 B. & C. 534, 538; *Brown v. Leavitt*, 13 Shepl. (Me.) 251; *Marsh v. Packer*, 5 Washb. (Vt.) 198; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *People v. Nash*, 111 N. Y. 310, 18 N. E. 630 7 Am. St. 747, 2 L. R. A. 180; this is said to be true though the matters submitted are in litigation: *Minneapolis & C. R. Co. v. Cooper*, 59 Minn. 290, 61 N. W. 143; a submission to arbitrators, if it is not founded on any consideration, or is not made a rule of court, may be revoked by the party submitting at any time before the award is delivered; but in Pennsylvania it is not so, when it is made under an agreement founded on sufficient consideration: *Paist v. Caldwell*, 75 Pa. St. 161; *Lewis appeal*, 91 Pa. St. 359.

*2 *Greenleaf* § 80; *Biddell v. Dowse*, 6 B. & C. 255; see also, *Britton v. Williams*, 6 Munf. (Va.) 453; *Mann v. Richardson*, 66 Ill. 481; *Stahl v. Brown*, 72 Iowa 720, 32 N.

W. 105; but it is not a good objection that one was an executor or administrator only, where he has authority to submit to arbitration: *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnam*, 6 Ind. 269; *Dickey v. Sleeper*, 13 Mass. 244.

* *Relyea v. Ramsay*, 2 Wend. (N. Y.) 602; *Allen v. Watson*, 16 Johns. (N. Y.) 203; see also, *Kimball v. Gilman*, 60 N. H. 54; *Johnson v. Cheney*, 17 Tex. 336.

* *Connor v. Simpson*, (Pa.) 7 Atl. 161; *Stinson v. Davis*, (Ky.) 50 S. W. 550; *Milnor v. Georgia & C. Co.*, 4 Ga. 385; *Stephenson v. Oatman*, 3 Lea (Tenn.) 462; but see, *Goodrich v. Hulbert*, 123 Mass. 190, 25 Am. R. 60; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446, 14 Am. St. 510; *Stemmer v. Scottish Ins. Co.*, 33 Ore. 65, 49 Pac. 588, 53 Pac. 498; *Elliott & C. Co.*, In re, 2 De G. Sm. 17, 12 Jur. 445; *Ellis v. Hopper*, 3 H. & N. 766, 28 L. J. Exch. 1; *Eckersley v. Mersey Docks & C.*, (1894) L. R. 2 Q. B. 667.

* *Chambers v. Ker*, 6 Tex. Civ. App. 373, 24 S. W. 1118; *Fort v. Battle*, 13 Sm. & N. (Miss.) 133; see also, *Boyd v. Magruder*, 2 Rob. (Va.) 761. There is, perhaps, no necessary conflict between this doctrine and that stated in the opening sentence of this paragraph, as much may depend upon the nature and extent of the arbitration and the particular

§ 1668. **Award as evidence in other proceedings.**—As a general rule a valid award merges all claims embraced in the submission, and it is generally conclusive evidence of facts necessarily involved in the arbitration in a subsequent litigation between the same parties or their privies when the same facts are directly in issue.⁸⁸ But an award is not, ordinarily, at least, competent evidence against one who was neither a party to the arbitration nor in privity with a party thereto.⁸⁹ And it has also been held that the rule which permits a verdict, in some instances, to be shown as evidence of reputation, even between strangers to the record, does not apply to an award.⁹⁰

circumstances of each case. *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825; *Prentiss v. Wood*, 132 Mass. 486; *Gaylord v. Gaylord*, 48 N. Car. 367; *Haubrick v. Johnston*, 23 Minn. 237; *Terre Haute &c. R. Co. v. Harris*, 126 Ind. 9, 25 N. E. 831; *Tennessee Mfg. Co. v. Haines*, 16 R. I. 204, 14 Atl. 853; *Whitehead v. Tattersall*, 1 Ad. & El. 491, 28 E. C. L. 239; *Gueret v. Audouy*, 62 L. J. Q.

B. 633; as to when it is *prima facie* evidence, see, *Withington v. Warren*, 12 Metc. (Mass.) 114.

⁸⁸ *Emery v. Fowler*, 38 Me. 99; *Coon v. Osgood*, 15 Barb. (N. Y.) 583; *Woodward v. Woodward*, 14 Ill. 370; *Smith v. Webber*, 1 Ad. & El. 119; but compare, *Thorpe v. Eyre*, 1 Ad. & El. 926, 28 E. C. L. 426.

⁹⁰ *Evans v. Rees*, 10 Ad. & El. 151, 37 E. C. L. 101.

CHAPTER LXXXIII.

ASSAULT AND BATTERY.

Sec. 1689. Generally. 1690. Burden of proof. 1691. Questions of law or fact. 1692. Scope of evidence—Res gestae. 1693. Time and place. 1694. Character or reputation. 1695. Declarations and admissions— Res gestae.	Sec. 1696. Opinions and conclusions of witnesses. 1697. Justification. 1698. Son assault demesne. 1699. Molliter manus imposuit. 1700. Moderate castigavit. 1701. Other defenses. 1702. Evidence in mitigation. 1703. Damages—Aggravation.
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§ 1689. **Generally.**—"An assault," says Judge Cooley, "is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. . . . A successful assault becomes a battery. A battery consists in an injury actually done to the person of another in an angry or revengeful, or rude or insolent manner."¹ There must in a sense be an intent, express or implied, to do injury, and an accidental injury, as to which the actor was blameless, is no battery.² But it is not essential that the actor should have designed to inflict the precise injury that he did inflict;³ and personal injury

¹ Cooley Torts (1st ed.) 160, 162; 59 Me. 568, 8 Am. R. 442; Shriver v. Bean, 112 Mich. 598, 71 N. W. 145; 14 L. R. A. 226; 1 Hawk P. C. 263; Metcalfe v. Conner, 5 Litt. (Ky.) 370; Paxton v. Boyer, 67 Ill. 132, 16 Coward v. Baddeley, 4 H. & N. 478; Am. R. 615; but compare, Carlton v. Bishop Non-Contract Law §§ 190 et seq. Henry, 129 Ala. 479, 29 So. 924; and see generally, Brown v. Collins, 53 (Mass.) 292; Fitzgerald v. Cavin, N. H. 442; Wakeman v. Robinson, 1 110 Mass. 153; Gibbons v. Pepper, 4 Bing. 213; Weaver v. Ward, Hob. Mod. 405; Alderson v. Waistell, 1 134; Fletcher v. Rylands, L. R. 3 H. Car. & K. 358; Stanley v. Powell, L. 330.
² State v. Myers, 19 Iowa 517; (1901) L. R. 1 Q. B. 6, 60 L. J. Q. B. 52; see also Commonwealth v. White, Corning v. Corning, 6 N. Y. 97; Vos- 110 Mass. 407; Stearns v. Sampson, burg v. Putney, 80 Wis. 528, 50 N.

to another by one who is doing an unlawful act, or by reckless conduct on his part, may constitute an assault and battery although there was no actual intention to inflict the injury.⁴

§ 1690. **Burden of proof.**—Under a plea of “not guilty,” or general denial, the burden is upon the plaintiff to prove every material allegation of his declaration or complaint.⁵ But it has been held that he need not show, in the first instance at least, by direct evidence that the defendant actually intended to commit the injury.⁶ Where excessive force or abuse of authority is alleged, the burden is upon the plaintiff to show it.⁷ But, ordinarily, where the assault and battery is proved, the burden of going forward with evidence in justification or mitigation is upon the defendant;⁸ and it has been held that if the

W. 403, 14 L. R. A. 226, and note; *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81; *Scott v. Shephard*, 2 W. Bl. 892; *Horne v. Mandelbaum*, 13 Ill. App. 607; *Ricker v. Freeman*, 50 N. H. 420, 9 Am. R. 267.

⁴ *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221; *Vosburg v. Putney*, 86 Wis. 278, 56 N. W. 480, 14 L. R. A. 226, and note; *Welch v. Durand*, 36 Conn. 182, 4 Am. R. 55; *James v. Hayes*, 63 Kans. 133, 65 Pac. 241; *Markley v. Whitman*, 95 Mich. 236, 54 N. W. 763, 20 L. R. 55, 35 Am. St. 558; *James v. Campbell*, 5 Car. & P. 372; see also, where injury is inflicted in a fight engaged in by consent: *Adams v. Waggoner*, 33 Ind. 531; *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008, 30 Am. St. 413; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; *Boulter v. Clark*, Buller N. P. 16; *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. 535.

⁵ *Cogdell v. Yett*, 1 Coldw. (Tenn.) 229; but a preponderance of the evidence is generally held sufficient; *Shaul v. Norman*, 34 Ohio St. 157; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. R. 668; even to warrant exemplary damages, *St. Ores v. McGlash-*

en, 74 Cal. 148, 15 Pac. 452; he must prove the assault and resulting injury, *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 512.

⁶ *Conway v. Reed*, 66 Mo. 346, 27 Am. R. 354; actual intention is usually more important in case of mere assault than where there is also a battery.

⁷ *Finnell v. Bohannon*, (Ky), 44 S. W. 94; *Henry v. Lowell*, 16 Barb. (N. Y.) 268; *Ayres v. Birtch*, 35 Mich. 501; *Wilkes v. Dinsman*, 7 How. (U. S.) 89; see also, where son assault demense, with general replication de injuria is pleaded: *Sampson v. Henry*, 11 Pick. (Mass.) 379; *Frederick v. Gilbert*, 8 Pa. St. 454; *Watson v. Hastings*, 1 Pen. (Del.) 47, 39 Atl. 587.

⁸ *Rutherford v. Foster*, 125 Fed. 187, 60 C. C. A. 129; *Conway v. Reed*, 66 Mo. 346, 27 Am. R. 354; *Tucker v. Johnson*, 89 Md. 471, 43 Atl. 778, 46 L. R. A. 181; *Schlosser v. Fox*, 14 Ind. 365; *Gizler v. Witzel*, 82 Ill. 322; *Great Southern R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. 28; *Hathaway v. Hatchard*, 160 Mass. 296, 35 N. E. 857; *Wakefield v. Fairman*, 41 Vt. 339; plaintiff need not show in the first instance that it

commission of the alleged assault and battery is admitted by the defendant and justification is pleaded, the burden is upon him; and he has the right to open and close.⁹

§ 1691. **Questions of law or fact.**—It is for the court to determine what is sufficient in law to constitute an assault,¹⁰ and there may be cases in which the evidence is undisputed and in which some question is so clear that the court could decide it as one of law, but they are not numerous.¹¹ Ordinarily, it is for the jury to determine, under proper instructions, whether there was an assault,¹² whether excessive force was used¹³ by one having authority, whether the injury was the result of the defendant's wrongful act,¹⁴ its extent,¹⁵ and the amount of damages.¹⁶ And the same is true as to various other questions that usually arise under a plea of justification or the like.¹⁷

§ 1692. **Scope of evidence—Res gestae.**—The scope of the evidence depends upon the issues and nature of the particular case. The plaintiff is usually confined to the particular assault or assaults charged,¹⁸

was without cause or justification, *Sweet v. Boyd*, (Iowa) 98 N. W. 601; see also, *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 712.

⁹ *Seymour v. Bailey*, 76 Ga. 339; *Johnson v. Strong*, (Ky.) 58 S. W. 430; *Berkner v. Dannenberg*, (Ga.) 43 S. E. 463, but not unless he admits the commission of the acts charged.

¹⁰ *Handy v. Johnson*, 5 Md. 450.

¹¹ *Cooley Torts* (1st ed.) 169; citing, *Commonwealth v. Rush*, 112 Mass. 58; *Edwards v. Leavitt*, 46 Vt. 126; *Hanson v. European & C. R. Co.*, 62 Me. 84, 16 Am. R. 404; *Currier v. Swan*, 63 Me. 323; see also, *Martin v. Moore*, (Md.) 57 Atl. 671; *Willet v. Johnson*, 13 Okla. 563, 76 Pac. 174.

¹² *Mailand v. Mailand*, 83 Minn. 453, 86 N. W. 445.

¹³ *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *Murdock v. Ripley*, 35 Me. 472; and for this reason the opinion of a witness as

to whether the force was excessive has been held inadmissible; *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

¹⁴ *Culley v. Walkeen*, 80 Mich. 443, 45 N. W. 368; see also, *Carlton v. Henry*, 129 Ala. 479, 29 So. 924; *Willi v. Lucas*, 110 Mo. 219, 19 S. W. 726.

¹⁵ *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *Reddin v. Gates*, 52 Iowa 210, 2 N. W. 1079.

¹⁶ *Gronan v. Kukkuck*, 59 Iowa 18, 12 N. W. 748; *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 307; *Thillman v. Neal*, 88 Md. 525, 42 Atl. 242; *Cross v. Carter*, 100 Ga. 632, 28 S. E. 390; *Borland v. Barrett*, 76 Va. 128, 44 Am. R. 152.

¹⁷ *Collins v. Walters*, 54 Ill. 485, *Handy v. Johnson*, 5 Md. 450; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; *Higgins v. Minaghan*, 76 Wis. 298, 45 N. W. 127.

¹⁸ *Carpenter v. Crane*, 5 Blackf. (Ind.) 119; *Peyton v. Rogers*, 4 Mo. 254; see also, as to the effect of a

and evidence is not admissible on the part of the plaintiff to prove that the assault was committed by another than the defendant when the latter was not present and there is nothing to show that such other person was acting under the defendant's authority.¹⁹ All the *res gestae* may generally be shown, and these may include not only direct evidence of just what was done by the parties at the time, but also declarations constituting part of the transaction,²⁰ and other circumstances of the assault.²¹ Evidence as to the physical condition or appearance of the parties has also been held admissible,²² in a proper case. In a recent case in an action against a street railway company for an assault and battery committed by its conductor, it was held proper to show the age and relative sizes of the plaintiff and the conductor and also that the conductor had used profane language to the plaintiff's companion on the same car, whereby the trouble was started.²³ So, in general, it may be said that proper evidence is admissible for the plaintiff to prove any fact which is necessary for him to prove in order to make his case under the issues, and, evidence which might not otherwise be admissible may be admissible upon the question of damages. The inducement of the acts or conduct of the parties forming part of the assault or leading up to it, and matters throwing light on the alleged assault, may usually be shown on the question of the

replication de injuria where two assaults are charged and one justified and, also, as to the difference where the plaintiff newly assigns on a plea of "not guilty" after a plea of "not guilty" and son assault demesne. *Berry v. Borden*, 7 Blackf. (Ind.) 384; *West v. Rousseau*, 7 Blackf. (Ind.) 450.

¹⁹ *Bacon v. Hooker*, 173 Mass. 554, 54 N. E. 253; see also, *McCann v. Tillingham*, 140 Mass. 327, 5 N. E. 164; *McManus v. Crickett*, 1 East 106; *Morley v. Gaisford*, 2 H. Bl. 442; but see as to evidence of acts of aiders and abettors, *Goetz v. Ambs*, 27 Mo. 28; *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290; *Cleveland v. Stilwell*, 75 Iowa 466, 39 N. W. 711; *Cox v. Crumley*, 5 Lea (Tenn.) 529; *Reizenstein v. Clark*, 104 Iowa 287, 73 N. W. 588.

²⁰ *Puett v. Beard*, 86 Ind. 104; *Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314; *Crow v. State*, 41 Tex. 468; *State v. Wiggins*, 152 Mo. 170, 53 S. W. 421; *Cleveland v. Stilwell*, 75 Iowa 466, 39 N. W. 711; *Smith v. Dawley*, 92 Iowa 312, 60 N. W. 625.

²¹ *Smith v. State*, 123 Ala. 64, 26 So. 641; *Bruce v. Priest*, 87 Mass. 100; *Brzezinski v. Tierney*, 60 Conn. 55, 22 Atl. 486; *Blake v. Damon*, 103 Mass. 199; *Commonwealth v. Crawley*, 167 Mass. 434, 45 N. E. 766; *Hoffmann v. State*, 65 Wis. 46, 26 N. W. 110.

²² *Harris v. State*, 123 Ala. 69, 26 So. 515; *Thomason v. Gray*, 82 Ala. 292, 3 So. 38; *Hodges v. State*, 15 Ga. 117.

²³ *Birmingham &c. Co. v. Mullen*, (Ala.) 35 So. 701.

animus or blame to be attached to either party, and to aid the jury in determining the question of damages,²⁴ provided the evidence is not too remote.²⁵ The scope of the evidence of the defendant is determined somewhat by the plaintiff's evidence, and more especially by the pleadings and issues thereby presented. Thus, as hereafter shown, evidence is inadmissible to establish justification unless it is specially pleaded;²⁶ but evidence tending to prove that the defendant did not commit the assault charged is admissible under the general issue. It has been held that a defendant, who is sued for assault and battery alleged to have been committed by his servant in the line of his employment, may prove under the general denial that the plaintiff assaulted his servant and that the latter inflicted the injury complained of in an attempt to defend himself.²⁷

§ 1693. *Time and place.*—As a general rule, neither the time nor the place is required to be proved precisely as charged. Proof of the assault at any time prior to the commencement of the action is generally sufficient.²⁸ So proof that it was committed at any place within the county is likewise sufficient.²⁹

²⁴ *MacDongal v. Maguire*, 35 Cal. 274, 95 Am. Dec. 98; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Blake v. Damon*, 103 Mass. 199; *Baker v. Gausin*, 76 Ind. 317; *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527; *Hammond v. Hightower*, 82 Ga. 290, 9 S. E. 1101; *Flint v. Bruce*, 68 Me. 183; *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548; *Bartram v. Stone*, 31 Conn. 159; *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060; *Watkins v. Gaston*, 17 Ala. 664; *Byers v. Horner*, 47 Md. 23; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Sledge v. Pope*, 3 N. Car. 402.

²⁵ *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347; *Irwin v. Yeager*, 74 Iowa 174, 37 N. W. 136; *Morgan v. O'Daniel*, (Ky.) 53 S. W. 1040; *Badostain v. Graziade*, 115 Cal. 425, 47 Pac. 118; *Chapell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Miller v. Curtis*, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. 469; see also, *Taylor v. Ad-*

ams, 58 Mich. 187, 25 N. W. 864; 58 Mich. 187, 24 N. W. 864; *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. 989; *Kuhn v. Freund*, 87 Mich. 545, 49 N. W. 867.

²⁶ *Norris v. Casel*, 90 Ind. 143; *Myers v. Moore*, 3 Ind. App. 226.

²⁷ *Oakland City & C. Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383.

²⁸ *Palmer v. Skillenger*, 5 Har. (Del.) 235; *Sellers v. Zimmerman*, 18 Md. 255; *Buller N. P.* 86; but see, where plea of son assault demesne is interposed: *Gibson v. Fleming*, 1 Har. & J. (Md.) 483; *Buller N. P.* 17.

²⁹ *Hammer v. Pierce*, 5 Har. (Del.) 304; *Miller v. McKee*, 3 Har. & M. (Md.) 593; *Hurley v. Marsh*, 2 Ill. 329; *Mostyn v. Fabrigas*, Cowp. 161. In some jurisdictions, as the action is personal and transitory, the assault and battery need not be alleged and proved to have been even in the county.

§ 1694. **Character or reputation.**—As already shown, evidence of the physical condition, relative size of the parties, or the like, is sometimes admissible, but character or reputation is not, ordinarily, in issue in an action for assault and battery. Thus, evidence of the defendant's good character or reputation for peace is not, ordinarily, admissible.³⁰ So, the plaintiff cannot, as a rule, show that he is a man of good character or reputation.³¹ Nor can the defendant, especially if he was the aggressor, ordinarily show, to reduce or mitigate damages, that the plaintiff was of a turbulent and quarrelsome disposition.³² But where self-defense is properly relied on, it is usually competent to show the quarrelsome character of the other party, and that this fact was known to the party, who seeks to show it, at the time of the assault in question.³³

§ 1695. **Declarations and admissions—Res gestae.**—As a general rule any acts or declarations that are part of the *res gestae* are admissible.³⁴ What was said at the time is admissible in evidence as part of

³⁰ *Elliott v. Russell*, 92 Ind. 526; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. 805; *Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859; *Reddin v. Gates*, 52 Iowa 210, 2 N. W. 1079; *Day v. Ross*, 154 Mass. 13, 27 N. E. 676; *Soule v. Bruce*, 67 Me. 584; *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876, 6 Am. St. 305; *Barr v. Post*, 56 Neb. 698, 77 N. W. 123; *Smithwick v. Ward*, 7 Jones L. (N. Car.) 64, 75 Dec. 453; *Brown v. Evans*, 17 Fed. (U. S.) 912, affirmed in 102 U. S. 180; but see, *Schuek v. Hagar*, 24 Minn. 339.

³¹ *Denton v. Ordway*, 108 Iowa 487, 79 N. W. 271; *Quinton v. Van Tuyl*, 30 Iowa 554; *Givens v. Bradley*, 3 Bibb (Ky.) 192, 6 Am. Dec. 646.

³² *Smithwick v. Ward*, 7 Jones L. (N. Car.) 64, 75 Am. Dec. 453; *Kuney v. Dutcher*, 56 Mich. 308, 22 N. W. 866, 868; *Macintosh v. Bartlett*, 67 Me. 130; *Hall v. Power*, 12 Metc. (Mass.) 482, 46 Am. Dec. 698; *McCarty v. Leary*, 118 Mass. 593; *Corning v. Corning*, 6 N. W. 625; *Nelson v.*

Dimick v. Downs, 82 Ill. 570; *Gardiner v. Cross*, 6 Rob. (La.) 454; *McKenzie v. Allen*, 3 Strobb. L. (S. Car.) 546; *Shook v. Peters*, 59 Tex. 393.

³³ *Galbraith v. Fleming*, 60 Mich. 403, 27 N. W. 581; *Culley v. Walken*, 80 Mich. 443, 45 N. W. 368; *Knight v. Smythe*, 57 Vt. 529; *Beckman v. Souther*, 68 N. H. 381, 36 Atl. 14; *Golder v. Lund*, 50 Neb. 867, 70 N. W. 379; *Silliman v. Sampson*, 42 N. Y. App. Div. 623, 59 N. Y. S. 923; *Keep v. Quallman*, 68 Wis. 451, 32 N. W. 233.

³⁴ *Macdougall v. Macguire*, 35 Cal. 274, 95 Am. Dec. 98; *Guen v. Bedell*, 48 N. H. 546; *Blake v. Damon*, 103 Mass. 199; *Bruce v. Priest*, 87 Mass. 100; *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. 883; *Pokriefka v. Mackurat*, 91 Mich. 399, 51 N. W. 1059; *Scheel v. Reimer*, 98 Mich. 126, 56 N. W. 1108; *Brzezinski v. Tierney*, 60 Conn. 55, 22 Atl. 486; *Smith v. Dawley*, 92 Iowa 312, 60 N. W. 625; *Nelson v.*

the *res gestae* as well as what was done, and even an exclamation by a bystander, has been held competent to show the appearances as they were presented to the defendant when the blow was struck.⁸⁵ But it is not competent for a bystander to testify as to what he thought of the assault, and it has also been held that it is not competent for the plaintiff to show in such a case that, at the time of the assault, bystanders asked a policeman to arrest the defendant, and made comments in favor of the plaintiff and against the defendant.⁸⁶ So, where the question of fact upon which the right of the plaintiff to recover depended was as to whether the defendant directed his son to throw the plaintiff out of the saloon, a statement of the son made upon the trial of an action against him, for the same assault to the effect that he took the plaintiff's money after he was injured, and said he would go and get a hack for the plaintiff but forgot it and spent the money for beer, was held inadmissible, although the son was insolvent and had been killed in a railroad accident after the recovery of a judgment against him.⁸⁷ And declarations of a defendant, pleading self-defense, that he would not go to a certain place, for fear he might have trouble with the plaintiff, made on occasions different from the occasion of the assault, have been held inadmissible as too remote.⁸⁸ A judgment of conviction against the defendant on a plea of guilty in a criminal prosecution for the same assault and battery may be shown as an admission of the defendant.⁸⁹ So, admissions or confessions of a defendant, whether directly made or inferred from silence, may be shown,⁹⁰ and it has been held that evidence of a disposition of his property after the commission of the alleged assault may be received

State, (Tex. Civ. App.) 20 S. W. 766.

⁸⁵ *Baker v. Gausin*, 76 Ind. 317; see, Vol. I, § 550.

⁸⁶ *Kuhn v. Freund*, 87 Mich. 545, 49 N. W. 867; see, Vol. I, § 550.

⁸⁷ *Murphy v. Cuff*, 177 N. Y. 314, 69 N. E. 607.

⁸⁸ *Evans v. Elwood*, (Iowa) 98 N. W. 584; see also, *Irwin v. Yeager*, 74 Iowa 174, 37 N. W. 136; but compare, *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346; both prior and subsequent declarations may, however, be admissible where it is material to show motive or malice or ill will on the question of damages;

see, *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202; *Byers v. Horner*, 47 Md. 23; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. R. 383; *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548; *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060.

⁸⁹ *Hamm v. Romine*, 98 Ind. 77; see also, *Corwin v. Walton*, 18 Mo. 71; *Hauser v. Griffith*, 102 Iowa 215, 71 N. W. 223; *Rex v. Morean*, 12 Jur. 626.

⁹⁰ *Cleveland v. Stilwell*, 75 Iowa 466, 39 N. W. 711; *Puett v. Beard*, 86 Ind. 104; *Breitenbach v. Townbridge*, 64 Mich. 393, 31 N. W. 402.

as tending to show an admission or to explain the character of the acts.⁴¹ But admissions or declarations by one co-defendant are not admissible against another,⁴² unless made in the course of a conspiracy, or before the separation of the parties where circumstances of aggravation are shown, or the like.⁴³

§ 1696. **Opinions and conclusions of witnesses.**—As elsewhere shown, witnesses may sometimes testify, as to appearances, conduct or demeanor, although their statements may be in a sense opinions or conclusions,⁴⁴ and this is true in assault and battery cases as well as in other cases in which the matter cannot be adequately described so as to enable the jury to understand it and draw the proper conclusion. But if the matter can be adequately described to the jury, or, in general, if the ordinary witness has no better means of forming an opinion or conclusion, his opinions and conclusions are inadmissible. Thus, it has been held that a witness cannot give his opinion as to the intent, or motive of the defendant in committing an assault and battery;⁴⁵ and that a witness cannot state the impression as to what effect the beating of one person by another was producing, where there is nothing to prevent him from fully describing to the jury what he saw.⁴⁶ So, it has been held that a defendant, pleading self-defense, cannot testify to the conclusion that he acted in self-defense, as that is the ultimate issue to be determined by the jury.⁴⁷

§ 1697. **Justification.**—Matter in justification of an assault and battery must be specially pleaded, and is not admissible under the general denial.⁴⁸ So, it has been held that where two assaults are charged

⁴¹ *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724; *Heneky v. Smith*, 10 Ore. 349, 45 Am. R. 143; but see, *Givens v. Berkley*, (Ky.) 56 S. W. 158.

⁴² *Sodusky v. McGee*, 7 J. J. Marsh, (Ky) 266; *Blackwell v. Davis*, 2 How. (Miss.) 812; *Elliott v. Russell*, 92 Ind. 526; *Wagner v. Haak*, 170 Pa. St. 495, 32 Atl. 1087; see also, *Hoffman v. Eppers*, 41 Wis. 251.

⁴³ *Bell v. Morrison*, 27 Miss. 68; *Mawlich v. Elsey*, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

⁴⁴ See Vol. 1, 678.

⁴⁵ *Smith v. State*, (Tex. Cr. App.) 20 S. W. 360; *Trimble v. State*, (Tex. Cr. App.) 22 S. W. 879; *State v. Garvey*, 11 Minn. 154.

⁴⁶ *Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181.

⁴⁷ *Evans v. Elwood*, (Iowa) 98 N. W. 584; but see, *Plank v. Grimm*, 62 Wis. 251, 22 N. W. 470.

⁴⁸ *Norris v. Casel*, 90 Ind. 143; *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724; *Lunsford v. Walker*, 93 Ala. 36, 8 So. 386; *Illinois Steel Co. v. Novak*, 184 Ill. 501, 56 N. E. 966;

and both are admitted by a plea of son assault, the defendant, in order to justify, must prove two assaults.⁴⁹ So, if the defendant seeks to justify, he must show a justification on the grounds alleged.⁵⁰ The plaintiff is not ordinarily required to show that the assault and battery was without cause or justification.⁵¹ Mere provocation, while it may mitigate, will not justify.⁵² But evidence of provocation is often admissible as part of the *res gestae* even though it may not be considered in justification.⁵³ It has also been held that a defendant may give quarantine regulations in evidence where he properly seeks to justify thereunder.⁵⁴

§ 1698. Son assault demeane.—The old plea of son assault demeane is a good plea in justification, or where the plaintiff committed an assault upon the defendant, and the latter merely defended himself.⁵⁵ To sustain this plea the defendant is ordinarily required to prove that the plaintiff assaulted him first,⁵⁶ and that what he himself did was

Barr v. Post, 56 Neb. 698, 77 N. W. 123; *Wilken v. Exterkamp*, (Ky.) 42 S. W. 1140; *Konigsberger v. Harvey*, 12 Ore. 286, 7 Pac. 114; *Wheeler v. Whitney*, 59 N. H. 197; *Atkinson v. Harran*, 68 Wis. 405, 32 N. W. 756; *Fraser v. Berkeley*, 7 Car. & P. 621, 32 E. C. L. 789; but see, *Syers v. Chapman*, 2 C. N. S. 438, 89 E. C. L. 438.

⁴⁹ *Hardin v. Harrison*, 2 Bibb (Ky.) 7.

⁵⁰ *Short v. Symmes*, 150 Mass. 298, 23 N. E. 42, 15 Am. St. 204; *Bell v. Martin* (Tex. Civ. App.) 28 S. W. 108; *Monks v. Dykes*, 1 H. & H. 418, 4 M. & W. 567, 8 L. J. Exch. 73; *Holmes v. Bagge*, 1 E. & B. 782, 22 L. J. Q. B. 301, 72 E. C. L. 782; *Moriarty v. Brooks*, 6 Car. & P. 684, 25 E. C. L. 638.

⁵¹ *Sweet v. Boyd*, (Iowa) 98 N. W. 601; *Berkner v. Dannenberg*, (Ga.) 43 S. E. 463, 60 L. R. A. 559; *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715; *Schlosser v. Fox*, 14 Ind. 365; *Birmingham &c. R. Co. v. Baird*, 130 Ala. 334, 30 So. 456, 89 Am. St. 43,

54 L. R. A. 752; *Willey v. Carpenter*, 65 Vt. 168, 26 Atl. 488, 15 L. R. A. 853; *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500; *Norris v. Casel*, 90 Ind. 143.

⁵² *Crosby v. Humphreys*, 59 Minn. 92, 60 N. W. 843; see also, *Byers v. Horner*, 47 Md. 23; *Davis v. Franke*, 33 Gratt. (Va.) 413.

⁵³ *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; where an officer sought to justify under a replevin writ, his return was held not to be conclusive; *McKinstry v. Collins*, (Vt.) 56 Atl.

⁵⁴ 1 East P. C. 406; *Andrews Stephen Pl.* 287, § 155; 3 Cooley *Blackstone* (4th ed.) 128, 306. As to whether evidence of any other assault than that charged in the declaration can be given, see *Gibson v. Fleming*, 1 Har. & J. (Md.) 483; *Dole v. Erskine*, 37 N. H. 316; *Peyton v. Rogers*, 4 Mo. 254; *Randle v. Webb*, 1 Esp. 38; *Downs v. Skrymsher*, B. & G. 233; *Carpenter v. Crane*, 5 Blackf. (Ind.) 119.

⁵⁵ *Stevens v. Lloyd*, 1 Cranch (U.

necessary, or apparently necessary, in defense of his own person.⁵⁷ It is generally said that where self-defense is relied upon in justification it must be shown that the acts relied upon were done in necessary self-defense; but where the circumstances and appearances are such as to lead a reasonable man to believe that his life was in danger or that he was in danger of great bodily harm from the plaintiff, and the defendant so believed, he may, usually act on such appearances.⁵⁸ Under the plea of son assault, and a replication de injuria it is generally held that the plaintiff can show and recover for excessive force used by the defendant.⁵⁹ And the same has been held where a general denial is pleaded under the code.⁶⁰

§ 1699. *Molliter manus imposuit*.—The old plea of *molliter manus imposuit* is likewise a plea in justification where only an amount of violence proportionate to the circumstances is used in defense of person or property, or in the prevention of a crime.⁶¹ Under this plea, says Greenleaf, "the matters justified are of great variety;

S.) 124; Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710; Thomason v. Gray, 82 Ala. 291, 3 So. 38; see also, Crogate's Case, 8 Co. 66; Reece v. Taylor, 4 Nev. & M. 469; Phillips v. Howgate, 5 B. & Ald. 220; Hulse v. Tollman, 49 Ill. App. 490; State v. Bryson, Winst. Eq. (N. Car.) 86; Valden v. Commonwealth, 12 Gratt (Va.) 717; State v. White, 18 R. I. 473; State v. Marguire, 69 Mo. 197.

⁵⁷ Watson v. Hastings, 1 Pen. (Del.) 47, 39 Atl. 587; Rogers v. Waite, 44 Me. 275; Fitzgerald v. Fitzgerald, 51 Vt. 420; see also, Shipley v. Edwards, 87 Iowa 310, 54 N. W. 151.

⁵⁸ Courvoisier v. Raymond, 23 Col. 113, 47 Pac. 284; Baker v. Gausin, 76 Ind. 317; Morris v. Platt, 32 Conn. 75; Tucker v. Walters, 78 Ga. 232, 2 S. E. 689; Irwin v. Yeager, 74 Iowa 174, 37 N. W. 136; Goucher v. Jamieson, 124 Mich. 21, 82 N. W. 663; Germolus v. Sausser, (Minn.) 85 N. W. 946; Norris v. Whyte, 158

Mo. 20, 57 S. W. 1037; Jamison v. Moseley, 69 Miss. 478, 10 So. 582; Sterling v. Warden, 51 N. H. 217, 12 Am. R. 80; French v. Ware, 65 Vt. 338, 26 Atl. 1096; Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. 428. But, as held in most of the authorities above cited, the belief must be reasonable.

⁵⁹ Fisher v. Bridges, 4 Blackf. (Ind.) 518; Watson v. Hastings, 1 Pen. (Del.) 47, 39 Atl. 587; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771; Ayres v. Kelly, 11 Ill. 17; Hannen v. Edes, 15 Mass. 347; Mellen v. Thompson, 32 Vt. 407; Curtis v. Carson, 2 N. H. 539; see also, Bennett v. Appleton, 25 Wend. (N. Y.) 371; Gaither v. Blowers, 11 Md. 536; but compare, Penn v. Ward, 2 M. & R. 338; Oakes v. Wood, 3 M. & W. 150; Selby v. Bardons, 3 B. & A. 1.

⁶⁰ Steinmetz v. Kelly, 72 Ind. 442.

⁶¹ 12 Viner Abr. 182; Bacon Abr. C, 8.

but they will be found to fall under one of these general heads, namely, the prevention of some unlawful act, or resistance, for some lawful cause."⁶² Under this plea one who justifies the use of force is required to show the facts justifying it,⁶³ and the defense is not, ordinarily, sustained if the evidence shows a beating and wounding of the other party by him.⁶⁴ If the defendant was justified in laying hands on the plaintiff, evidence of the use of necessary and reasonable force will sustain the plea, but will not if the force, shown to have been used by the defendant, was unnecessary and unreasonable.⁶⁵ If one unlawfully attempts to take the goods of another, the latter is justified in laying hands on him to prevent him from so doing, and if he persists with violence, sufficient force may generally be used to cause him to desist.⁶⁶ So, the owner entitled to possession, or the lawful occupant of premises, may ordinarily use necessary and reasonable force to defend his possession or to expel trespassers.⁶⁷ But where the entry was lawful and

⁶² 2 Greenleaf Ev. § 98.

⁶³ *Brown v. Gordon*, 1 Gray (Mass.) 182; *Coleman v. New York &c. R. Co.*, 106 Mass. 161; *Hanson v. European &c. R. Co.*, 62 Me. 84, 16 Am. R. 404; *Rhinehart v. Whitehead*, 64 Wis. 42, 24 N. W. 401; but see, *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. 428; *Finnell v. Bohannon*, (Ky.) 44 S. W. 94; *Mengedocht v. Van Dorn*, 48 Neb. 880, 67 N. W. 858; *Talmage v. Smith*, 101 Mich. 370, 69 N. W. 656.

⁶⁴ *Cox v. Cooke*, 1 J. J. Marsh, (Ky.) 360; *Shain v. Markham*, 4 J. Marsh. (Ky.) 578, 20 Am. Dec. 232; *French v. Marstin*, 24 N. H. 440, 57 Am. Dec. 294; *Bush v. Barker*, 1 Bing. 72; *Gates v. Lonsbury*, 20 Johns. (N. Y.) 427.

⁶⁵ *Hyatt v. Wood*, 3 Johns. (N. Y.) 239, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Bristor v. Burr*, 120 N. Y. 427, 24 N. E. 937; *Todd v. Jackson*, 26 N. J. L. 525; *Larkin v. Avery*, 23 Conn. 304; *Pitford v. Armstrong*, Wright (Ohio) 94; *Comstock v. Brosseau*, 65 Ill. 39; *Sinclair v. Stanly*, 69 Tex.

718, 7 S. W. 511; *Denver &c. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Green v. Bartram*, 4 Car. & P. 308; *Imason v. Cope*, 5 Car. & P. 193; *Hillary v. Gay*, 6 Car. & P. 284; *Edwick v. Hawkes*, 18 Ch. D. 199; but compare, *Sterling v. Warden*, 51 N. H. 217, 12 Am. R. 80; *Rich v. Keyser*, 54 Pa. St. 86.

⁶⁶ *Scribner v. Beach*, 4 Denio (N. Y.) 448, 47 Am. Dec. 265; *Devor v. Knauer*, 84 Ill. App. 184; *Leach v. Francis*, 41 Vt. 670; *Ayres v. Birtch*, 35 Mich. 501. *McClelland v. Kay*, 14 B. Mon. (Ky.) 103; *Stachlin v. Destrehan*, 2 La. Ann. 1019; *Alderson v. Walstell*, 1 C. & K. 358, 47 E. C. L. 358; as to recaption of personal property see authorities reviewed in, *Commonwealth v. Donahue*, 148 Mass. 529, 12 Am. St. 591; also *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766; *Sabre v. Mott*, 88 Fed. (U. S.) 780; *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167; *Bowman v. Brown*, 55 Vt. 184.

⁶⁷ *Hammond v. Hightower*, 82 Ga. 290, 9 S. E. 1101; *Shain v. Markham*, 4 J. J. Marsh (Ky.) 578, 20 Am.

the assailant does not use force, the defendant, under this plea, is required to show a notice or request to depart, before he can justify the use of force.⁶⁸ It has also been said that if the interference was to prevent others from fighting, the defendant must show that he first requested them to desist.⁶⁹

§ 1700. **Moderate castigavit.**—The old plea of moderate castigavit is likewise a plea in justification, proper in defense of an action for assault and battery where the defendant moderately corrected the plaintiff when and as he had a right to do.⁷⁰ It is held that under this plea, the defendant must not only show his authority, and cause for the chastisement, but also that it was, in fact, moderate.⁷¹ In the case of an apprentice it is also said that the defendant must show that fact by the articles of apprenticeship, and must produce evidence of misbehavior sufficient to justify the correction given.⁷² Evidence as to the customary former practice of masters in chastising their apprentices has been held inadmissible,⁷³ and so is evidence to the effect that the defendant is ordinarily mild and moderate.⁷⁴ The rule permitting proper correction applies in the relations of parent and child, and schoolmaster and pupil, and was also applied in many old cases to jailer and prisoner, and shipmaster and seaman; the term "moderate

Dec. 232; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. 428; *Chapell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Fosbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *Watson v. Hastings*, 1 Pen. (Del.) 47, 39 Atl. 587; *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221.

* *McIlvoy v. Cockran*, 2 A. K. Marsh. (Ky.) 271; *Adams v. Freeman*, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327; *Scribner v. Beach*, 4 Denio (N. Y.) 448, 47 Am. Dec. 265; *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221; *Redfield v. Redfield*, 75 Iowa 435, 39 N. W. 688; *McDarmott v. Kennedy*, 1 Har. (Del.) 143; *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402, 8 Am. St. 829; *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 Term R. 78;

Tullay v. Reed, 1 Car. & P. 6, 12 E. C. L. 16.

* Hawk P. C. b. 1, C. 31, § 49; 1 East P. C. 304; for cases as to what must be shown where the interference was to prevent a crime or the like, see *Stonehouse v. Elliott*, 6 Term R. 315; *Holyday v. Oxenbridge*, Cro. Car. 234, 2 Roll. Abr. 546; *Ledwith v. Catchpole*, Cald. 291; *Hancock v. Baker*, 2 B. & P. 260.

* 2 Chitty Pl. 576.

* *Hannen v. Edes*, 15 Mass. 347, 365.

* *Greenleaf Ev.*, § 97; 1 *Saunders Pl. & Ev.* 107.

* *Newman v. Bennett*, 2 Chitty 195.

* *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

correction" being given a very liberal interpretation and effect in the latter relation.⁷⁵ But, while one authorized by a parent to take care of a child, may reasonably chastise the child in a proper case,⁷⁶ an employer in the ordinary case of master and servant, where the master does not stand in loco parentis, ordinarily at least, has no such right.⁷⁷

§ 1701. **Other defenses.**—Whatever force may be used in defense of oneself may generally be used in defense of members of one's family,⁷⁸ and a servant may defend his master and the master may defend his servant in a proper case.⁷⁹ Consent may also be sufficient defense,⁸⁰

⁷⁵ *Hawkins Pl. Cr.*, § 23; *Watson v. Christie*, 2 B. & P. 224; *Sampson v. Smith*, 15 Mass. 365; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Tryon v. White*, 1 Pet. Adm. (U. S.) 96, 173; *United States v. Ruggles*, 5 Mason (U. S.) 192; *State v. Neff*, 58 Ind. 516; *Wilkes v. Dinsman*, 7 How. (U. S.) 89; *Bacon Abr. Assault and Battery*, C., 373; as to the extent of the school master's right, see *Heritage v. Dodge*, 64 N. H. 297, 9 Atl. 722; *Cooper v. McJunkin*, 4 Ind. 4 Ind. 290; *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273, 57 Am. R. 818; *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

⁷⁶ *Vanmeter v. True*, 16 Ky. L. R. 320; *Hernandez v. Cornobelli*, 4 Duer (N. Y.) 642; connection of ward by guardian; *Dean v. State*, 59 Ala. 46; *Snowden v. State*, 12 Tex. App. 105, 41 Am. R. 667.

⁷⁷ *Matthews v. Terry*, 10 Conn. 455; see also, *Cooper v. State*, 8 Baxt. (Tenn.) 324, 35 Am. R. 704; 1 *Cooley Blackstone* 428; 2 *Kent Comm.* 261; it is also generally held by modern authorities that a husband has no right to whip his wife: *State v. Oliver*, 70 N. Car. 60; *Commonwealth v. McAfee*, 108 Mass.

458, 11 Am. R. 383; *Perry v. Perry*, 2 Paige (N. Y.) 501; *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664; *Pearman v. Pearman*, 1 S. & T. 601.

⁷⁸ *Hanchett v. Bassett*, 35 Conn. 27; *McIlvoy v. Cockran*, 2 A. K. Marsh (Ky.) 271; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. 428; *Tompkins v. Knut*, 94 Fed. 956; *Obler v. Neal*, 1 Houst. (Del.) 449; but the son can only interfere when father was not aggressor and only to reasonable or necessary extent: *Flint v. Bruce*, 68 Me. 183; *Drinkhorn v. Bubel*, 85 Mich. 532, 48 N. W. 710.

⁷⁹ *Fortune v. Jones*, 30 Ill. App. 116, reversed on another point in 128 Ill. 518; *Tickell v. Read*, Lofft 215; *Barefoot v. Reynolds*, 2 Str. 953; *Pond v. People*, 8 Mich. 150; *Orton v. State*, 4 Greene (Iowa) 140.

⁸⁰ *Fitzgerald v. Cavin*, 110 Mass. 153; *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; *Caldwell v. Farrell*, 28 Ill. 438; *Pillow v. Bushnell*, 5 Barb. (N. Y.) 156; *McCue v. Klein*, 60 Tex. 168, 48 Am. R. 260; *Latter v. Bradell*, 50 L. J. Q. B. 448, 45 J. P. 520; see also, *Christopherson v. Bare*, 11 C. B. 473, 63 E. C. L. 473.

provided it is not obtained by fraud or it is not to do an unlawful act such as to commit a breach of the peace.⁸¹ It is generally a sufficient defense to show that the injury was inflicted by accident, without any fault on the part of the defendant; and a former recovery for the assault and battery is a good defense notwithstanding the damages may have turned out to be greater than appeared at the time of the former recovery;⁸² but voluntary intoxication is no defense to a civil action for assault and battery.⁸³ Common carriers,⁸⁴ innkeepers,⁸⁵ and the like may eject persons who are disorderly and disobey their proper rules, without being held liable, for assault and battery, so long as they do so under proper circumstances and in a proper manner. So, a defendant who resists an unlawful arrest in a proper manner may show that fact in defense⁸⁶ in a proper case.

§ 1702. Evidence in mitigation.—Matters of provocation, so recent as to raise the presumption that they induced the assault, may be shown in mitigation,⁸⁷ although there are some jurisdictions in which they can only be shown to defeat or mitigate punitive damages and not to mitigate compensatory damages.⁸⁸ So, other matters, such as the

⁸¹ *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008, 30 Am. St. 413; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. R. 230; *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. 535; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; *Boulter v. Clarke*, Buller N. P. 16; *Reg. v. Lock*, 12 Cox Cr. Cas. 244.

⁸² *Fetter v. Beale*, Salk. 11; former recovery must be specially pleaded, *Coles v. Carter*, 6 Cow. (N. Y.) 691.

⁸³ *Reese v. Barbee*, 61 Miss. 181.

⁸⁴ *Jencks v. Coleman*, 2 Sumn. (U. S.) 224; *Southern Kans. R. Co. v. Hinsdale*, 38 Kans. 507; *Brown v. Hannibal &c. R. Co.*, 66 Mo. 588; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337; *Barney v. Oyster Bay &c. Co.*, 67 N. Y. 301, 23 Am. R. 115. See generally, 4 *Elliot Railroad*, §§ 1594, 1637, 1638.

⁸⁵ *State v. Steele*, 106 N. Car. 766, 19 Am. St. 573; *Howell v. Jackson*,

6 Car. & P. 723, 25 E. C. L. 617, after request to depart.

⁸⁶ *Codd v. Cabe*, L. R. 1 Exch. Div. 352; see also, *Kernan v. State*, 11 Ind. 471; *State v. Hooker*, 17 Vt. 658; *Alford v. State*, 8 Tex. App. 545; *People v. Denby*, 108 Cal. 54, 40 Pac. 1051.

⁸⁷ *Avery v. Ray*, 1 Mass. 12; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658; *Caspar v. Prosadame*, 46 La. Ann. 36, 14 So. 317; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; *Crosby v. Humphreys*, 59 Minn. 92, 60 N. W. 843; *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715; *Haman v. Omaha Horse R. Co.*, 35 Neb. 74, 52 N. W. 830; *Rochester v. Anderson*, 1 Bibb (Ky.) 428; *Cushman v. Waddell*, 1 Baldw. (U. S.) 58, 6 Fed. Cas. No. 3516; *Dennis v. Pawling*, 12 Viner Abr. 159.

⁸⁸ *Goldsmith v. Joy*, 61 Vt. 488, 7 Atl. 1010, 4 L. R. A. 500, 15 Am. St.

fact that the injury was unintentionally inflicted, that the defendant believed himself to be in great danger of bodily harm, and the like, may be shown to mitigate damages, in a proper case;⁸⁹ and provocation, even though not immediate and contemporaneous, may sometimes be shown in exceptional cases.⁹⁰ But, as a general rule, nothing can be proved in mitigation unless it has some more or less direct connection with the transaction on which the action is based,⁹¹ and where the assault is committed in revenge, or after the lapse of time sufficient for reflection and coolness, previous matters that may in some sense have prompted it cannot, ordinarily, be shown.⁹² So, as a general rule, the character and standing of the parties cannot be shown to mitigate compensatory damages;⁹³ but there are some authorities

923, reviewing many authorities; see also, *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Burke v. Melvin*, 45 Conn. 243; *Tatnall v. Courtney*, 6 Houst. (Del.) 434; *Waters v. Brown*, 3 A. K. Marsh (Ky.) 557; *Scott v. Fleming*, 16 Ill. App. 539; *Shapiro v. Michelson*, 19 Tex. Civ. App. 615, 47 S. W. 746; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468; *Brown v. Swineford*, 44 Wis. 282, 28 Am. R. 582.

⁸⁹ *Keyes v. Devlin*, 3 E. D. Smith (N. Y.) 518; *Hogan v. Ryan*, 5 N. Y. St. 110; *James v. Campbell*, 5 Car. & P. 372, 24 E. C. L. 611; *Sheehan v. Sturges*, 53 Conn. 481, 2 Atl. 841; *Waters v. Brown*, 3 A. K. Marsh (Ky.) 557; *Ward v. Blackwood*, 41 Ark. 295, 48 Am. R. 41; *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. 883; *Bauman v. Bean*, 57 Mich. 1; *Wasson v. Canfield*, 6 Blackf. (Ind.) 406.

⁹⁰ *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. 883; *Davis v. Franke*, 33 Gratt. (Va.) 413; *Irwin v. Porter*, 1 Hawaii 159; *Gaither v. Blowers*, 11 Md. 536; *Fairbanks v. Witter*, 18 Wis. 287, 86 Am. Dec. 765; *Stellar v. Nellis*, 60 Barb. (N. Y.) 524, 42 How. Pr. (N. Y.) 163; *Currier v. Swan*, 63 Me. 323; *Fraser v. Berkeley*, 2 M. & R. 3.

⁹¹ *Schlosser v. Fox*, 14 Ind. 365; *Butt v. Gould*, 34 Ind. 552; they must generally be in some sense part of the *res gestae*; *Mowry v. Smith*, 9 Allen (Mass.) 67; *Tyson v. Booth*, 100 Mass. 258; *Dupee v. Lentine*, 147 Mass. 580; *Byers v. Horner*, 47 Md. 23; *Currier v. Swan*, 63 Me. 323; *Richardson v. Hine*, 42 Conn. 206; *Collins v. Todd*, 17 Mo. 537; *Dolan v. Fagan*, 63 Barb. (N. Y.) 73.

⁹² *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Murphy v. McGrath*, 79 Ill. 594; *Millard v. Truax*, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. 705; *Chappell v. Schmidt*, 104 Cal. 511, 38 Pac. 892; *Kaiser v. Smith*, 71 Ala. 481, 46 Am. R. 342; *Cleveland v. Stillwell*, 75 Iowa 466, 39 N. W. 711; *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. 989; *Fullerton v. Warrick*, 3 Blackf. (Ind.) 219, 25 Am. Dec. 99; *Jacaway v. Dula*, 7 Yerg. (Tenn.) 82, 27 Am. Dec. 492; *Lee v. Woolsey*, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230; *Brooks v. Carter*, 34 Fed. (U. S.) 505.

⁹³ *Corning v. Corning*, 6 N. Y. 97; *Hare v. Marsh*, 61 Wis. 435, 21 N. W. 267, 50 Am. R. 141; *Givens v. Bradley*, 3 Bibb. (Ky.) 192, 6 Am. Dec. 646; *Reddin v. Gates*, 52 Iowa 210; *Brown v. Evans*, 17 Fed. (U.

to the effect that in an action for indecent assault, where mental and moral outrage is relied upon as a substantial ground of recovery, evidence showing the plaintiff's want of chastity is admissible,⁹⁴ but specific acts of unchastity cannot, ordinarily, be shown.⁹⁵ Consent on license may sometimes be shown to mitigate damages,⁹⁶ although it may not constitute a justification. But evidence that the defendant had been criminally prosecuted and convicted,⁹⁷ or acquitted,⁹⁸ cannot be shown either in bar or in mitigation of compensatory damages, although it has been held that a prior conviction and punishment can be shown in mitigation of punitive damages.⁹⁹

§ 1703. **Damages—Aggravation.**—It is not proposed to consider the rules as to the measure of damages in assault and battery cases, but it may be said, in a general way, that the defendant may be held

S.) 912; *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. 805; but character or standing has been held relevant in determining punitive damages where they are (*Ind. App.*) 67 N. E. 547; *Fay v. proper*, *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 44 L. R. A. 500, 15 Am. St. 923; and in such cases it is generally held that the financial standing of the defendant may be shown.

⁹⁴ *Crossman v. Bradley*, 53 Barb. (N. Y.) 125; *Gulerette v. McKinley*, 27 Hun (N. Y.) 320; *Mitchell v. Work*, 13 R. I. 645; see also, *Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150; *Parker v. Coture*, 63 Vt. 155; *Watry v. Ferber*, 18 Wis. 500, 86 Am. Dec. 789; *Schuek v. Hagar*, 24 Minn. 339; but compare, *Sayen v. Ryan*, 9 Ohio C. C. 631.

⁹⁵ *Gore v. Curtis*, 81 Me. 403, 17 Atl. 314, 10 Am. St. 265; *Dímick v. Downs*, 82 Ill. 570; *Miller v. Curtis*, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. 469; see also, *Derwin v. Parsons*, 52 Mich. 425, 18 N. W. 200; but compare, *Ford v. Jones*, 62 Barb. (N. Y.) 484.

⁹⁶ *Adams v. Waggoner*, 33 Ind. 531, 5 Am. R. 230; *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. 535; *Logan v. Austin*, 1 Stew. (Ala.) 476; *Schutter v. Williams*, 1 Ohio Dec. 47; *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008, 30 Am. St. 413, to reduce punitive damages.

⁹⁷ *Wolff v. Cohen*, 8 Rich. L. (S. Car.) 144; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. R. 197; *Jefferson v. Adams*, 4 Har. (Del.) 321; *Lucas v. Flinn*, 35 Iowa 9; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Rhodes v. Rodgers*, 151 Pa. St. 634, 24 Atl. 1044; *Towle v. Blake*, 48 N. H. 92; *Wheatley v. Thorn*, 23 Miss. 62; but compare, *Flanagan v. Womack*, 54 Tex. 45; *Cherry v. McCall*, 23 Ga. 193.

⁹⁸ *Edwards v. Wessinger*, 65 S. Car. 161, 43 S. E. 518, 95 Am. St. 789.

⁹⁹ *Smithwick v. Ward*, 52 N. Car. 64, 75 Am. Dec. 453; *Porter v. Seller*, 23 Pa. St. 424, 62 Am. Dec. 341; *Jackson v. Wells*, 13 Tex. App. 275, 35 S. W. 528.

liable for all the natural and proximate consequences of his wrongful act, and the plaintiff, if entitled to recover, is usually entitled to such damages as will fairly compensate him for the injury received, including such as are alleged and proved to be reasonably certain to be suffered in the future as a proximate cause of such wrongful act as well as those sustained to the time of the trial.¹⁰⁰ In many jurisdictions, exemplary, vindictive, or punitive damages are also allowed in some instances, as, where the assault and battery was committed wantonly, maliciously, or the like.¹⁰¹ Damages that are the natural and immediate consequence of the act complained of may usually be shown under a general averment on the subject,¹⁰² but special damages should be specifically alleged.¹⁰³ Evidence of the extent of the injury, pain and suffering, loss of earnings, and medical expenses, proximately caused by the act complained of, is usually admissible to show the general damages;¹⁰⁴ and, under a proper complaint, evidence of mental suffering because of circumstances of insult and indignity accompanying the assault has also been held admissible.¹⁰⁵ Failure to prove

¹⁰⁰ *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; *Gronan v. Kukukuck*, 59 Iowa 18, 12 N. W. 748; *Fetter v. Beale*, 1 Ld. Raym. 339, 2 Salk. 11; *Moore v. Adam*, 2 Chitty 198; *Sloan v. Edwards*, 61 Md. 89; *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 27 Am. St. 47, 14 L. R. A. 226; *Brownback v. Fralley*, 78 Ill. App. 262; *Chicago &c. R. Co. v. Tracey*, 109 Ill. App. 563; *Newell v. Whitcher*, 53 Vt. 589, 38 Am. R. 763.

¹⁰¹ 1 *Sutherland Dam.*, §§ 393, 401; 3 Cyc. 1108, 2 Am. & Eng. Ency. of Law 993, 41 Cent. L. J. 308, 12 Cent. L. J. 529, 554, 577, notes in 27 Am. Dec. 684-689, 50 Am. Dec. 765-775, 28 Am. St. 870-883. Many of the authorities to the effect that punitive damages cannot be assessed are cited in *Borkenstein v. Shrack*, (Ind. App.) 67 N. E. 547; *Fay v. Parker*, 53 N. H. 342, 16 Am. R. 270.

¹⁰² *Hutts v. Shoaf*, 88 Ind. 395; *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; *Hawes v.*

O'Reilly, 126 Pa. St. 440, 17 Atl. 642; *Sloan v. Edwards*, 61 Md. 89.

¹⁰³ *Hawes v. O'Reilly*, 126 Pa. St. 440, 17 Atl. 642; *Lunsford v. Walker*, 93 Ala. 36, 8 So. 386; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 642; *Martin v. Murphy*, 85 Iowa 669, 52 N. W. 662; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96, and note; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Morgan v. Curley*, 142 Mass. 107.

¹⁰⁴ *Uertz v. Singer Mfg. Co.*, 35 Hun (N. Y.) 116; *Robinson v. Stokely*, 3 Watts (Pa.) 270; see also, *Kuhn v. Freund*, 87 Mich. 545, 49 N. W. 867.

¹⁰⁵ *Van Reeden v. Evans*, 52 Ill. App. 209; *Hutts v. Shoaf*, 88 Ind. 395; *Smith v. Holcomb*, 99 Mass. 552; *Stuppy v. Hof*, 82 Mo. App. 272; *Goucher v. Jamieson*, 124 Mich. 21, 82 N. W. 663; *Craker v. Chicago &c. R. Co.*, 36 Wis. 657, 17 Am. R. 504; *Wilson v. Young*, 31 Wis. 574; *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. 870; *Root v. Sturdivant*, 70 Iowa 55, 29 N. W. 802;

matters of aggravation will not preclude a recovery of damages shown to have been actually and proximately caused by the wrongful act of the defendant complained of;¹⁰⁶ and upon proof of the unlawful assault or battery alleged nominal damages may be recovered, although no appreciable damages are shown.¹⁰⁷ Testimony as to the wounds, pain, loss of sleep, and poor health after the injury is not inadmissible as opinion evidence.¹⁰⁸ Matters of aggravation, such as circumstances of outrage and insult attending an assault and battery which wound the feelings, and the like, may be given in evidence under a proper pleading, to increase the damages,¹⁰⁹ at least where exemplary damages are allowed, and proper evidence to show malice and the like, is also admissible in such cases.¹¹⁰ Evidence of pecuniary condition and standing of the defendant is likewise admissible where exemplary damages are allowed,¹¹¹ and in some cases evidence of the standing or condition in life of the plaintiff is admissible to augment his damages or show the extent thereof;¹¹² but the wealth of the defendant¹¹³ or the

Leach v. Leach, 11 Tex. Civ. App. 699, 33 S. W. 703; *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Kelley v. Kelley*, 8 Ind. App. 606, 34 N. E. 1009. In the last two cases it is held that humiliation and loss of reputation and social position may be considered. *Atkins v. Gladwish*, 25 Neb. 390, 41 N. W. 347.

¹⁰⁶ *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. R. 668.

¹⁰⁷ *Barlow v. Lowder*, 35 Ark. 492; *Tatnall v. Courtney*, 6 Houst. (Del.) 434; *Lewis v. Hoover*, 3 Blackf. (Ind.) 407; *Crosby v. Humphreys*, 59 Minn. 92, 60 N. W. 843; *Andrews v. Stone*, 10 Minn. 72.

¹⁰⁸ *Hamm v. Romine*, 98 Ind. 77.

¹⁰⁹ *Root v. Sturdivant*, 70 Iowa 55, 29 N. W. 802; *Sloan v. Edwards*, 61 Md. 89; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Borland v. Barrett*, 76 Va. 128, 44 Am. R. 152; *Dickey v. McDonnell*, 41 Ill. 62; see also, *Malsenbacker v. Concordia Soc.*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. 213; *Alcorn v. Mitchell*, 63 Ill. 553.

¹¹⁰ *Sledge v. Pope*, 3 Hayw. (N. Car.) 402; *Joice v. Branson*, 73 Mo. 28; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548; *Worford v. Isbel*, 1 Bibb. (Ky.) 247, 4 Am. Dec. 633; *Pratt v. Ayler*, 4 Har. & J. (Md.) 448; *Klein v. Thompson*, 19 Ohio St. 569.

¹¹¹ *Belknap v. Boston &c. R. Co.*, 49 N. H. 358; *Cockran v. Ammon*, 16 Ill. 315; *Jones v. Jones*, 71 Ill. 562; *Gore v. Chadwick*, 6 Dana (Ky.) 477; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Sloan v. Edwards*, 61 Md. 89; *Pendleton v. Davis*, 1 Jones L. (N. Car.) 98; *Rowe v. Moses*, 9 Rich. L. (S. Car.) 423, 67 Am. Dec. 560; *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. R. 143; *Brown v. Evans*, 17 Fed. (U. S.) 912.

¹¹² *Dailey v. Houston*, 58 Mo. 361; *Eltringham v. Earhart*, 67 Miss. 488, 7 So. 346, 19 Am. St. 319; *Heneky v. Smith*, 10 Ore. 349, 45 Am. R. 143; *McNamara v. King*, 7 Ill. 432.

¹¹³ *Hare v. Marsh*, 61 Wis. 435, 21 N. W. 267, 50 Am. R. 141; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96;

poverty of the plaintiff¹¹⁴ cannot, ordinarily, be shown where only actual compensatory damages are allowed. A further treatment of the rules as to the measure and evidence of damages in such cases will be found, with a citation of the authorities supporting them, in the chapter in this volume on the subject of damages.

Morgan v. Durfee, 69 Mo. 469, 33 Am. R. 508; **Roach v. Caldbeck**, 64 Vt 593, 24 Atl. 989; **Beck v. Dowell**, 111 Mo. 506, 20 S. W. 209, 33 Am. St. 547. ¹¹⁴ **Marsh v. Bristol**, 65 Mich. 378, 32 N. W. 645; **Sloan v. Edwards**, 61 Md. 89.

CHAPTER LXXXIV.

ASSIGNEES.

Sec.	Sec.
1704. Scope of chapter—Generally.	1710. Delivery and acceptance.
1705. Right of assignee to sue—Burden of proof.	1711. Consideration.
1706. Evidence of assignee's right.	1712. Best and secondary evidence.
1707. Proof of the assignment.	1713. Parol evidence.
1708. Assignee of corporation.	1714. Other extrinsic evidence.
1709. Assignees under general assignment for creditors.	1715. Declarations and admissions.
	1716. Former 'adjudication—Estoppel.

§ 1704. **Scope of chapter—Generally.**—It is not the purpose in this chapter to consider what may or may not be assigned, nor to consider the manner or nature of assignments in general. It is the purpose, however, to treat of certain rules and matters of evidence in cases in which assignees are parties, either as plaintiffs or defendants. In so doing it will be necessary, or at least proper, to consider some matters of evidence in cases under state insolvency laws, and voluntary general assignments for the benefit of creditors, as well as in cases of ordinary assignments of choses in action, or the like, not made for the benefit of creditors under such laws. The subject, so far as it relates to assignees in bankruptcy, under the act of Congress, will be treated in another chapter.

§ 1705. **Right of assignee to sue—Burden of proof.**—In some jurisdictions it is provided that in case of an assignment by written endorsement the assignor need not be made a party, but that if there is no such assignment he must be made a party to answer as to his own interest; and in many jurisdictions the assignee is allowed to sue, in a proper case, in the assignor's name. It is also the law in many jurisdictions that if there appears to be such a written assignment it can only be questioned and put in issue by the defendant by an answer under oath. In such a case it has been held that where the assignment of an account sued on by the assignee is not put in issue by an answer

under oath, formal proof of the assignment is unnecessary, and that it is not necessary to show the plaintiff's acceptance of the assignment, nor to show demand of payment before the commencement of the action,¹ but that where the assignment is denied by an answer under oath, the burden is on the plaintiff to show a sufficient assignment by a preponderance of the evidence.² In another jurisdiction, it has been held that where the complaint alleges that the plaintiff is the actual bona fide owner of the claim sued on, by written assignment, although a general denial admits the due execution and delivery of the written assignment, yet such denial puts in issue the right of the plaintiff to sue as the actual bona fide owner of the claim, and the burden is upon him to show that he is its owner for his own benefit, without accountability.³ Where, however, the plaintiff holds the cause of action as collateral security for a debt due him from a third person, the burden of proving a defense arising out of the state of dealings between the plaintiff and his principal debtor, such, for instance, as that the principal debt has been paid, or is not equitably enforceable as against the defendant, has been held to be upon the latter.⁴

§ 1706. Evidence of assignee's right.—Where a statement of the account sued on was attached to the complaint, and an assignment of the account in writing appeared at the close thereof signed by the person who performed the services which the account was for, and he testified that the signature was genuine, this was held sufficient evidence of the assignee's right to sue.⁴ It was also held, in a recent case, that where one assigned a trade secret, but did not become the owner thereof until afterwards, his assignee took title by estoppel.⁵ In another case a promise by a son to his father, on receiving property from the latter, that, at the death of the father, the son would pay his sister a certain sum was held to be or create a chose in action, which, on being assigned to the sister, could be enforced by her. And it was also held that the agreement of the son with his sister, at the request of the

¹ *Lassiter v. Jackman*, 88 Ind. 118; 701, 46 Atl. 156; *Wagenhurst v. Woronieki v. Pariskiego*, 74 Conn. 224, 50 Atl. 562. *Wineland*, 20 App. D. C. 85.

² *Stair v. Richardson*, 108 Ind. 429, 9 N. E. 300. ^{**} *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138.

³ *Uncas Paper Co. v. Corbin*, 75 Conn. 675, 55 Atl. 165; *Woronieki v. Pariskiego*, 74 Conn. 224, 50 Atl. 562; *Gaffney v. Tammany*, 72 Conn. 562. ⁴ *Neal v. Heying*, (Iowa) 98 N. W. 603.

⁵ *Vulcan &c. Co. v. American Can Co.*, (N. J. Eq.) 58 Atl. 290.

father, to pay the money to her, was sufficient evidence of a delivery of such chose in action.⁶ In a very recent case the action was brought on certain bounty claims against the state, and evidence that the plaintiff's assignor had purchased them from one claiming to be the person named as the owner in a certificate issued to such owner, in accordance with the statute, by the clerk, and who then had such certificate in his possession and thereupon delivered it to the purchaser, and each of the holders of such certificates transferring the same in the name of such holder, authorized the purchasers by power of attorney to receive the warrant therefor from the state Controller and the money from the state Treasurer, was held sufficient to prove that such claims were transferred to plaintiff by original owners, in the absence of evidence that the persons making the assignments were not the identical persons named in the certificates. The line of argument pursued by the court was substantially as follows: The law presumes that a person is the owner of property from exercising acts of ownership. Likewise the law presumes that a person is innocent of crime or wrong in civil as well as in criminal cases, and it will be presumed that the persons making the transfers and executing the power of attorney did not attempt to personate others, and by so doing fraudulently procure property to which they were not entitled, but rather that they were the person whom they represented themselves to be, the persons designated in the certificates of which they had possession, and the owners of the claims which they purported to sell. In each transaction the person signing the power of attorney signed as his name, the name appearing in the certificates as the name of the person to whom the certificate had been issued. Identity of person is presumed from identity of name, and it must therefore be presumed that the person signing the power of attorney was the person named in the certificate as the original owner of the claim. As the person who signed the power of attorney is the person who sold the claim, the proof is complete.⁷

§ 1707. **Proof of the assignment.**—It has been held that a patent regularly issued to the assignee of a land warrant is prima facie evidence that the assignment was regularly made,⁸ and that such an as-

⁶ Ebel v. Plehl, (Mich.) 95 N. W. 1004.

⁸ McArthur v. Phoebus, 2 Ohio 415; McArthur v. Gallaher, 8 Ohio

⁷ Bickerdike v. State, (Cal.) 78 512.

Pac. 277; see also, Bauer v. State, (Cal.) 78 Pac. 280.

signment will be presumed from great lapse of time together with the fact of payment of a consideration for the land.⁹ The execution of a written assignment may generally be proved by the acknowledgment of the assignor, or it may be proved, as in New York, by a subscribing witness, before an officer authorized to take acknowledgment and proof of deeds; and this may be done in that state even after the action has been commenced, and at any time before the actual offer of the document in evidence.¹⁰ Unless this is authorized in the particular jurisdiction and is done, the assignment, whether under seal or not,¹¹ if attested by a subscribing witness, must generally be proved by the witness or by his handwriting,¹² except where, as in many jurisdictions, the rule requiring a subscribing witness to be called has been relaxed by statute or otherwise.¹³ Direct proof of an assignment, however, is not always essential. The assignment of a mortgage or collateral may be shown in many instances by proof of an assignment of the principal obligation.¹⁴ But an assignment of the principal obligation cannot, ordinarily, be inferred from the mere fact of an assignment of a collateral security or other incident.¹⁵ If the assignment is oral it may be proved by parol,¹⁶ even though there was an agreement unperformed to give a written transfer.¹⁷ It is sufficient proof of a parol assignment that some evidence of the debt, such as a bond and mort-

⁹ *Duke v. Thompson*, 16 Ohio 34, 48, 53; *Bridenbaugh v. King*, 42 Ohio St. 410.

¹⁰ *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616.

¹¹ *Greenleaf Ev.*, § 569; *King v. Smith*, 21 Barb. (N. Y.) 158.

¹² *1 Greenleaf Ev.*, § 569; *Jones v. Underwood*, 28 Barb. (N. Y.) 481.

¹³ It is now the law in most jurisdictions that the execution of an ordinary written assignment of a chose in action or the like may be proved by evidence of those who saw it executed and by proof of the signature, as well as in other ways. So, as already shown, in many jurisdictions, its execution is regarded as admitted unless denied under the oath. Even the beneficiary, it has been held, may testify to its execution if there is no subscribing wit-

ness. *Little v. Vanleer*, (Tex. Civ. App.) 27 S. W. 736.

¹⁴ *Jackson v. Blodgett*, 5 Cow. (N. Y.) 202; *Green v. Hart*, 1 Johns. (N. Y.) 580; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Bowdoin v. Colman*, 3 Abb. Pr. (N. Y.) 431, 6 Duer (N. Y.) 182; *Bolen v. Crosby*, 49 N. Y. 183; *Lindsay v. Bates*, 42 Miss. 397; *Ryan v. Dunlap*, 17 Ill. 40.

¹⁵ *Merritt v. Bartholick*, 36 N. Y. 44, aff'g 47 Barb. (N. Y.) 253.

¹⁶ *Hooker v. Eagle Bank*, 30 N. Y. 83; *Fessel v. Albetiss*, 56 Barb. (N. Y.) 362; *Dunn v. Snell*, 15 Mass. 481; *Gurnell v. Gardner*, 9 Jur. N. S. 1220; *Hoffman v. Smith*, 94 Iowa 495, 63 N. W. 182, N. Y.

¹⁷ *Doremus v. Williams*, 4 Hun (N. Y.) 458.

gage, or a note held for the debt, or the like, was delivered to the assignee by the assignor,¹⁸ with intent to transfer the title to the demand; and the declarations of the assignor accompanying the delivery may usually be proved as a part of the *res gestae*. But, on the other hand, it has been held that neither the mere production of a non-negotiable security,¹⁹ nor proof of mere words of intention on the part of the alleged assignor, are enough, and that the plaintiff cannot prove his title by mere evidence of oral declarations of the assignor, unknown to the defendant, that he had at a previous time assigned the demand to plaintiff.²⁰ And under an allegation of an assignment, evidence of an assignment after the commencement of the suit has been held insufficient.²¹

§ 1708. **Assignee of corporation.**—Where the plaintiff claims as assignee of a corporation, it has been said that evidence of the existence of the corporation is admissible without any allegation of the fact other than such as is implied in the mention of the corporate name in the complaint.²² As against the debtor, an assignment of the cause of action has been presumed valid, although a vote of the board was necessary to its legality, and there was no evidence thereof.²³ But where there was evidence that the transfer was made without a vote of the board, the burden was held to be on the assignee to show that he took it for value and, without notice.²⁴ This he may show in support of

¹⁸ *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; and see, *Kamend v. Heulbig*, 12 Am. Law Reg. N. S. 61; *Mack v. Mack*, 3 Hun (N. Y.) 323; *Armstrong v. Cushney*, 43 Barb. N. Y. 340; *Billings v. Jane*, 11 Barb. (N. Y.) 620; but as to the strict common law rule, see, *Palmer v. Merrill*, 6 Cush. (Mass.) 282.

¹⁹ *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

²⁰ *Worrall v. Parmelee*, 1 N. Y. 521. *Crocker v. Muller*, 83 N. Y. S. 189, testimony of the assignor that he intended to assign his title to the chose in action was held sufficient.

²¹ *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578. It has been held that ratification of an authorized assign-

ment of a chose of action made after suit is brought will not relate back to the date of such assignment, and thereby support the action. *Read v. Buffum*, 79 Cal. 77, 12 Am. St. 131, 21 Pac. 555, but variance in the mode of assignment may be disregarded, if not prejudicial; *Bowman v. Keleman*, 65 N. Y. 598; see as to presumption and proof of date, *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

²² *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

²³ *Belden v. Meeker*, 47 N. Y. 307, aff'g 2 Lans. (N. Y.) 470; 9 Moak's Eng. 255, n.; *Houghton v. McAuliffe*, 2 Abb. Ct. App. Dec. 409.

²⁴ *Houghton v. McAuliffe*, 2 Abb. Ct. App. Dec. (N. Y.) 409; contra,

his title, whether he took directly from the corporation or through a third person.²⁵ The fact that the plaintiff himself,²⁶ was a director at the time of such an illegal transfer has also been held sufficient evidence of notice to defeat the action. The official character of the officers making the transfer may be proved either by the corporate minutes, or in a proper case, by witnesses testifying to the fact of their habitually acting as such,²⁷ and the jury may infer that the officer had authority to do the particular act from evidence of the exercise by him of the same general power, with the knowledge and acquiescence of the directors.²⁸ So, where the due execution of the assignment is admitted in the pleadings, this admission implies that the persons who executed it in behalf of the corporation had authority to do so, and that the seal attached is its common seal.²⁹

§ 1709. **Assignees under general assignment for creditors.**—In an action by an assignee under a voluntary general assignment for the benefit of creditors, as such, on a cause of action which he acquired by the assignment, the plaintiff is bound to prove that he is such assignee, at least where this issue is properly raised.³⁰ For this purpose the deed by the insolvent to his assignee, expressing a pecuniary consideration is admissible in evidence without proving the insolvency proceedings, although it recites their existence and purports to be made pursuant to a judge's order.³¹ Although prior fraudulent transfers by the assignor do not necessarily avoid the assignment, yet it has been

Caryl v. McElrath, 3 Sandf. (N. Y.) 176.

²⁵ *Curtis v. Leavitt*, 15 N. Y. 9. Proof of payment of value has been said to raise a presumption that the plaintiff took without notice. *Warner v. Chappell*, 32 Barb. (N. Y.) 309.

²⁶ *Smith v. Hall*, 5 Bosw. (N. Y.) 319.

²⁷ *Partridge v. Badger*, 25 Barb. (N. Y.) 146. An assignment of a claim by a corporation, executed by its president, and attested by its secretary and corporal seal, is sufficient to protect the debtor in paying the amount of the claim to the assignee. *Purdy v. Nova Scotia Midland R. Co.*, 8 Misc. (N. Y.) 510; but author-

ity of the secretary to make an assignment of the indebtedness due to the corporation will not be presumed. *Read v. Buffum*, 79 Cal. 77; 12 Am. St. 131, 21 Pac. 555.

²⁸ *Merchant's Bank v. State Bank*, 10 Wall (U. S.) 604; compare, *Jackson v. Campbell*, 5 Wend. (N. Y.) 572; *Hoyt v. Thompson*, 5 N. Y. 320; and see Vol. I, §§ 64, 71.

²⁹ *Woronieki v. Pariskiego*, 74 Conn. 224, 50 Atl. 562.

³⁰ *Best v. Strong*, 2 Wend. (N. Y.) 319, under general denial in New York.

³¹ *Rockwell v. Brown*, 54 N. Y. 210; under many statutes the deed is made in the first instance.

held that they may be considered in a proper case in determining whether there was any fraud in the assignment in question.³² Delivery of the deed may also be proved by circumstantial evidence,³³ but it has been held that a subsequent fraudulent sale by the assignee has no bearing upon the question of delivery.³⁴ The assignee's title is generally proved by producing the assignment, or a certified copy of it. This has been held admissible under an allegation of an assignment to the plaintiff, without stating that it was in trust for creditors, unless the defendant shows that he has been misled to his prejudice.³⁵ The assent of the beneficiaries to a valid assignment for their benefit is generally presumed, unless there is evidence to the contrary.³⁶ It has also been said that the assent of a creditor may be proved by the act of his attorney, and that of a firm by the act of a partner.³⁷ If the plaintiff's right depends on the power of the assignee to convert or apply the assets to the purpose of the trust, he should also prove the filing of the bond, where that is required, and other steps, if any, which the statute makes a condition to the exercise of that power.³⁸ But in an action to recover for goods sold and delivered by an assignor the original general assignment and the bond and schedule, were introduced in evidence without objection, and it was held that there was sufficient proof of the assignment, the assignee also testifying to that

³² *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99; see, *Batten v. Smith*, 62 Wis. 92; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227, 41 Am. Dec. 503.

³³ *Ward v. Lewis*, 4 Pick. (Mass.) 518; *Scott v. Mills*, 115 N. Y. 376, 22 N. E. 156; *Taylor v. Atwood*, 47 Conn. 498.

³⁴ *Leeds v. Commonwealth*, 83 Pa. St. 453; *Foster Woolen Co. v. Wollman*, 87 Mo. App. 658, it is held that after the assignment is completed neither the declarations of the assignor nor those of the assignee, whose only authority is to sell the property and distribute the proceeds, can bind the property. Date of execution is held to be *prima facie* the date of delivery; *McIl-*

hargy v. Chambers, 117 N. Y. 532, 23 N. E. 561.

³⁵ *Hoogland v. Trask*, 6 Rob. (N. Y.) 540; *Lauve's Case*, 6 La. Ann. 530.

³⁶ *Burrill Assignments*, § 381; *Inman v. Schloss*, 122 Ala. 461, 25 So. 739; *Gonzales v. Batts*, 20 Tex. Civ. App. 421, 50 S. W. 403; *Van Buskirk v. Warren*, 4 Abb. Ct. App. Dec. (N. Y.) 458; *Fleming v. Stiefel*, 8 Ohio Dec. R. 779, 782; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *Widgery v. Haskell*, 5 Mass. 144, 4 Am. Dec. 41; *Naylor v. Fosdick*, 4 Day (Conn.) 146, 4 Am. Dec. 187.

³⁷ *Burrill Assignments*, 392.

³⁸ *Thrasher v. Bentley*, 1 Abb. New Cas. (N. Y.) 39.

fact.³⁹ Where the assignor did not state in the assignment his residence and place of business, it was held that his identity might be determined by his signature to the assignment, and the acknowledgment thereof before an officer specified in the statute.⁴⁰ The deed of assignment for the benefit of creditors cannot, under ordinary circumstances, be contradicted or varied by parol evidence;⁴¹ but the circumstances attending its execution may be shown in a proper case,⁴² and, under many of the statutes where it is apparent that the deed was made under the statute as a voluntary general assignment of all property for the benefit of all creditors (except such, if any, as was exempt by law), it will be given that effect, even though it may not in its terms cover all such property.⁴³ But in other cases, where there is no such statute, if the assignment is not made under the statute, a specific description and designation in the deed will usually control, and parol evidence will not, ordinarily, be admissible to include other property or persons.⁴⁴ Parol evidence is usually admissible, however, to identify

³⁹ *Hitching v. Kayser*, 65 N. Y. App. Div. 302, 72 N. Y. S. 749.

⁴⁰ *Dutchess County Mut. Ins. Co. v. Van Wagonen*, 132 N. Y. 398; 30 N. E. 971; as to declarations of assignor, see, *Von Sachs v. Kretz*, 72 N. Y. 548; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Vance v. Smith*, 2 Heisk. (Tenn.) 343; *Coole v. Brahan*, 3 Exch. 185; *Jarrett v. Leonard*, 2 M. & Sel. 265.

⁴¹ *Wilson v. Hanson*, 12 Me. 58; *Burchinell v. Mosconi*, 4 Colo. App. 401, 36 Pac. 307; *Price v. Laing*, 152 Ill. 380, 38 N. E. 921; *Steedman v. Dobbins*, 93 Tenn. 397, 24 S. W. 1133; *Hall v. Cottingham*, 124 N. Car. 402, 32 S. E. 745; *Hays v. Covington*, 16 Lea (Tenn.) 262.

⁴² *City Nat. Bank v. Merchant's Nat. Bank*, 7 Tex. Civ. App. 584, 27 S. W. 848; *Collins v. Sanger*, 8 Tex. Civ. App. 69, 27 S. W. 500; *First Nat. Bank v. Roberts*, (Ky.) 7 S. W. 890; *Bugbee v. Lombard*, 94 Wis. 326, 68 N. W. 958; *Winnier v. Hoyt*, 66 Wis. 227, 28 N. W. 380, 57 Am. R. 257; *Richmond v. Mississippi Mills*,

52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413; *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. 309; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 12 Sup. Ct. 318.

⁴³ *Foreman v. Burnette*, 83 Tex. 396, 18 S. W. 756; *Landauer v. Conklin*, 3 S. Dak. 462, 54 N. W. 322; *Dawley v. Sherwin*, 5 S. Dak. 594, 59 N. W. 1027; *Siebert v. Milligan*, 110 Ind. 106, 10 N. E. 929; *Keighler v. Nicholson*, 4 Md. Ch. 86; *Long v. Meriden & Co.*, 94 Va. 594, 27 S. E. 499; but compare, *Barnitz v. Rice*, 14 Md. 24; *Lookout Bank v. Noe*, 86 Tenn. 21, 5 S. W. 433; *McMillan v. Knapp*, 76 Ga. 171, 2 Am. St. 29.

⁴⁴ *Driscoll v. Fiske*, 21 Pick. (Mass.) 503; *Mims v. Armstrong*, 31 Md. 87; *Palmer v. McCarthy*, 2 Colo. App. 422, 31 Pac. 241; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677; as to the deed and recitals therein as evidence between and against the parties, see *Arnold v. Bailey*, 24 S. Car. 493; *Hays v. Covington*, 16 Lea (Tenn.) 262; *Huntington v. Hav-*

the property described and apply the instrument to the subject matter.⁴⁵

§ 1710. **Delivery and acceptance.**—Delivery of a written assignment is sufficiently proved or presumed when the instrument is proved to have been executed by the assignor, and is actually produced by the plaintiff at the trial.⁴⁶ So, it has been held that affirmative proof of the acceptance of an assignment which appears to be beneficial to the assignee, is not required from the party relying upon it, and that the party impeaching it must disprove acceptance.⁴⁷ The presumption is usually indulged in such a case that the assignment, being beneficial to the assignee, was accepted by him;⁴⁸ and the same presumption of acceptance has been held to arise in case of a voluntary general assign-

ens, 5 Johns. Ch. (N. Y.) 23; Griffin v. Macaulay, 7 Gratt. (Va.) 476; State v. Beach, 147 Ind. 74, 46 N. E. 145; as to strangers, see, Langdon v. Thompson, 25 Minn. 509; Martin-Brown Co. v. Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695; Southern Suspender Co. v. Van Borries, 91 Ala. 507, 8 So. 367; Little Rock &c. R. Co. v. Sparkman, 60 Ark. 25, 28 S. W. 509.

⁴⁵ Frank v. Myers, 97 Ala. 437, 11 So. 832; Maul v. Drexel, 55 Neb. 446, 76 N. W. 163; Pingree v. Comstock, 18 Pick. (Mass.) 46; Smith v. Stoker, 8 Colo. 286, 7 Pac. 10; Dorr v. Schmidt, 38 Fla. 354, 21 So. 279; Snyder v. Murdock, 20 Utah 419, 59 Pac. 91; Silsby v. Strong, 38 Ore. 36, 62 Pac. 633; Brashear v. West, 7 Pet. (U. S.) 608.

⁴⁶ Story v. Bishop, 4 E. D. Smith (N. Y.) 423; North v. Turner, 9 S. & R. (Pa.) 244.

⁴⁷ Van Buskirk v. Warren, 4 Abb. Ct. App. Dec. (N. Y.) 457; as to evidence of delivery and acceptance generally, see, Hackett v. Moxley, 65 Vt. 71, 25 Atl. 898; Owen v. Potter,

115 Mich. 556, 73 N. W. 977; Palmer v. Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Marshall v. Strange, (Ky.) 9 S. W. 250; Williamson v. Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. 184; as to assignment by separate writing, see, Franklin v. Twogood, 18 Iowa 515; Conyngham v. Smith, 16 Iowa 471; Erickson v. Kelly, 9 N. Dak. 12, 81 N. W. 77; as to constructive delivery where there is no writing, see, White v. Kilgore, 77 Me. 571; Preston v. Peterson, 107 Iowa 244, 77 N. W. 864; Risley v. Phoenix Bank, 83 N. Y. 318, 38 Am. R. 421, proof of delivery not required; Rollison v. Hope, 18 Tex. 446; Noyes v. Brown, 33 Vt. 431; Wolcott v. Merchant's Co., 60 N. Y. S. 862, long acquiescence in the assignee's claim was held to raise a presumption of its legal origin, and proof of delivery was not required.

⁴⁸ Vol. 1, § 108, notes 109, 110; see also, Pearey v. Tilton, 18 N. H. 251, note in 45 Am. Dec. 365 and Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315.

ment for the benefit of creditors.⁴⁹ So, the assignment of a mortgage by a nominal mortgagee is sufficient to show an acceptance by him.⁵⁰

§ 1711. **Consideration.**—For the purpose of enabling the assignee to maintain an action against the debtor, proof of a consideration for the assignment is not, ordinarily, essential, unless required by statute, for the liability of the debtor is not affected by the fact that there was no consideration for the assignment.⁵¹ Even if a consideration is not expressed, it will generally be presumed.⁵² But it has been held that the defendant may prove that the assignee paid and took the assignment as trustee or agent for one who has no right to enforce the claim,—for instance, a principal debtor or a joint debtor.⁵³ And as between the assignor and the assignee, or between subsequent purchasers or creditors of the assignor and the assignee a valuable and legal consideration may be necessary to complete the assignment.⁵⁴

§ 1712. **Best and secondary evidence.**—If it appears that the assignment was made by a written instrument, the writing is the best evidence, and must usually be produced or accounted for.⁵⁵ But evidence that, after its execution, the assignment had been delivered by the plaintiff to his attorney and left by the latter in court among the

* *Burrill Assignments*, § 239; *Fleming v. Stiefel*, 8 Ohio Dec. R. 779, 782.

* *Lady Superior &c. v. McNamara*, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184.

* *Pugh v. Miller*, 126 Ind. 189, 25 N. E. 1040; *Sammis v. Wightman*, 31 Fla. 10; *Young v. Hudson*, 99 Mo. 102; *Cummings v. Morris*, 25 N. Y. 625; *Guy v. Craighead*, 6 App. Div. (N. Y.) 463; *Daby v. Ericsson*, 45 N. Y. 786; *Deach v. Perry*, 52 Hun 613, 6 N. Y. S. 940; *Mills v. Fox*, 4 E. D. Smith 220, whether the action is on contract; *St. John v. Mutual Life Ins. Co.*, 13 N. Y. 31, or for a wrong; *Merrick v. Brainard*, 38 Barb. N. Y. 574; 34 N. Y. 208, an absolute valid assignment transfers the legal title, but the assignee can, in most jurisdictions, recover even

on an equitable assignment and title.

* *Eno v. Crooke*, 10 N. Y. 60; *Richardson v. Mead*, 27 Barb. N. Y. 178; *Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697; *Dickerson v. City*, 26 Wash. 292, 66 Pac. 381.

* *Ten Eyck v. Craig*, 62 N. Y. 416, aff'g 2 Hun 452; *Arnott v. Webb*, 1 Dil. (U. S.) 362.

* *White v. Kilgore*, 77 Me. 571, 1 Atl. 739; *Tallman v. Hoey*, 89 N. Y. 537; *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145; *Brokaw v. Brokaw*, 41 N. J. Eq. 215, 4 Atl. 66; *Baker v. Wood*, 157 U. S. 212, 15 Sup. Ct. 577.

* *Gilmore v. Banks*, 55 Ga. 403; see also, *Epping v. Mockler*, 55 Ga. 376; but compare, *Dunn v. Hewitt*, 2 Denio (N. Y.) 638.

papers in the case, and that, after proper search, it could not be found, has been held a sufficient foundation to let in secondary evidence of its contents.⁵⁶

§ 1713. **Parol evidence.**—As already shown an assignment of a chose in action, good as an equitable assignment at least, may, in most instances and in most jurisdictions, be made and proved by parol. But where it is in writing the rule excluding parol evidence to vary a written contract is generally applicable, and it has often been applied against assignees of a contract, and against a debtor seeking to contradict or vary an assignment of his debt. But the rule, as usually applied, forbids neither the assignee nor the debtor to give parol evidence, in a proper case, to vary either the contract sued on or the assignment, “unless they are both parties to the same instrument, or have come under obligations of parties, or the agreement is one which the law requires to be in writing.”⁵⁷ Thus, a person not a party to a policy of insurance, but holding it by assignment, or as one to whom, in case of loss, it is payable, may adduce evidence to explain it, in his action against the company.⁵⁸ If the plaintiff proves a written assignment absolute on its face the defendant cannot successfully impeach the plaintiff's title, by parol evidence to show that it was made upon condition that part of the claim assigned should, when collected, be paid to the assignor.⁵⁹ And in some jurisdictions, the debtor cannot defend in such a case, on the ground that the claim was assigned to the plaintiff to collect for the use of the assignor.⁶⁰

§ 1714. **Other extrinsic evidence.**—As in other cases, extrinsic evidence is sometimes admissible to identify the subject matter of the assignment. So, evidence of the course of dealing and correspondence of the parties may be admissible to show the practical construction of

⁵⁶ *Everett v. Hart*, (Colo. App.) 77 Pac. 254; see also, *Bickerdike v. State*, (Cal.) 78 Pac. 277, 279.

⁵⁷ *Furbush v. Goodwin*, 25 N. H. 425, 446; *Dempsey v. Klipp*, 61 N. Y. 462, and cases cited.

⁵⁸ *McMaster v. Insurance &c. Co.*, 55 N. Y. 222, 234, 1 Abbott Tr. Ev. 9.

⁵⁹ *Durgin v. Ireland*, 14 N. Y. 322, but he may, for the purpose of showing the bias of the assignor, if the assignor has testified for plaintiff;

Moore v. Viele, 4 Wend. (N. Y.) 420, and under certain circumstances parol evidence of the mode of payment has been held admissible. *Hildebrant v. Crawford*, 6 Lans. (N. Y.) 502, 507.

⁶⁰ *Young v. Hudson*, 99 Mo. 102, 12 S. W. 632; see also *Briscoe v. Eckley*, 35 Mich. 112; *McBride v. Farmer's Bank*, 26 N. Y. 450; *Petersen v. Chemical Bank*, 32 N. Y. 21.

the assignment by the parties where its construction is otherwise doubtful.⁶¹ Many illustrations of the use of extrinsic evidence have already been given in preceding sections, and others will be found in the next section and in the authorities cited below.⁶² But where an action was brought on an account assigned to the plaintiff in writing, and the execution of the assignment was admitted by the pleadings, it was held that evidence on the part of the defendant, tending to show that the assignment was only colorable and that the plaintiff was not the real party in interest, was properly excluded in the absence of a pleading setting up such a defense.⁶³ A formal release or receipt, given by the assignor to the debtor, before the transfer, is generally competent against the assignee; but it is said that the date of the paper is not even presumptive evidence against the assignee that it was then given, that there must be extrinsic evidence that it was given before the assignor parted or assumed to part with the chose in action; and that it is left in doubt as to whether it was given before or after the transfer, it must be excluded.⁶⁴ And, under ordinary circumstances at least, the assignor cannot release or discharge the debtor, after he has parted with his interest, to the disadvantage of the assignee.⁶⁵ As a general rule, the assignee of a non-negotiable chose in action, as distinguished from the bona fide transferee of negotiable paper, takes it subject to all equities, whether known or unknown to the assignee, existing against the assignor at the time of the assignment, in favor either of the debtor or of any person who has succeeded to his right at the time of the assignment,⁶⁶ and even, according to some authorities,

⁶¹ *Mueller v. Northwestern University*, 195 Ill. 236, 63 N. E. 110, 117.

⁶² *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160; *Curtis v. Curtis*, (Mich.) 96, N. W. 32; *Gardiner-Campbell Co. v. Iroquois Iron Co.*, 127 Fed. (U. S.) 648; *Green v. Witte*, 5 Ind. App. 343, 32 N. E. 214; *Fitger v. Archibald Guthrie & Co.*, 89 Minn. 330, 94 N. W. 888.

⁶³ *Lesh v. Meyer*, 63 Kans. 524, 66 Pac. 245.

⁶⁴ *Foster v. Beals*, 21 N. Y. 250; *Chaffer v. Cox*, 1 Hilt (N. Y.) 78; but see, Vol. I, § 487, n. 48; and § 589; *Byrd v. Tucker*, 3 Ark. 451; *Knisely v. Sampson*, 100 Ill. 573, *Roac. N. P.* 38.

⁶⁵ *Welch v. Mandeville*, 1 Wheat. (U. S.) 233; *Marr v. Hanna*, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449; *Lipp v. South Omaha Land Syndicate*, 24 Neb. 692, 40 N. W. 129; *Ivy Coal &c. Co. v. Long*, (Ala.) 36 So. 722; *Fassett v. Mulock*, 5 Colo. 466; and it has been held that even proof of fraud of the parties such as would enable creditors to avoid the assignment will not necessarily avail the debtor; *Osborne v. Moss*, 7 Johns. (N. Y.) 161; *Waterbury v. Westervelt*, 9 N. Y. 598.

⁶⁶ *Evertson v. Evertson*, 5 Paige (N. Y.) 644; *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438; *Clute v. Robison*, 2 Johns. (N. Y.) 595; *Ty-*

subject to latent equities in favor of a third person;⁶⁷ but the weight of authority seems to be to the effect that a bona fide assignee will not, ordinarily, be bound by latent equities of the third person.⁶⁸ If the cause of action was complete against the debtor before the assignment was made, notice to the debtor, of the assignment, need not, as a rule, be proved,⁶⁹ except for the purpose of shutting out evidence of subsequent dealings by the debtor with the assignor. As between the assignor and assignee of a chose in action notice to the debtor need not be proved.⁷⁰ But as between the debtor and the assignee, until the debtor has such notice he is usually entitled to treat the assignor as the owner, and may accept a release from him or purchase a claim to be used as a set-off in a proper case.⁷¹

§ 1715. Declarations and admissions.—Declarations and admissions of the assignor are not, ordinarily, competent evidence in favor of the assignee,⁷² unless part of the *res gestae* of an act properly in evi-

ler Car &c. Co. v. Wettermark, (Tex. Civ. App.) 34 S. W. 807; 2 Am. & Eng. Ency. of Law 1080, and numerous authorities cited; 5 Lawson Rights, Rems. & Pr. §§ 26, 63.

⁶⁷ Green v. Warnick, 64 N. Y. 224, overruling, Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441, and other cases to the contrary; Bush and Lathrop, 22 N. Y. 535; Fairbanks v. Sergeant, 104 N. Y. 108.

⁶⁸ Mott v. Clark, 9 Pa. St. 399, 49 Am. Dec. 566, and note; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244, and note; Newlin v. Osborne, 6 Jones L. (N. Car.) 128, 72 Am. Dec. 566, and note; Moore v. Holcombe, 3 Leigh (Va.) 597; Baker v. Wood, 157 U. S. 212, 15 Sup. Ct. 577; 2 Am. & Eng. Ency. of Law (2d ed.) 1081, 1082.

⁶⁹ Muir v. Schenck, 3 Hill (N. Y.) 88 Am. Dec. 633; Schilling v. Mullen, 55 Minn. 122, 43 Am. St. 475, 56 N. W. 586; Myers v. Davis, 22 N. Y. 489, rev'g 26 Barb. (N. Y.) 367; Heermans v. Ellsworth, 64 N. Y. 161.

⁷⁰ Wakefield v. Martin, 3 Mass.

558; Bishop v. Holcomb, 10 Conn. 444; Jackson v. Hamm, 14 Colo. 58, 23 Pac. 88; Rodick v. Gandell, 1 De G., M. & G. 776; so in some jurisdictions as to creditors of the assignor; Thayer v. Daniels, 113 Mass. 129; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. R. 66; but see, Vanbuskirk v. Hartford Fire Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Ward v. Morrison, 25 Vt. 593; Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; see also, Manning v. Matthews, 70 Iowa 503, 30 N. W. 749.

⁷¹ Baker v. Wood, 157 U. S. 212, 15 Sup. Ct. 577; Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; Rider v. Johnson, 20 Pa. St. 190; Stocks v. Dobson, 4 De G., M. & G. 11.

⁷² Roscoe N. P. 57; Riddle v. Dixon, 2 Pa. St. 372; according to Howard v. Upton, 9 Hun (N. Y.) 434, it would seem that the act must not only be properly in evidence, but in issue, or relevant to the issue. See also, Outrom v. Morewood, 5 Term R. 123; Bond v. Fitzpatrick, 4 Gray (Mass.) 89; declara-

dence or brought home to the debtor. The assignor's admissions and declarations, to be admissible against the assignee must usually have been made while the assignor was the owner; and even his formal written acknowledgments made after he ceased to be the owner,⁷² are incompetent against the assignee, unless the evidence connects the assignee with them; and it has been held that it makes no difference that the assignment is only as collateral,⁷⁴ or good only in equity.⁷⁵ But it seems that if the assignee is merely a nominal party suing for the assignor's benefit, they may be competent;⁷⁶ and that, on the other hand, if the assignee is the real party in interest, the fact that the action is in the assignor's name does not render his declaration competent when made subsequent to the transfer.⁷⁷ According to the weight of authority, evidence of the assignor's acts and declarations against his own interest, made during his ownership and possession⁷⁸ is generally competent against his assignee, except in the case of a bona fide holder for value before maturity or dishonor of negotiable paper, at least where the assignee is the mere agent and representative of the assignor, or where he took title with actual notice of the true state of that of the assignor, as qualified by the admission in question, or where he purchased the demand already stale, or otherwise infected with circumstances of suspicion.⁷⁹ The New York rule, rec-

tions made by one who afterward became an assignee in bankruptcy, or a trustee, are not ordinarily admissible against him in that capacity; *Legge v. Edmonds*, 25 L. J. Ch. 125; *Metters v. Brown*, 32 L. J. Eq. 138.

⁷² *Ellis v. Watkin's Estate*, 73 Vt. 371, 50 Atl. 1105; *Eby v. Eby*, 5 Pa. St. 435; *Kinna v. Smith*, 3 N. J. Eq. (Green) 14; *Pringle v. Pringle*, 59 Pa. St. 289; *Morton v. Morton*, 13 S. & R. (Pa.) 108; *Van Gelder v. Van Gelder*, 81 N. Y. 625; *Wangner v. Grimm*, 169 N. Y. 421, 62 N. E. 569; *Zobel v. Bauersachs*, 55 Neb. 20, 75 N. W. 43; *Welcome v. Mitchell*, 81 Wis. 566, 29 Am. St. 913, 51 N. W. 1080; *Muncey v. Sun Insurance Co.*, 109 Mich. 542, 67 N. W. 562; *Brock v. Brock*, 92 Va. 175, 23 S. E. 224;

Parry v. Libbey, 166 Mass. 112, 44 N. E. 124.

⁷⁴ *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Dazey v. Mills*, 10 Ill. (5 Gilm.) 70.

⁷⁵ *Mandeville v. Welch*, 5 Wheat. (U. S.) 277.

⁷⁶ *Eaton v. Corson*, 59 Me. 510.

⁷⁷ *Frear v. Evertson*, 20 Johns. (N. Y.) 142; see also, *Wing v. Bishop*, 3 Allen (Mass.) 456.

⁷⁸ Ante, Vol. 1, § 267, n. 143, and numerous authorities there cited; see also, *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213; 50 N. E. 655; *Frick v. Reynolds*, 6 Okla. 638, 52 Pac. 391; notes in 95 Am. Dec. 49; 42 Am. Dec. 80; but see, *Bond v. Fitzpatrick*, 4 Gray (Mass.) 89, 92; *Bullis v. Montgomery*, 50 N. Y. 358.

⁷⁹ 1 Greenleaf Ev. § 190; 1 Taylor Ev. § 713; ante, Vol. 1, § 266.

ognized also in the Supreme Court of the United States,⁸⁰ is more strict in protecting the rights of the assignee.⁸¹ That rule is, that the oral admissions or declarations, as distinguished from the transactions of the former holder of any chose in action or personal property,⁸² even if made before his transfer, are not competent evidence against the transferee, unless there is a present identity of interest between them.⁸³ And it has also been held in New York that even though the assignor had died before the trial, this did not make the declarations admissible under the rule that declarations against interest, by a person since deceased, are competent.⁸⁴ But, even under the New York rule, although the mere independent declarations of a prior holder of a chose in action cannot be given in evidence to affect the title or the rights of a subsequent holder, such declarations made at the time the chose in action was negotiated to the person who is seeking to enforce it, may usually be proved as part of the *res gestae*, and may qualify the latter's title.⁸⁵ So, the statements of a third person in possession of property, as to whom he holds it for, or as to who is the owner of it, and not regarded as hearsay, but are held competent as a part of the *res gestae* and as characterizing the possession.⁸⁶ It has also been held in New York that an offer to give the acts and declarations of an assignor in evidence against his assignee, should be so framed as to show they were made before the transfer,⁸⁷ that they may then be admissible as having been made against interest when they were made; that the judge must determine the question of their admissibility, and not leave it to the jury to determine when they were made;⁸⁸ and that if it is left in doubt whether the declarations were made before or

⁸⁰ *Paige v. Cagwin*, 7 Hill (N. Y.) 361; *Dodge v. Freedman's &c. Co.*, 93 U. S. 379.

⁸¹ *Jones v. East Society &c.* 21 Barb. (N. Y.) 174.

⁸² *Smith v. Webb*, 1 Barb. (N. Y.) 234; *Beach v. Wise*, 1 Hill (N. Y.) 612.

⁸³ *Flannery v. Van Tassel*, 127 (N. Y.) 631, 27 N. E. 393; *Truax v. Slater*, 86 N. Y. 630, note in 42 Am. Dec. 68.

⁸⁴ *Stark v. Boswell*, 6 Hill (N. Y.) 405, 1 Barb. (N. Y.) 234.

⁸⁵ *Benjamin v. Rogers*, 126 N. Y. 60; 26 N. E. 970; see also, *Bushnell*

v. Wood, 85 Ill. 88; *Adams v. Dividson*, 10 N. Y. 309.

⁸⁶ *Elwood v. Saterlie*, 68 Minn. 173, 71 N. W. 13; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. 860, 19 N. E. 190; but see, *Oberholtzer v. Hazen*, 101 Iowa 340, 70 N. W. 307; see Vol. I, §§ 264, 553.

⁸⁷ *Jermian v. Denniston*, 6 N. Y. 276; to the contrary, *Magee v. Raiguel*, 64 Pa. St. 110, rev'g 7 Phil. (Pa.) 231.

⁸⁸ *Vrooman v. King*, 36 N. Y. 477, 484; *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403.

after the transfer, they must be excluded.⁸⁹ The New York rule excludes, not only evidence of words, but evidence of acts offered as merely in the nature of admissions, such as the discontinuance by the assignor of an action brought for the same cause, and suffering judgment for costs;⁹⁰ but it does not exclude evidence of transactions such as a message sent by the assignor while owner, to the debtor, on which the latter acted or gave assent, so as to constitute an agreement.⁹¹ It has also been held that the rule cannot apply against written evidence put into the debtor's hands by the assignor before the assignment.⁹² The assignor's admissions under the New York rule, may not be competent against his assignee, but his agreement is.⁹³ So, where a fraudulent combination or conspiracy is shown to have existed between the assignor and assignee, by preliminary evidence independent of the declarations of either, then the declarations of each, made during the existence of such conspiracy and while acting in furtherance of the wrongful scheme, are competent against the other, under the rule applicable to the declarations of conspirators.⁹⁴

§ 1716. **Former adjudication—Estoppel.**—A final judgment on the merits in a suit in which the assignor was a party is usually conclusive as to the assignee where the assignment was made thereafter;⁹⁵ but it is not so, ordinarily, where the assignment was made before the suit was instituted.⁹⁶ And a judgment for, or against the assignee will not, ordinarily, be conclusive for or against the assignor where the latter was not a party.⁹⁷ Yet where the assignment was made merely

⁸⁹ *Vrooman v. King*, 36 N. Y. 477; admissions of the assignor, after the assignment, are not competent to prove that goods came into the defendant's hands as assignee; *Finance Co. v. Josephson*, 88 N. Y. 8. 707.

⁹⁰ *Tousley v. Barry*, 16 N. Y. 497.

⁹¹ *Smith v. Schanck*, 18 Barb. (N. Y.) 344.

⁹² *Jermain v. Denniston*, 6 N. Y. 276.

⁹³ *Fort v. Burch*, 6 Barb. (N. Y.) 60, 77; *Beers v. Hawley*, 2 Conn. 467.

⁹⁴ *Cuyler v. McCartney*, 40 N. Y. 22; see also, Vol. I, § 249; *Wright*

v. Zeigler, 70 Ga. 501; *Caldwell v. Williams*, 1 Ind. 405.

⁹⁵ *Newton Mfg. Co. v. Wilgus*, 90 Fed. (U. S.) 483; *Corcoran v. Chesapeake &c. Co.*, 94 U. S. 741; *Zion Church v. Parker*, 114 Iowa 1, 86 N. W. 60; *Soward v. Coppage*, (Ky.) 9 S. W. 389.

⁹⁶ *Gregory v. Clabrough*, 129 Cal. 475, 62 Pac. 72; *Aultman v. Sloan*, 115 Mich. 151, 73 N. W. 123; *Simplot v. Chicago &c. R. Co.*, 16 Fed. (U. S.) 350.

⁹⁷ *Gainnes v. Patterson*, 3 Dana (Ky.) 408; *Hunt v. Lucas*, 68 Mo. App. 518; *Johnson v. Union Switch &c. Co.*, 59 N. Y. Super. Ct. 169, *aff'd* in 129 N. Y. 653.

for the purpose of the suit the judgment will usually conclude the assignor;⁸⁸ and where the assignor is a defendant, as a necessary party, and permits judgment to be rendered, he is thereafter estopped from maintaining an action upon the same instrument.⁸⁹

⁸⁸ *Hodson v. Union Pac. R. Co.*, 14 Utah 402, 47 Pac. 859, 60 Am. St. 14 N. E. 479.
⁸⁹ *Morrison v. Ross*, 113 Ind. 186, 902; *Garretson v. Ferrall*, 92 Iowa 728, 61 N. W. 251.

CHAPTER LXXXV.

ASSUMPSIT.

Sec.	Sec.
1717. Generally.	1727. Money lent.
1718. General assumpsit—Common counts.	1728. Money paid.
1719. Distinguished from other forms of action.	1729. Money had and received.
1720. Burden of proof.	1730. Duress—Mistake—Failure of consideration.
1721. Presumptions.	1731. Money received by agent.
1722. Questions of law or fact.	1732. Goods bargained and sold, or sold and delivered.
1723. The promise.	1733. Work, labor, or service—Material furnished.
1724. Consideration.	1734. Board and lodging.
1725. Request and demand.	1735. Use and occupation.
1726. Non-assumpsit—Defenses.	

§ 1717. **Generally.**—As assumpsit is an undertaking, either express or implied, to perform a simple contract,¹ it is therefore necessary to support the action, that there must be a contract express or implied in law.² The action lies, in general for the recovery of damages for breach of a parol or simple contract, or certain quasi contractual obligations where the law implies a promise. Special assumpsit is where the action is brought for breach of an express promise, and general assumpsit is where the action is brought in the form of common counts based on a promise implied by law. "General assumpsit will not lie where there has been an express contract, except: (a) where the contract has been fully executed by the plaintiff, and nothing remains but the payment of the money by the defendant; (b) where, after part performance of the contract by the plaintiff, further

¹ 4 Cyc. 319; 1 Bouv. Law Dict. (Rawle's ed.).

² McCormick Harvesting Mach. Co. v. Waldo, (Mich.) 87 N. W. 55; Osborn v. Bell, 5 Denio (N. Y.) 370, 49 Am. Dec. 275; Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Westcott v. Sharp, 50 N. J. L. 392, 13 Atl. 243; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Rudder v. Price, 1 H. Bl. 551, 554; Taylor v. Laird, 25 L. J. Exch. 329.

performance is prevented by an act of the defendant, or by some act or event not within either party's control, which in law operates as a discharge of the contract, or the contract is abandoned or rescinded; (c) in a few states there can be a recovery in general assumpsit for a part performance benefiting the defendant, if the plaintiff acted in good faith; (d) if the special contract is merely void (not illegal), or unenforceable, or voidable and has been avoided, there may be a recovery in general assumpsit for part performance; (e) general assumpsit lies for additional work done on request in performing the special contract."³ It is said by Mr. Greenleaf that,⁴ "The law on this subject may be reduced to these three general rules:⁵ (1) So long as the contract continues executory, the plaintiff must declare specially; but when it has been executed on his part, and nothing remains but the payment of the price in money, by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election.⁶ If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though on the common counts, must not be brought until the term of credit has expired.⁷ This election to sue on the common

³ Shipman Com. L. Pl. (2nd ed.) 12.

⁴ 2 Greenleaf Ev. § 104; see also, *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, note in 5 L. R. A. 707. 5 Lawes Assumpsit, pp. 2-12; see also, *Mead v. Degolyer*, 16 Wend. (N. Y.) 637, 638, per Bronson, J.; *Cooke v. Munstone*, 1 Bos. & P. 351; *Buller N. P.* 139; *Tuttle v. Mayo*, 7 Johns. (N. Y.) 132; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Linningdale v. Livingston*, 10 Johns. (N. Y.) 36; *Keys v. Stone*, 5 Mass. 391; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Clark v. Smith*, 14 Johns. (N. Y.) 326.

⁵ *Gordon v. Martin*, Fitzg. 303; *Payne v. Bacomb*, 2 Doug. 651; cited, 1 New Rep. 355, 356; *Streeter v. Harlock*, 1 Bing. 34, 37; *Studdy v. Sanders*, 5 B. & C. 628, per Hol-

royd, J.; *Tuttle v. Mayo*, 7 Johns. (N. Y.) 132; *Baker v. Corey*, 19 Pick. (Mass.) 496; *Pitkin v. Frink*, 8 Metc. (Mass.) 12; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Felton v. Dickinson*, 10 Mass. 287; *New Hampshire &c. Ins. Co. v. Hunt*, 10 Foster (N. H.) 219; *Hale v. Handy*, 6 Foster (N. H.) 206; *Wright v. Morris*, 15 Ark. 444; *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282, 56 Am. St. 253; *McArthur v. Whitney*, 202 Ill. 527, 67 N. E. 163; *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988; *McDermott v. St. Wilhelmina &c. Soc.*, (R. I.) 54 Atl. 58.

⁷ *Robson v. Godfrey*, 1 Stark. 220; *Moorhead v. Fry*, 24 Pa. St. 37; *Hanna v. Mills*, 21 Wend. (N. Y.) 90; *Mussen v. Price*, 4 East 147; *Manton v. Gammon*, 7 Ill. App. 201.

counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff. (2) Where the contract, though partly performed, has been either abandoned by mutual consent or rescinded and extinct by some act on the part of the defendant, the plaintiff may resort to the common counts alone, for remuneration for what he has done under the special agreement. But, in order to do this, it is not enough to prove that the plaintiff was hindered by the defendant from performing the contract on his part; for we have just seen that in such case he must sue upon the agreement itself. It must appear, from circumstances, that he was at liberty to treat it as at an end.⁸ (3) Where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him. Here, the plaintiff cannot recover on the contract, from which he has departed, yet he may recover upon the common counts,⁹ for the reasonable value of the benefit which, upon the whole, the defendant has derived from what he has done."¹⁰

§ 1718. **General assumpsit—Common counts.**—It is generally said that there are three general common counts, namely: indebitatus counts, or indebitatus assumpsit; quantum meruit; and quantum valebant; although account stated is sometimes treated as one of the general common counts in assumpsit. Indebitatus counts are further divided into money counts and other counts. The principal money

⁸ *Giles v. Edwards*, 7 Term R. 177; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Burn v. Miller*, 4 Taunt. 745; *Hullee v. Heightman*, 2 East 145; *Linningdale v. Livingston*, 10 Johns. (N. Y.) 36; *Raymond v. Bearnard*, 12 Johns. (N. Y.) 274; *Mead v. Degolyer*, 16 Wend. (N. Y.) 632; *Canada v. Canada*, 6 Cush. (Mass.) 15; *Woolen Mills Co. v. Titus*, 35 Ohio St. 253; *cf. Mitchell v. Scott*, 41 Mich. 108; *Cutter v. Powell*, 2 Smith Lead. Cas. 1; *Howard v. Daly*, 61 N. Y. 362; *compare, Chicago v. Tilley*, 103 U. S. 146; *Fitzgerald v. Allen*, 128 Mass. 232.

⁹ *Keck's Case*, Buller N. P. 139; *Burns v. Miller*, 4 Taunt. 745; *Streeter v. Horlock*, 1 Bing. 34, 37; *Jewell v. Schroepel*, 4 Cow. (N. Y.) 564; *Pepper v. Burland*, Peake's Cas. 103; *Dunn v. Body*, 1 Stark. 175; *Robson v. Godfrey*, 1 Stark. 220.

¹⁰ *Taft v. Montague*, 14 Mass. 282; *Cutter v. Powell*, 2 Smith Lead. Cas. 1 and notes; see also, *Clark v. Gilbert*, 32 Barb. (N. Y.) 576; *Smith v. Smith*, 1 Sandf. (N. Y.) 206; *White v. Oliver*, 36 Me. 92; *Davis v. Barrington*, 30 N. H. 517; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putman*, 27 Vt. 759; *Bassett v. Sanborn*, 9 Cush. (Mass.) 58; *Gleason v. Smith*, 9 Cush. (Mass.) 484; see, *Hutchison v. Cullum*, 23 Ala. 622.

counts are for money paid to the defendant's use, money lent and money had and received. The principal other counts in indebitatus assumpsit are for goods sold and delivered or for goods bargained and sold, for work and labor or service, for work, labor and materials, for use and occupation, and for board and lodging.

§ 1719. **Distinguished from other forms of action.**—Assumpsit, while sometimes a concurrent remedy with debt, differs from debt in that it is generally for damages for the breach rather than to recover the debt, that it will lie for an unliquidated as well as a liquidated sum, and that it will often lie for default in the payment of an installment of a debt payable in installments, whereas debt will not ordinarily lie until the whole debt is due. It differs from covenant at common law in that it will not lie on a specialty or contract under seal, or a record. A distinguishing feature also, is that it will lie on an implied promise where there is no express promise. It is often a concurrent remedy with certain actions ex delicto, as, for instance, where there is a tort and also a breach of an implied promise and the plaintiff has an election.

§ 1720. **Burden of proof.**—The plaintiff must prove the promise by direct proof or show a state of facts from which the law will imply a promise as laid in the declaration.¹¹ Plaintiff is not bound to prove all the causes of action as set out in the common counts, but the proof must establish and correspond with the material allegations of at least one count of the declaration.¹² If the plaintiff relies upon a special contract, the plaintiff must establish the special contract by competent evidence and that the contract relied upon corresponds in substance and in material terms with the one in the declaration;¹³ and he cannot rely upon an implied contract when he declares wholly on a special express contract.¹⁴ The plaintiff, although required to

¹¹ *Wrought Iron Bridge Co. v. Highway Commissioners*, 101 Ill. 518; *Hill v. Packard*, 69 Me. 158; *Connorsville v. Wadleigh*, 6 Blackf. (Ind.) 297; *Baker v. Rend*, 8 Ill. App. 409; *Landrum v. Brookshire*, 1 Stew. (Ala.) 252. 156, 26 Am. Dec. 701; *Crawford v. Morrell*, 8 Johns. (N. Y.) 253; *Baltimore R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Kidder v. Flagg*, 28 Me. 477; *Keiser v. Topping*, 72 Ill. 226; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Little*

¹² *Bailey v. Freeman*, 4 Johns. (N. Y.) 280; *Lafferty v. Day*, 7 Ark. 258. *Klamath Water Ditch Co. v. Ream*, 27 Ore. 129, 39 Pac. 998.

¹³ *Rose v. Jackson*, 40 Mich. 29; *Fowler v. Austin*, 1 How. (Miss.) 295, 19 N. E. 138; *Sanders v. Hartge*, 116 Ind.

prove an express promise to pay by clear and convincing evidence,¹⁶ is not generally required to show a certain date nor certain time of payment¹⁶ or a fixed price.¹⁷ Where the express promise exists, it must usually be proved and the law will not ordinarily imply one.¹⁸ But it is generally held that although a special contract is declared on, if it is not proved, and common counts are also used, there may be a recovery on them if the evidence establishes a case in which the law implies a contract for which a recovery could have been had under such counts alone.¹⁹ In an action upon a special contract, the plaintiff has the burden of showing performance of all the conditions of such contract to be by him performed.²⁰

§ 1721. *Presumptions.*—General assumpsit is based very largely upon presumptions or implications of law, the promise, in reality, being a fictitious one implied by law, and, under certain circumstances, as already shown, these presumptions or implications are conclusive. Aside from this, however, although ordinary presumptions frequently arise in such cases, they need not be treated here, as there is a full treatment of presumptions in another volume, and a specific treatment of many of them in this chapter under sections devoted to particular counts in assumpsit. It may be said here, however, that a request necessary to support a promise may be inferred from the beneficial nature of the consideration and the circumstances

¹⁷ Ind. App. 243, 46 N. E. 604; *Thompson v. French*, 10 Yerg. (Tenn.) 452; *Price v. Price*, 101 Ky. 28, 39 S. W. 429; *Mayer v. Ver Bryck*, 46 Neb. 221, 64 N. W. 691.

¹⁸ *Dowell v. Applegate*, 15 Fed. (U. S.) 419; *Gerry v. Gerry*, 67 Wis. 248, 30 N. W. 601; *Collier v. French*, 64 Iowa 577, 21 N. W. 90.

¹⁹ *Gerry v. Gerry*, 67 Wis. 288, 30 N. W. 601; *Byrnes v. Clark*, 57 Wis. 13, 14 N. W. 815.

²⁰ *Michaels Bay Lumber Co. v. Jenks*, 20 Ill. App. 369.

²¹ *Rumford Falls Power Co. v. Rumford Falls Paper Co.*, 95 Me. 186, 49 Atl. 876; *Brown v. Fales*, 139 Mass. 21, 29 N. E. 211; *Hersey v. Northern Asso. Co.*, 75 Vt. 441, 56 Atl. 95; *Parry Com. L. Pl.* 88. This

is true while the contract remains executory, but as hereafter shown, it may be otherwise after performance.

²² *Shea v. Kerr*, 1 Pen. (Del.) 530, 43 Atl. 843; *Perrine v. Hankinson*, 11 N. J. L. 215; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Barnes v. Gorman*, 9 Rich. L. (S. Car.) 297; *Cooke v. Munstone*, 1 Bos. & P. 351.

²³ *Parmly v. Farrar*, 169 Ill. 606, 48 N. E. 693; *Kerstetter v. Raymond*, 10 Ind. 199. Or, he may show, in some cases, a good excuse, as that he has been prevented by the defendant from fully performing; see, for instance, *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129.

surrounding the transaction,²¹ unless there has been an express declaration of the party charged, made at the time and contrary to the legal implication.²²

§ 1722. **Questions of law or fact.**—Where the law conclusively implies a promise, or where it must be presumed, in the absence of anything to the contrary, and there is nothing to rebut it, or, in cases of an express promise without any evidence to the contrary, the question may well be one of law for the court; but, ordinarily, the question as to whether there is a contract between the parties is a question of fact to be determined by the jury²³ under proper instructions. And where there is a rebuttable presumption that compensation was intended or not intended, as the case may be, and there is some evidence to rebut it, the question is usually for the jury.²⁴ The amount to be recovered is also generally a question of fact,²⁵ and it is usually for the jury to determine whether or not there has been such a performance of the contract as to entitle a plaintiff to recover.²⁶ The plaintiff must show in some form that a promise has been directly made or such a state of facts that it may be implied.²⁷ As already stated, it must also correspond with that alleged.

§ 1723. **The promise.**—The evidence of a promise, however, may be direct, or it may be circumstantial, to be considered and weighed by the jury; or, in some cases the promise may be conclusively presumed by law, from the existing relations proved between the parties,

²¹ *Merriwether v. Bell*, 22 Ky. L. R. 844, 58 S. W. 987; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188.

²² *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238; *Osborn v. Bell*, 5 Den. (N. Y.) 370, 49 Am. Dec. 275.

²³ *Neale v. Engle*, (Pa.) 7 Atl. 60; *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *Curry v. Curry*, 114 Pa. St. 167, 7 Atl. 61; *Feiertag v. Feiertag*, 80 Mich. 489, 45 N. W. 188.

²⁴ *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *Cauble v. Ryman*, 26 Ind. 207; *Wall's Appeal*, 111 Pa. St. 460, 5 Atl. 220.

²⁵ *Clowe v. Imperial Pine Product Co.*, 114 N. Car. 304, 19 S. E. 153.

²⁶ *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Mount Hope Cem. Asso. v. Weidenmann*, 139 Ill. 67, 28 N. E. 834; *Clause v. Press Co.*, 118 Ill. 612, 9 N. E. 201.

²⁷ *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 105; *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 105; *Conrad Nat. Bank v. Great Northern R. Co.*, 24 Mont. 178, 61 Pac. 1; *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629; *Candler v. Rossiter*, 10 Wend. (N. Y.) 487; *Robinson v. Welty*, 40 W. Va. 385, 22 S. E. 73.

and in these cases, the relation being proved, the jury is bound to find the promise. As already shown, however, the law generally presumes a promise only where it does not appear that there is any special agreement between the parties.²⁸ For, if there is a special contract, which is still open, unrescinded, and executory, embracing the same subject-matter with the common counts, the plaintiff will not be permitted to recover upon the common counts.²⁹

§ 1724. Consideration.—In actions upon contracts not under seal, except generally in suits by indorsees, or the like, where the instrument imports a consideration, it is incumbent on the plaintiff to allege and prove a consideration for the alleged promise of the defendant.³⁰ The consideration must be proved as set out in the declaration,³¹ and where the consideration consists in the doing of certain things, the full performance must be proved.³² If the contract is in writing, and recites that a valuable consideration has been received, this is *prima facie* evidence of the fact, and the necessity of producing

²⁸ *Toussaint v. Martinant*, 2 Term R. 105, per Buller, J.; *Cutter v. Powell*, 6 Term R. 320.

²⁹ *Cooke v. Munstone*, 1 Bos. & P. 351; Buller N. P. 139; *Lawes Assumpsit*, pp. 7, 12; *Young v. Preston*, 4 Cranch (U. S.) 239; *Russell v. South Britain Society*, 9 Conn. 508; *Clark v. Smith*, 14 Johns. (N. Y.) 326; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Woods v. Edwards*, 19 Johns. (N. Y.) 205; *Sargent v. Adams*, 3 Gray (Mass.) 72; *Streeter v. Sumner*, 19 N. H. 516; *Weston v. Downes*, 1 Doug. 23; *Towers v. Barrett*, 1 Term R. 133; *Power v. Well*, Cowp. 818; but, if the contract is invalid as where there has been a parol contract for the sale of land, void under the Statute of Frauds, and the land has been conveyed in accordance with that contract, *assumpsit* will lie to cover the price. The action in such a case is based on the implied promise not on the parol contract; *Basford v. Pearson*,

9 Allen (Mass.) 387; see also, *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707. The plaintiff cannot in such a case recover the value of the land as agreed upon in the contract, but only what the land is reasonably worthy; *Long v. Woodman*, 65 Me. 56.

³⁰ *Foster v. Tucker*, 3 Me. 458, 14 Am. Dec. 243; *Farlow v. Kemp*, 7 Blackf. (Ind.) 544; as to what constitutes a sufficient consideration, see, 21 Am. Jur. 257-286; 1 Stephen N. P. 240-260; *Chitty Cont.* 22-25; 2 Kent Comm. 463-468; *Story Cont. c. 4*; *Clark Cont.* 147-209.

³¹ *Bromley v. Goff*, 75 Mich. 213, 42 N. W. 810; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Colburn v. Pomeroy*, 44 N. H. 19; *Meyers v. Phillips*, 72 Ill. 460; *Indianapolis &c. R. Co. v. Rhodes*, 76 Ill. 285.

³² *Indianapolis &c. R. Co. v. Rhodes*, 76 Ill. 285; *Jordan v. Roney*, 23 Ala. 758; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140.

evidence to the contrary devolves on the defendant.³³ So, if the action is founded on a document, or memorandum, usually circulating as evidence of property, such as a bank check, or the like, proof of the usage and course of business may suffice as evidence of the consideration, until this presumption is met by opposing proof.³⁴

§ 1725. Request and demand.—In actions upon the common counts for goods sold, work and materials furnished, money lent, and money paid, a request by the defendant is generally material to be proved;³⁵ for, ordinarily, no man can make himself the creditor of another by any act of his own, unsolicited, and purely officious.³⁶ But it may be proved by circumstantial³⁷ as well as by direct evidence. A mere moral obligation, in the ethical sense of the term, without any pecuniary benefit to the party, or previous request is insufficient;³⁸

³³ *Meyers v. Phillips*, 72 Ill. 460.

³⁴ *Greenleaf Ev.* § 105; see also, Vol. I, 107.

³⁵ It has, however, been held that in indebitatus assumpsit for money lent, and perhaps in a count for goods sold and delivered, a request need not be alleged, though it is otherwise in a count for money paid; *Victor v. Davis*, 1 Dowl. & L. 984. In those cases a request is involved in the nature of the transaction.

³⁶ To render the defendant liable the plaintiff must show the act for which he seeks compensation; expectation of payment, *Johnson v. Boston &c. R.*, 69 Vt. 521, 38 Atl. 267; *Lafontain v. Hayhurst*, 89 Me. 388, 36 Atl. 623; from the defendant, *Coleman v. United States*, 152 U. S. 96, 14 Sup. Ct. 473; on the part of the plaintiff, or ignorance on the part of the defendant of the absence of such expectations; *Thomas v. Thomasville Shooting Club*, 121 N. Car. 238, 28 S. E. 293; knowledge of the plaintiff's expectation, or reason to know thereof on the part of the defendant at the time the act was done; *Price v. Hay*, 132 Ill. 543,

24 N. E. 620. In *New Hampshire* only, that the defendant expected to pay for the act, *Clark v. Sanborn*, 68 N. H. 411, 36 Atl. 14. As to the effect of the family relation upon the inference of a promise to pay, see *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191; *Arnold v. Wise*, 37 S. W. 488; *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Cann v. Cann*, 20 S. E. 910, 40 W. Va. 138; *Harriman Contracts*, 43-45.

³⁷ *Hill v. Packard*, 69 Me. 158; *Merriwether v. Bell*, 22 Ky. L. R. 844, 58 S. W. 987.

³⁸ *Morris v. Norton*, 75 Fed. (U. S.) 912; *Com'r's Court v. Street*, 116 Ala. 28, 22 So. 629; *Wilcox v. Arnold*, 116 N. Car. 708, 21 S. E. 434; *Harriman Contracts*, 84; see also, article in 15 Cent. Law Jour. 386; but see as to promise based on a prior legal obligation that had been barred by the statute of limitations or could not be enforced because of disability, *Chitty Cont.* 40-42; *Story Cont.* § 143, 1 Stephen N. P. 246-249; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Ferrers v. Costello*, 1 Longf. & Towns, 292; *Mellen v. Whipple*, 1 Gray (Mass.) 317; *Rodgers v. Steph-*

but, it is said by Mr. Greenleaf that "where the act done is beneficial to the other party, whether he himself was legally bound to have done it or not, his subsequent promise will be binding; and even his subsequent assent will be sufficient evidence, from which the jury may find a previous request, and he will be bound accordingly."³⁹ This statement, however, is, perhaps, too broad, and it is not fully sustained by the weight of authority.⁴⁰ It is not necessary for the plaintiff to prove an express assent of the defendant, in order to enable the jury to find a previous request; they may infer it from his knowledge of the plaintiff's act, and his own conduct, or, it seems, even from such knowledge and his silent acquiescence.⁴¹ The law does not ordinarily imply a promise, against the express declaration of the party.⁴² But where there is a legal duty, paramount to the will of the party refusing to perform it, he may be bound, notwithstanding any negative protestation. Thus, if a husband wrongfully turns his wife out of doors, or a father wrongfully discards his child, this has been held sufficient to support a count against him in assumpsit, for their necessary support, shown to have been properly furnished by a stranger.⁴³ "And if one commit a tort on the goods of another, by which he gains a pecuniary benefit, as if he wrongfully takes the goods and sells them, or otherwise applies them to his own use, the owner may waive the tort and charge him in assumpsit on the common counts, as for

ens. 2 Term R. 713; *Lundie v. Robertson*, 7 East 231; *Story Bills*, § 320; *Duhammel v. Pickering*, 2 Stark. 88; see, *American Jur.* Vol. XXI, pp. 276-278; *Goulding v. Davidson*, 26 N. Y. 609; *Lawrence v. Oglesby*, 78 Ill. 122, 52 N. E. 945; "Equitable Consideration," 15 Cent. Law Jour.

³⁹ 2 Greenleaf Ev. § 107, citing *Osborne v. Rogers*, 1 Saund. 264, n. 1, by Williams; *Bosden v. Thinne*, Yelv. 41, n. 1, by Montcalf.

⁴⁰ *Roscorla v. Thomas*, L. R. 3 Q. B. 234; *Dearborn v. Bowman*, 3 Metc. (Mass.) 155; *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820; *Cleaver v. Lenhart*, 182 Pa. St. 285, 37 Atl. 811; *Brabo, The*, 33 Fed. (U. S.) 884; *Harriman Cont.* 83; *Anson Cont.* 92-97; *Clark Cont.* 198; see,

however, *Lampleigh v. Braithwait*, Hob. 105, 1 Smith Lead. Cas. 67; *Bradford v. Roulston*, 8 Ir. C. L. 468; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188; *Wilson v. Edmons*, 24 N. H. 517; *Gleason v. Dyke*, 22 Pick. (Mass.) 390.

⁴¹ See *American Jur.*, pp. 2-11; see also, *Bosden v. Thinne*, Yelv. 41, n. 1, by Metcalf; *Doty v. Willson*, 14 Johns. (N. Y.) 378, 382; *Simpson v. Bowden*, 33 Me. 549; see also, *Lewis v. Trickey*, 20 Barb. (N. Y.) 387; *Moline Water Power &c. Co. v. Nichols*, 26 Ill. 90.

⁴² *Whitting v. Sullivan*, 7 Mass. 107.

⁴³ *Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480; 20 Am. Jur. p. 9; 22 Am. Jur. 2-11; see also, *Hanover v. Turner*, 14 Mass. 227.

goods sold or money received, which he will not be permitted to gainsay."⁴⁴ Where demand is made one of the express or implied terms of an agreement, the defendant may show that no demand has been made, as a bar to the action;⁴⁵ and the plaintiff must generally allege and prove a request or demand where the express or implied terms of the contract are such as to impose upon him the duty of making it before commencing an action.⁴⁶

§ 1726. **Non-assumpsit—Defenses.**—The plea of non-assumpsit is the general issue in assumpsit and denies the express promise or contract alleged and all the facts as constituting an implied promise.⁴⁷ The burden, therefore, is generally upon the plaintiff to show the express contract or the facts creating the implied contract, as the case may be, including, as a general rule, the consideration; and to prove all the other material facts alleged, such as the performance of conditions precedent, if any, on his part, notice to the defendant, request, where these are material, and the like, together with the amount of damages sustained by the breach of the agreement. Under the plea of non-assumpsit the defendant may prove almost any defense that will show that there was no cause of action at the beginning of the action.⁴⁸ Under this plea it has been held that defendant may show

⁴² *Greenleaf Ev.* § 108; *Cummings v. Noyes*, 10 Mass. 436; *Webster v. Drinkwater*, 5 Greenl. (Me.) 323; *Hambly v. Trott*, Cowp. 372; *Cravath v. Plympton*, 13 Mass. 454; *Chauncey v. Yeaton*, 1 N. H. 151; *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *Miller v. Miller*, 7 Pick. (Mass.) 133; *Hitchen v. Campbell*, 2 W. Bl. 827; *Johnson v. Spiller*, 1 Doug. 167, n.; *Smith v. Hodson*, 4 Term R. 211; *Hill v. Davis*, 3 N. H. 384; *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Appleton v. Bancroft*, 10 Metc. (Mass.) 231; *Willett v. Willett*, 3 Watts (Pa.) 277; *Bethlehem v. Fire Co.*, 81 Pa. St. 445; see *Keen Quasi-Contracts*, 173.

⁴³ *Rose v. Foord*, 96 Colo. 152, 30 Pac. 1114; *Bradley v. Farrington*, 4 Ark. 532.

⁴⁴ *Greenwood v. Curtis*, 6 Mass. 358; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Bradley v. Farrington*, 4 Ark. 532; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114.

⁴⁵ *Young v. Rummel*, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; *Swift River Co. v. Brown*, 77 Me. 40; *Shipman Com. L. Pl.* 283; but that capacity to sue is not denied, see, *Penobscot R. Co. v. Mayo*, 60 Me. 306; *Peck v. Thompson*, 23 Miss. 367; *Tillman v. Ailles*, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520; and that while it denies the facts, it impliedly admits that if they existed there is a right to recovery, see, *Wrought Iron Bridge Co. v. Highway Commissioners*, 101 Ill. 518.

⁴⁶ *Falconer v. Smith*, 18 Pa. St. 130, 55 Am. Dec. 611; *Blaisdell v.*

coverture,⁴⁹ drunkenness,⁵⁰ former recovery,⁵¹ fraud,⁵² infancy,⁵³ insanity,⁵⁴ release,⁵⁵ performance,⁵⁶ usury,⁵⁷ failure of consideration,⁵⁸ accord and satisfaction.⁵⁹ Such was the rule originally at common law as to implied contracts, and it was later extended, somewhat illogically, to express contracts. Where the common law forms of action are still retained, and there is no statutory modification of the rules, such defenses are still admissible in assumpsit under the general issue; but in other forms of actions, and in some states by statute, some of them,—such for instance, as payment or accord and satisfaction,—are not admissible unless specially pleaded.⁶⁰ So, it has been held that payment, and similar matters, after the commencement of the action, cannot be shown under the general issue;⁶¹ and set-off, discharge of the defendant in bankruptcy, and the statute of limitations, were not available under a plea of non-assumpsit even at common law.⁶² Where a debt is payable in installments and assumpsit lies for the payment, the defendant may prove that no installment is

Davis, 72 Vt. 295, 48 Atl. 14; Kelly 397, 13 N. W. 790; Boyd v. Weeks, v. Fahrney, 123 Fed. (U. S.) 280; 2 Denio (N. Y.) 321, 43 Am. Dec. 749.

Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Wilson v. King, 83 Ill. 232; Emley v. Perrine, 58 N. J. L. 472, 33 Atl. 951; Virginia &c. Ins. Co. v. Buck, 88 Va. 517, 133 S. E. 973; 1 Chitty Pl. 417, 420; Shipman Com. L. Pl. (2d ed.) 283.

“Heck v. Shener, 4 S. & R. (Pa.) 240, 8 Am. Dec. 700; Monson v. Beecher, 45 Conn. 299.

“Peebles v. Rand, 43 N. H. 337.

“Young v. Rummel, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Bartels v. Schell, 16 Fed. (U. S.) 341.

“Thomas v. Grise, 1 Pen. (Del.) 381, 41 Atl. 883.

“Heck v. Schener, 4 S. & R. (Pa.) 249, 8 Am. Dec. 700.

“Mitchell v. Kingman, 5 Pick. (Mass.) 431.

“Young v. Rummel, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

“Brennan v. Tietsort, 49 Mich. 397, 13 N. W. 790; Boyd v. Weeks, 2 Denio (N. Y.) 321, 43 Am. Dec. 749; Child v. Eureka Powder Works, 44 N. H. 354; Robbins v. Harvey, 5 Conn. 335.

“McKyring v. Bull, 16 N. Y. 297; Hubler v. Pullen, 9 Ind. 273, and note; Abbott Tr. Ev. 1014.

“Pemigewasset Bank v. Brackett, 4 N. H. 557; Boyd v. Weeks, 2 Denio (N. Y.) 321, 43 Am. Dec. 749; Costar v. Davies, 8 Ark. 213, 46 Am. Dec. 311; Boyd v. Weeks, 2 Denio (N. Y.) 321, 43 Am. Dec. 749; Child v. Eureka Powder Works, 44 N. H. 354; Robbins v. Harvey, 5 Conn. 335.

“Young v. Rummel, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; 1 Chitty Pl. 420.

due, and such evidence will constitute a complete defense.⁶³ This same rule is true where the defendant was to do certain things at different times and the defendant shows that the time for the performance for the different acts had not yet arrived.⁶⁴ But, where an agent or bailee converts the thing bailed to his own use, the contractual relation ends and the bailor may prove the conversion in an action of assumpsit and the defendant cannot avail himself of the fact that no demand has been made.⁶⁵

§ 1727. **Money lent.**—As a general rule, when money is lent and there is no express promise to pay it, or, even if there is an express promise, where the promise cannot, for some reason, be set up by the borrower, the lender may recover the money in general assumpsit for money lent.⁶⁶ It is not sufficient, however, merely to show that the plaintiff delivered money or a bank check to the defendant, for this of itself does not establish a loan; but, on the contrary, it may well be taken as evidence only of the payment by the plaintiff of his own debt, antecedently due to the defendant.⁶⁷ He must prove that the transaction was essentially a loan of money.⁶⁸ And, in such an action where there was no evidence that the plaintiff had any knowledge that the defendant intended to loan the money to a certain third person, or that the plaintiff had agreed to accept such third person's note in payment of the loan to the defendant, the notes of such third person, some of which were made payable to the defendant and some to the plaintiff, without authority from the plaintiff, were held inadmissible in evidence against the plaintiff.⁶⁹ It has been held that a witness

⁶³ *Fontaine v. Aresta*, 2 McLean (U. S.) 127; *Hamlin v. Race*, 78 Ill. 422.

⁶⁴ *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 271.

⁶⁵ *Smith v. Stewart*, 5 Ind. 220.

⁶⁶ *Marston v. Boynton*, 6 Metc. (Mass.) 127; *Currier v. Davis*, 111 Mass. 480; *Brown v. Campbell*, 1 S. & R. (Pa.) 176; *Shipman Com. L. Pl.* (2d ed.) 31; see also, *Curtis v. Leavitt*, 15 N. Y. 9; *Baxter v. Paine*, 16 Gray (Mass.) 273.

⁶⁷ *Welsh v. Seaborn*, 1 Stark. 385; *Cary v. Gerrish*, 4 Esp. 9; *Cushing*

v. Gore, 15 Mass. 74; *Fleming's Exr. v. McLain*, 13 Pa. St. 177; *Hicks v. Keats*, 4 B. & C. 71; *Union Trust Co. v. Whiton*, 9 Hun (N. Y.) 657; *White v. Ambler*, 8 N. Y. 170; *McFarland v. Shipp*, 17 Ark. 41, holding that a receipt for money without indicating it as a loan, although admissible in evidence, is not in itself sufficient to support the action.

⁶⁸ *Painter v. Abel*, 9 Jur. N. S. 549; see also, *Bogert v. Morse*, 1 N. Y. 377; *Fleming's Exr. v. McLain*, 13 Pa. St. 177.

⁶⁹ *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.

may testify directly to the fact that he made a loan;⁷⁰ but he cannot give his mere opinion that he considered it a loan.⁷¹ If there is a complete, valid, written contract, parol evidence is generally inadmissible to contradict or vary its terms; and it has been held that if the agreement is to pay according to the terms of another writing referred to, but not set out or recited in substance, such other writing must be produced or accounted for,⁷² although its execution need not be proved.⁷³ It has also been said that where the making of any loan is denied, evidence of the plaintiff's poverty at the time is admissible as tending to disprove it.⁷⁴

§ 1728. Money paid.—To sustain the count for money paid to the defendant's use, the plaintiff must generally prove the actual payment,⁷⁵ and the defendant's prior request so to do, or his subsequent assent and approval of the act.⁷⁶ And if the money has been paid upon the defendant's request, with an undertaking express or implied on his part to repay the amount, it is not essential that the defendant should be shown to have been relieved from liability or otherwise to have profited by the payment.^{76*} If the money has been paid to a third person, in compliance with a written order of the defendant, the possession of the order by the plaintiff will generally be prima

⁷⁰ *Cole v. Varner*, 31 Ala. 244.

Duer (N. Y.) 45; *Ainslie v. Willson*, 7 Cow. (N. Y.) 662.

⁷¹ *Saltmarsh v. Bower*, 34 Ala. 613, 620.

⁷² 2 *Greenleaf Ev.*, § 113; see also, *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, but the request may be inferred from circumstances, and the law under certain circumstances implies it; *Abbott's Tr. Ev.* 307, or does not in reality require it; *Bailey v. Bussing*, 28 Conn. 455; *Exall v. Patridge*, 8 Term R. 308.

⁷³ *Alabama &c. R. Co. v. Nabors*, 37 Ala. 489; see also, Vol. I, § 585.

⁷⁴ *Smith v. New York &c. R. Co.*, 4 Abb. Ct. App. Dec. (N. Y.) 262; *Abbott Tr. Ev.* 305.

⁷⁵ *Dowling v. Dowling*, 10 Ir. C. L. 236; see also, *Cochrane v. West Duluth &c. Co.*, 64 Minn. 369, 67 N. W. 206; *Smith v. Doherty*, 109 Ky. 616, 60 S. W. 380; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. R. 143; and compare. Vol. I, § 178, and authorities cited; see also, §§ 160, 162 as to the inadmissibility of evidence of collateral matters.

⁷⁶ *Power v. Butcher*, 10 B. & C. 329, 346; *Whiting v. Aldrich*, 117 (Mass.) 582; *Cottrell v. Conklin*, 4

^{76*} *Britain v. Lloyd*, 14 M. & W. 762; *Emery v. Hobson*, 62 Me. 578, 16 Am. R. 513; *Lewis v. Campbell*, 14 Jur. 396; but see, *Knox v. Martin*, 8 N. H. 154; *Merritt v. Seaman*, 6 N. Y. 168, there must be a promise express or implied; *Briscoe v. Power*, 64 Ill. 72, but it may be implied where the money is paid under compulsory legal process; *Logan v. Talbot*, 59 Cal. 652.

facie evidence that he has paid the money.⁷⁷ Where no express order or request has been given, it will usually be sufficient, so far as this element is concerned, for the plaintiff to show that he has paid money for the defendant for a reasonable cause, and not officiously.⁷⁸ But it does not follow that the plaintiff can recover from a defendant merely because the plaintiff expended money at the request of some third person not in any way authorized to bind the defendant;⁷⁹ and letters

⁷⁷ *Blount v. Starklie*, 1 Taylor 110, 2 Hayw. (N. C.) 75; *Succession of Penny*, 14 La. Ann. 194; *Zeigler v. Gray*, 12 S. & R. (Pa.) 42.

⁷⁸ *Brown v. Hodgson*, 4 Taunt. 190, per Mansfield, C. J.; *Skillin v. Merrill*, 16 Mass. 40; *King v. Sears*, 2 C. M. & R. 53; see also to necessity for request when consideration is executed; *Child v. Morley*, 8 Term R. 610; *Stokes v. Lewis*, 1 Term R. 20; *Naish v. Tatlock*, 2 H. Bl. 319; *Hayes v. Warren*, 2 Str. 933; *Richardson v. Hall*, 1 B. & B. 50; *Durnford v. Messiter*, 5 M. & S. 446. "A mere voluntary courtesy is not sufficient to support a subsequent promise, nor is the promise nudum pactum, but couples itself with and relates back to the previous request, and the merits of the party, which may be either express or implied. If it had not been made in express terms, it will be implied under the following circumstances: First, where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable: *Jeffreys v. Gurr*, 2 B. & A. 833; *Pownall v. Ferrand*, 6 B. & C. 439; *Exall v. Partridge*, 8 Term R. 308; *Toussaint v. Martinnant*, 2 Term R. 100; second, when the defendant has adopted and enjoyed the benefit of the consideration; for in that case the maxim applies, 'omnis ratihabito retrotrahitur et mandato æquiparatur;' third, where the

plaintiff voluntarily does that whereunto the defendant was legally compellable, and the defendant, afterwards, in consideration thereof, expressly promises: *Wennall v. Adney*, 3 B. & P. 250, in notes; *Wing v. Mill*, 1 B. & A. 104; *Stephen N. P.* (8th ed.), p. 57, n. 11; *Paynter v. Williams*, 1 C. & M. 818; but it must be observed that there is this distinction between this and the two former cases, namely, that in each of the two former cases the law will imply the promise as well as the request, whereas in this and the following case the promise is not implied, and the request is only then implied when there has been an express promise; *Atkins v. Banwell*, 2 East 505; fourth, in certain cases where the plaintiff voluntarily does that to which the defendant is morally, though not legally, compellable, and the defendant, afterwards, in consideration thereof, expressly promises. See *Lee v. Muggeridge*, 5 Taunt. 36; *Watfon v. Turner*, Buller N. P. 129, 147, 281; *Trueman v. Fenton*, Cowp. 544; *Atkins v. Banwell*, 2 East 505. But every moral obligation is not, perhaps, sufficient for this purpose." See per Lord Tenterden, C. J., in *Littlefield v. Shee*, 2 B. & A. 811. See, 1 Smith Lead. Cas., p. 70, n.

⁷⁹ *Little Bros. Fertilizer &c. Co. v. Willmott*, (Fla.) 32 So. 808; *Burdick v. Glass Co.*, 11 Vt. 19; *McElroy v. Melear*, 7 Coldw. (Tenn.) 140.

and telegrams written by the drawers of a draft to the drawees telling them to pay it and charge it to a third party, cannot alone make such third party liable as for money paid at his request.⁸⁰ In general, however, where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which the defendant ought to have paid, this count will be supported.⁸¹

§ 1729. Money had and received.—The count for money had and received, may, in general, be proved by any proper evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff.⁸² It is a liberal action, in which the plaintiff waives all tort, trespass, and damages, and claims only the money which the defendant has actually received.⁸³ Thus, this count may

⁸⁰ *Allen v. Bobo*, (Miss.) 33 So. 288; see also, *Contoocook Fire Precinct v. Hopkinton*, 71 N. H. 574, 53 Atl. 797.

⁸¹ 1 *Stephen N. P.* 324-326; *Lubbock v. Tribe*, 3 M. & W. 607; *Cowell v. Edwards*, 2 B. & P. 268; *Alexander v. Vane*, 1 M. & W. 511; *Grissell v. Robinson*, 3 Bing. New Cas. 10; *Toussaint v. Martinnant*, 2 Term R. 100; *Fisher v. Fallows*, 5 Esp. 171; *Gillett v. Rippon*, 1 M. & M. 406; *Knight v. Hughes*, M. & M. 247; *Smith v. Compton*, 3 B. & A. 407; 1 *Smith Lead. Cas.*, p. 70; *Duncan v. Keiffer*, 3 Bin. (Pa.) 126; *Cross v. Cheshirs*, 7 Exch. 43; *Skillin v. Merrill*, 16 Mass. 40; *Nicholas v. Bucknam*, 117 Mass. 488; *Whiting v. Aldrich*, 117 Mass. 582; *Bates v. Lane*, 62 Mich. 132, 28 N. W. 753, money paid on judgment afterwards reversed; *Martin v. Woodruff*, 2 Ind. 237; *Peyser v. Mayor*, 70 N. Y. 497, 500, 26 Am. R. 624, as to what is proper evidence of the payment; *Keith v. Maftt*, 38 Ill. 303; *Berry v. Berry*, 17 N. J. L.

440; *Cutbush v. Gilbert*, 4 S. & R. (Pa.) 555; *Sluby v. Champlin*, 4 Johns. (N. Y.) 461; *Remington v. Palmer*, 62 N. Y. 31; *Stover v. Flack*, 30 N. Y. 64.

⁸² *McCormick Harvesting Co. v. Stires*, (Neb.) 94 N. W. 629; *Jones v. Mutual Fidelity Co.*, 123 Fed. (U. S.) 506; *Barnett v. Warren*, 82 Ala. 557, 2 So. 457; *Barnes v. Johnson*, 84 Ill. 95; *Post v. Clark*, 35 Conn. 339; *Babcock v. Granville*, 44 Vt. 325; *Gordon v. Camp*, 2 Fla. 422.

⁸³ *Anonymous*, Lofft, 320; *Feltham v. Terry*, Cowp. 419; *Moses v. MacFarlan*, 2 Bur. 1005; *Eastwick v. Hugg*, 1 Dall. (Pa.) 222; *Lee v. Shore*, 1 B. & C. 94; 1 Cowp. 749, per Ld. Mansfield; 4 M. & S. 748, per Ld. Ellenborough; but see, *Miller v. Atlee*, 13 Jur. 431; *Colt v. Clapp*, 127 Mass. 476; the propositions above stated are taken almost literally from *Law v. Uhrlaub*, 104 Ill. App. 263, following *Greenleaf*; see, however, as to right to recover only the balance, where defendant has a lien or cross-action, *Simpson v. Swan*, 3

the parties cannot be reinstated in statu quo, the remedy is to be had only under a special count upon the contract."⁹⁶ In the same manner, that is, under the common count in assumpsit for money had and received, money that was paid under a mistake of fact may be recovered.⁹⁷ So, generally, wherever one has money to which, in equity and good conscience, another is entitled, the law creates or implies a promise by the former to pay, and the latter may maintain assumpsit therefor.⁹⁸ But the burden has been held to be upon the plaintiff to prove the receipt of the money by the defendant.⁹⁹

§ 1731. Money received by agent.—When money is received by an agent for his principal, the general rule is said to be that the action to recall it must be brought against the principal only, since, in legal contemplation, the receipt was by the principal, with whom the agent was identified.¹⁰⁰ This is true, at least where the agent has paid over the money to the principal without any notice to the contrary, or knowledge of anything wrong.¹⁰¹ In a recent case an undisclosed principal was permitted to maintain the action notwithstanding a written contract with the agent stipulating, among other things, that he would not assign it, and the court said that parol evidence is ad-

386; *Warner v. Wheeler*, 1 Chipm. (Vt.) 159; *Atkinson v. Scott*, 36 Mich. 18.

⁹⁶ 2 Greenleaf Ev. § 124.

⁹⁷ *Wolf v. Bealrd*, 123 Ill. 585, 15 N. E. 161, 162; *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786; *Indianapolis v. McAvoy*, 86 Ind. 587; *Keane v. Beard*, 11 Mo. App. 10; *Davis v. Krum*, 12 Mo. App. 279; 2 Chitty Cont. 771.

⁹⁸ *Devries Estate v. Hawkins*, (Neb.) 97 N. W. 792; *Guthrie v. Hyatt*, 1 Har. (Del.) 447.

⁹⁹ *White River School Tp. v. Caxton Co.*, (Ind. App.) 72 N. E. 185.

¹⁰⁰ *Owen v. Crank*, L. R. 1895, 1 Q. B. 265; *United States v. America &c. Bank*, 70 Fed. (U. S.) 232. But there must be some evidence that he was the defendant's agent. *Farias v. De Lizardi*, 4 Rob. (La.) 407, and declarations of an alleged

agent are usually inadmissible to prove his agency; *Snook v. Lord*, 56 N. Y. 605, Vol. I, § 252, but when a sufficient agency is proved, a receipt given, or admission by the agent at the time of the transaction, it is competent against the principal to show payment; *Thalhimer v. Brinckerhoff*, 6 Cow. (N. Y.) 90; see also, *Coates v. Bainbridge*, 5 Bing. 58; *Knowlton v. Clark*, 25 Ind. 395.

¹⁰¹ *United States v. America &c. Bank*, 70 Fed. (U. S.) 232; *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533; *Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632. But it has been held that there is no presumption that the money has been paid to the principal unless from the nature of the transaction or course of business it would be expected; *Hathaway v. Burr*, 21 Me. 567, 572.

missible to charge the principal or to enable him to sue in his own name, but the agent who expressly binds himself in writing will not be allowed to contradict the writing by proving that he contracted only as agent and not as principal.¹⁰² This form of action is also sometimes used in actions by a principal against his agent; but that subject is considered elsewhere.¹⁰³

§ 1732. Goods bargained and sold, or sold and delivered.—An action in assumpsit may be maintained as for goods bargained and sold even though they have not been delivered.¹⁰⁴ Neither delivery nor acceptance is necessary to be proved to support the action in that form;¹⁰⁵ but after delivery, the form of the action is for goods sold and delivered, and an actual delivery and acceptance must usually be shown,¹⁰⁶ although an actual acceptance is not always required.¹⁰⁷ Facts showing that the plaintiff, at the defendant's instance and request, sold and delivered to him the goods in question, for which he owes the price or value, are implied in, and admissible under, the general allegation that the defendant is indebted to the plaintiff in a certain sum, for goods sold and delivered to the defendant at a certain time and place at his request.¹⁰⁸ Evidence of an agreement for

¹⁰² *Prichard v. Budd*, 76 Fed. (U. S.) 710, 713; citing, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 381; *Nash v. Towne*, 5 Wall. (U. S.) 689; *Higgins v. Senior*, 8 M. & W. 844; *Thompson v. Davenport*, 91 B. & C. 78; *Smith Lead. Cas.* (6th Am. ed.) 421, and other authorities.

¹⁰³ See, however, as to evidence in such cases, *Allen v. Brown*, 44 N. Y. 228; *Beardsley v. Root*, 11 Johns. (N. Y.) 464; *Smedes v. Elmendorf*, 3 Johns. (N. Y.) 185; *Richards v. Millard*, 56 N. Y. 574; *Hunter v. Welch*, 1 Stark. 178; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Boston &c. R. Co. v. Dana*, 1 Gray (Mass.) 83, 101.

¹⁰⁴ See *Sands v. Taylor*, 5 Johns. E. 117; *Clark v. Greeley*, 62 N. H. 394; *Maclean v. Dunn*, 4 Bing. 722, *Story Sales*, (4th ed.) § 436.

¹⁰⁵ *Morse v. Sherman*, 106 Mass. 430; *Doremus v. Howard*, 23 N. J. L. 390; *Outwater v. Dodge*, 7 Cow. (N. Y.) 85; but in some instances a tender may be necessary; *Stokes v. Mackay*, 82 Hun (N. Y.) 449.

¹⁰⁶ *Atwood v. Lucas*, 53 Me. 510, 89 Am. Dec. 713; *Catlin v. Tobias*, 26 N. Y. 217; *Gray v. Walton*, 107 N. Y. 254; *Dexter v. Bevins*, 42 Barb. (N. Y.) 573; *Hewes v. Jordan*, 39 Md. 472, 17 Am. R. 578; *Snodgrass v. Broadwell*, 2 Litt. (Ky.) 355; *Graff v. Fitch*, 58 Ill. 373, 11 Am. R. 85; *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241; *Hart v. Tyler*, 15 Pick. (Mass.) 171; *Cort v. Ambergate &c. R. Co.*, L. R. 17 Q. B. 127, 79 E. C. L. 126.

¹⁰⁷ *Nichols v. Morse*, 100 Mass. 523; *Ozark Lumber Co. v. Chicago Lumber Co.*, 51 Mo. App. 555.

¹⁰⁸ *Allen v. Patterson*, 7 N. Y. 476.

the manufacture of goods for the defendant rather than for a sale to him,¹⁰⁹ or of a sale to the defendant on his credit, and delivery at his request to a third person,¹¹⁰ has been held not to be a fatal variance. The fact that delivery was made, and the manner and time thereof may be proved by the testimony of witnesses who are cognizant of such facts,¹¹¹ and, like other facts, the fact of delivery may be proved by circumstantial¹¹² as well as direct evidence. Where the action is on a special contract fixing the price, evidence of the reasonable value of the goods is generally irrelevant and inadmissible,¹¹³ but it has been held in some jurisdictions that where the contract is oral and there is a dispute as to what price was thereby fixed, evidence of the value is admissible in a proper case.¹¹⁴ So, evidence of value is, of course, admissible under the common count, in the absence of any express contract, and it has been held that, in a proper case, on failure to prove a valid special contract, evidence of reasonable value may be admissible.¹¹⁵ But, on the other hand, a special contract, where for some reason there cannot be a recovery on it, and where there can be a recovery under a common count that is pleaded, especially after performance, may be admissible in evidence to fix the amount of recovery.¹¹⁶ In a recent case¹¹⁷ it is held by the Supreme Court of the United States that where a contract for the sale of hay is invalid because not reduced to writing and signed as required by statute, the contractor cannot, after furnishing the hay and receiving the contract

¹⁰⁹ *Union Rubber Co. v. Tomlinson*, 1 E. D. Smith (N. Y.) 364.

¹¹⁰ *Rogers v. Verona*, 1 Bosw. (N. Y.) 417; see also, *Porter v. McClure*, 15 Wend. (N. Y.) 189, and authorities cited.

¹¹¹ *Lee v. Hills*, 66 Ind. 474.

¹¹² *Lance v. Pearce*, 101 Ind. 595; *Stewart v. Davis*, 18 Ind. 74; *Dant v. State*, 106 Ind. 79, 5 N. E. 870.

¹¹³ *Sohn v. Jervis*, 101 Ind. 578.

¹¹⁴ *Zelch v. Hirt*, 59 Minn. 360, 61 N. W. 20; *Kumler v. Ferguson*, 7 Minn. 442; *Schwerin v. DeGraff*, 21 Minn. 354, as tending to show which party is most likely right or worthy of belief. See also, *Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672; *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007; but compare,

Shakespeare v. Baughman, 113 Mich. 551, 71 N. W. 874.

¹¹⁵ *Sussdorf v. Schmidt*, 55 N. Y. 319.

¹¹⁶ *Kerstetter v. Raymond*, 10 Ind. 199; *Scott v. Congdon*, 106 Ind. 268, 6 N. E. 625; see also, *Redman v. Adams*, 165 Mo. 60, 65 S. W. 300; *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Bank of Columbia v. Patterson's Admr.*, 7 Cranch (U. S.) 299, 304; *Daly v. Bernstein*, 6 N. Mex. 380, 28 Pac. 764, where contract was rescinded after money had been paid thereon; *Brewing Co. v. Hermann*, 187 Ill. 40, 58 N. E. 397; *Steward v. Hinkel*, 72 Cal. 187, 13 Pac. 494.

¹¹⁷ *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 24 Sup. Ct. 47.

price, maintain a quantum valebat for the value of the hay as increased after the time it was agreed to be delivered, but it is intimated that if, instead of paying for the hay, the purchaser had set up the invalidity of the contract, the plaintiff might have recovered on a quantum valebat.¹¹⁸ Evidence of the market value is frequently required, but this subject, as well as the manner of proving price or value generally, has already been considered,¹¹⁹ and will be further considered elsewhere in treating of sales. So, questions in regard to admission of parol evidence,¹²⁰ and the use of shop books,¹²¹ and the like, have been considered in another volume. The quantum valebat count is, perhaps, most often used to recover in general assumpsit in cases of the character discussed in this section, but, in many instances¹²² the proper count in indebitatus assumpsit may likewise be used.

§ 1733. **Work, labor, or service—Material furnished.**—When work is done or services are rendered, without any special contract, under such circumstances that the law will imply a promise to pay what they are reasonably worth, or, generally, where, though under a special contract, that contract cannot for some reason be set up, general assumpsit will lie to recover compensation, and, as a rule, either indebitatus assumpsit or quantum meruit counts may be used.¹²³ The same rule holds good, in general, where the action is to recover for work, labor and materials done and furnished in building a house, or the like.¹²⁴ So, recovery may be had on a common count for serv-

¹¹⁸ Citing to that effect, *Clark v. United States*, 95 U. S. 539, 542, 543; *Bacon v. Parker*, 137 Mass. 309, 310, 311; see also, *Garfield & Co. Coal Co. v. Fitchburg & Co. R. Co.*, 166 Mass. 119, 123, 44 N. E. 119.

¹¹⁹ See Vol. I, § 182.

¹²⁰ See Vol. I, ch. XXVI.

¹²¹ Vol. I, ch. XXI, XXII.

¹²² *Shipman Com. L. Pl.* (2d ed.) 33; *Shearer v. Jewett*, 14 Pick. (Mass.) 232; *Wadsworth v. Gay*, 118 Mass. 44; *Toledo & Co. R. Co. v. Chew*, 67 Ill. 378; *Wilson v. Foree*, 6 Johns. (N. Y.) 110; *Larkin v. Mitchell & Co.*, 42 Mich. 296, 3 N. W. 904; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 28 N. W. 280.

¹²³ *Shipman Com. L. Pl.* (2d ed.) 34; *Fuller v. Brown*, 11 Metc. (Mass.) 440; *Atkins v. Barnstable Co.*, 97 Mass. 428; *Miles v. Moodie*, 3 S. & R. (Pa.) 211; *Summers v. McKim*, 12 S. & R. (Pa.) 405; *Frazer v. Gregg*, 20 Ill. 299; *Mooney Iron Co.*, 82 Mich. 263, 46 N. W. 376.

¹²⁴ *Shipman Com. L. Pl.* (2d ed.) 35; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Day v. Caton*, 119 Mass. 513; *Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Willey v. School Dist.*, 25 Mich. 419.

ices or material furnished under an express contract, where it has been fully performed, and the amount of such recovery measured by the contract price.¹²⁵ Questions as to the value and manner of proving value of services, and the like, have been elsewhere treated,¹²⁶ and so have other questions that usually arise in such actions.¹²⁷

§ 1734. Board and lodging.—General assumpsit is the proper form of action to recover for board and lodging furnished, where there is no express promise to pay, but the circumstances are such that the law will imply one.¹²⁸ It has been held that an implied promise by a father to pay for board and lodging of his child may be inferred from knowledge and acquiescence,¹²⁹ but that this rule does not apply where the child is illegitimate and the father has not admitted his relationship or adopted the child.¹³⁰ Declarations of the

¹²⁵ *Stucky v. Hardy*, 15 Ind. App. 19, 41 N. E. 606; see also, *Nones v. Homer*, 2 Hilt. (N. Y.) 116; *Monarch v. Board*, 49 La. Ann. 991, 22 So. 259; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; *Ludlow v. Dole*, 1 Hun 715, affirmed in 62 N. Y. 617; *Hibbard v. Wilson*, 51 Neb. 436, 71 N. W. 65; *Harrison v. Hancock*, (Neb.) 89 N. W. 374.

¹²⁶ Vol. I, §§ 183, 685; see also, *Cummings v. Nichols*, 13 N. H. 420, and *Barnes v. Ingalls*, 39 Ala. 193, as to evidence of skill and competency; *Brabo, The*, 33 Fed. (U. S.) 884, it was held that there could be no recovery on the quantum meruit count because in that case there was no evidence of the reasonable value of the services.

¹²⁷ As to the presumption of a promise to pay for services, and as to the cases in which it does not arise or apply where the dealings are between the members of the same family, or those living together and closely related by blood or marriage, see Vol. I, § 108 and numerous authorities there cited. For recent cases upon the general subject of actions to recover for

work and labor, services and material, and as to the admissibility of evidence, see *Petterson v. Stockton & Co. R. Co.*, 134 Cal. 244, 66 Pac. 304; *Sully v. Pratt*, 106 La. Ann. 601, 31 So. 161; *Morrisette v. Wood*, 128 Ala. 505 30 So. 630; *Terry v. Warder*, (Ky.) 78 S. W. 154, services of daughter residing with mother presumed gratuitous; *McKnight v. Newell*, 207 Pa. St. 562, 57 Atl. 39; *Leidigh v. Keever*, (Neb.) 97 N. W. (N. Y.) 395, 4 Am. Dec. 374; *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. 801, where one employed for given time at an agreed price and employment is continued after such time without any new agreement as to price, the presumption is that it was at the same rate as before; *Garr v. Cranney*, 25 Utah 193, 70 Pac. 853.

¹²⁸ *Shipman Com. L. Pl.* (2d ed.) 32; *Thompson v. Reed*, 48 Ill. 118; *Raymond v. Eldridge*, 111 Mass. 390; *Smith v. Milligan*, 43 Pa. St. 107.

¹²⁹ *Nichole v. Allen*, 3 Car. & P. 36.

¹³⁰ *Monchief v. Ely*, 19 Wend. (N. Y.) 406.

child have also been held admissible when part of the *res gestae*,¹⁸¹ and one that has had long experience in the care of a person who is non compos mentis has been held competent to give an opinion as to the value of his board and care.¹⁸²

§ 1735. *Use and occupation.*—Where the relation of landlord and tenant is created by contract, express or implied, and there is no express promise to pay, the law generally implies a promise, and assumpsit for the use and occupation will lie.¹⁸³ Possession is often one element tending to show the relation, but mere evidence of possession without other facts or circumstances, is not sufficient.¹⁸⁴ There are, however, many facts and circumstances from which the relation and the implied promise to pay may be inferred¹⁸⁵ as well as from direct evidence. It has also been held that a void lease, under which the defendant entered into possession, is admissible to show the nature of the possession and thus show the relationship of the parties with reference thereto.¹⁸⁶ Authorities upon questions as to the admissibility of evidence in such actions are cited below.¹⁸⁷

¹⁸¹ *Edy v. McCoy*, 20 Ala. 403.

¹⁸² *Kendall v. May*, 10 Allen (Mass.) 59, 67; see also, *Carr v. Cranney*, 25 Utah 193, 70 Pac. 853.

¹⁸³ *Shipman Com. L. Pl.* (2d ed.) 31; *Dwight v. Cutler*, 3 Mich. 566; *Crouch v. Briles*, 7 J. J. Marsh (Ky.) 257; *Dudding v. Hill*, 15 Ill. 61; *Gould v. Thompson*, 4 Metc. (Mass.) 227; *Gunn v. Scovill*, 4 Day (Conn.) 228; *Howard v. Ransom*, 2 Ark. (Vt.) 252. See also, *Howard v. Shaw*, 8 M. & W. 118; *Fender v. Rogers*, 97 Ill. App. 280.

¹⁸⁴ *Ettlinger v. Degnon-McLean & Co.*, 42 Misc. (N. Y.) 215, 85 N. Y. S. 394; *Belger v. Sanchez*, 137 Cal. 514, 70 Pac. 738; *Janouch v. Pence*, 68 Neb. 867, 93 N. W. 217; *Winterbottom v. Ingham*, L. R. 7 Q. B. 611.

¹⁸⁵ *Despard v. Walbridge*, 15 N. Y. 374; *McFarlan v. Watson*, 3 N. Y.

286; *Bishop v. Howard*, 2 B. & C. 100; *Withington v. Warren*, 12 Metc. (Mass.) 114; *Roscoe N. P.* 340.

¹⁸⁶ *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550; see also, *Ecclesiastical Coms. v. Merral*, L. R. 4 Exch. 162; *Greton v. Smith*, 33 N. Y. 245; but see, *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 593; *Kiersted v. Orange & C. R. Co.*, 69 N. Y. 343.

¹⁸⁷ *Emory Mfg. Co. v. Rood*, 182 Mass. 166, 65 N. E. 58; *Dimock v. Van Bergen*, 12 Allen (Mass.) 551; *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103; *Waters v. Clark*, 22 How. Pr. (N. Y.) 104; *Brewer v. Palmer*, 3 Esp. 213; *Roscoe N. P.* 334, 337; *Cornwall v. Hoyt*, 7 Conn. 420, 428; *Buell v. Cook*, 5 Conn. 206; *Corbett v. Costello*, 8 La. Ann. 427.

CHAPTER LXXXVI.

ATTACHMENT.

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§ 1736. Generally.—The remedy by attachment exists by virtue of the statutes of the different states and in derogation of the common law. It has been said to be an extraordinary remedy given in aid of an action already commenced at the time of the attachment proceedings.¹ Certain rules of evidence are generally laid down by stat-

¹Rodde v. Hollweg, 19 Ind. App. 222, 49 N. E. 282; Excelsior Fork Co. v. Lukens, 38 Ind. 438; Smith v. Armour, 1 Pen. (Del.) 361, 40 Atl. 720; Hoffman v. Henderson, 145 Ind. 613, 44 N. E. 629; Gunby v. Porter, 80 Md. 402, 31 Atl. 324; Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Estlow v. Hanna, 75 Mich. 219, 42 N. W. 812; Hoagland v. Wilcox, 42 Neb. 138, 60 N. W. 376; Birchall v. Griggs, 4 N. Dak. 305, 60 N. W. 842, 50 Am. St. 654; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100.

utes, and where this is true, these rules must be strictly adhered to and are binding. Attachment proceedings may be said to owe their origin to statutory enactments and all else must give way to the rules so prescribed.³ In the absence of specific statutory provisions, however, the same rules of evidence that govern in other proceedings are in force, with few exceptions.

§ 1737. Burden of proof.—It is said that when the matters set out in the verified complaint are not denied by the defendant, the affidavit will be *prima facie* proof and will stand as true, but as soon as the defendant offers any contradicting evidence, then the burden is placed upon the plaintiff to prove all the material facts upon which he relies for his writ of attachment.³ He must prove his allegations by a fair preponderance of the evidence and cannot rely upon the affidavit when his affidavit is denied.⁴ This rule is sometimes modified and especially where the conduct of the defendant has been such as to estop him from denying the facts alleged, but this estoppel will not arise from mere inference. In order to be binding the plaintiff must have acted upon the faith of defendant's conduct and from an honest belief founded upon the acts or conduct of the defendant which were such as to warrant the belief and action upon the part of the plaintiff. The burden is upon the plaintiff to show all these facts which work such an estoppel, but when once established the defendant will generally be precluded from denying their effect.⁵ Where the defendant in an attachment proceedings sets up as ground of defense that there is an irregularity of the court or of some officer, or that service was not properly served, or any other facts which would tend to discharge the attachment, the burden is said to be upon the defendant to prove

³ *Louisville &c. R. Co. v. Parish*, 6 Ind. App. 89; *Cunningham v. Jacobs*, 120 Ind. 306, 22 N. E. 335.

⁴ *Morris v. Quick*, 45 N. J. L. 308; *Genesee Co. Sav. Bank v. Mich. Barge Co.*, 52 Mich. 164, 17 N. W. 790; *McMorran v. Moore*, 113 Mich. 101, 71 N. W. 505; *Strauss v. Abraham*, 32 Fed. (U. S.) 310.

⁵ *Bender v. Rinker*, 21 Wash. 633, 59 Pac. 503; *Burruss v. Trant*, 88 Va. 980; *Deseret Nat. Bank v. Little*, 13 Utah 365, 44 Pac. 930; *Park v. Armstrong*, 9 S. Dak. 269, 68 N. W. 739; *Lipscomb v. Rice*, 47 S. Car. 14, 24 S. E. 925; *Seville v. Wagner*, 46 Ohio St. 52, 18 N. E. 430; *Geneva Nat. Bank v. Ballor*, 48 Neb. 866, 67 N. W. 865; *Jones v. Swank*, 51 Minn. 285, 53 N. W. 634; *Drake v. Avanzini*, 20 Colo. 104, 36 Pac. 846; *Byford v. Girton*, 90 Iowa 661, 57 N. W. 588; *Champion Mach. Co. v. Updyke*, 48 Kans. 404, 29 Pac. 573.

⁶ *Roach v. Brannon*, 57 Miss. 490.

any of these facts to the satisfaction of the court.⁶ Thus, the burden has been held to be upon the defendant to prove the insufficiency of an attachment bond, when the defendant so questions it.⁷ So, where defendant has removed property from the state, the burden has been held to be upon him to show that he did not intend to defraud creditors or that he has ample property remaining to satisfy all creditors.⁸ But where application has been made for the dissolving of an attachment, the burden is held to be upon the plaintiff to show sufficient cause for the issuing of the writ.⁹ So, where the plaintiff sues out an attachment on the ground that defendant failed to pay for labor, where this is made a ground for attachment, the burden is upon the plaintiff to show the terms of the contract and the time when the services were to be paid for.¹⁰ And where a plaintiff in an attachment suit against two debtors alleges a joint action and joint indebtedness on the part of both in respect to their joint property with intent to defraud creditors, the burden is upon the plaintiff to show joint action and joint indebtedness.¹¹

§ 1738. **Presumptions.**—As elsewhere shown, innocence or good faith, rather than fraud or bad faith, is generally presumed,¹² but fraud or fraudulent intent may be presumed, or more properly, perhaps, inferred from conduct and circumstances,¹³ in attachment as well as other cases. Possession usually carries with it the presumption of ownership, yet an intervening claimant, it is said, cannot rely entirely upon the fact of possession, but is bound to prove his title and his right of possession;¹⁴ and ordinarily the party wishing to take advantage of possession has the burden of proving that fact.¹⁵

⁶ *Cureton v. Dargan*, 12 S. Car. 122; *Sprague v. Parsons*, 13 Daly (N. Y.) 553.

⁷ *Reid v. Armour & Co.*, 93 Ga. 696, 21 S. E. 131.

Pickard v. Samuels, 64 Miss. 822, 2 So. 250.

⁸ *McMorran v. Moore*, 113 Mich. 101, 71 N. W. 505; *Marcumber v. Beam*, 22 Mich. 403; *Folsom v. Teichner*, 27 Mich. 107; *Wagon Co. v. Benedict*, 25 Neb. 372, 41 N. W. 254; *Dolan v. Armstrong*, 35 Neb. 339, 53 N. W. 132; *Jordan v. Dewey*, 40 Neb. 639, 59 N. W. 88.

¹⁰ *Drake v. Avanzini*, 20 Colo. 104, 36 Pac. 846.

¹¹ *Cottrell v. Hatheway*, 108 Mich. 619, 66 N. W. 596.

¹² Vol. I, § 94 and authorities cited in notes 2 and 3.

¹³ *Meyer & Sons Co. v. Black*, 4 N. Mex. 190, 16 Pac. 620; *Ross v. Clark*, 32 Mo. 296; *Hanks v. Andrews*, 53 Ark. 327; *Strauss v. Abrahams*, 32 Fed. (U. S.) 310; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154, and note.

¹⁴ *Wallace v. Robeson*, 100 N. Car. 206, 65 S. E. 650.

¹⁵ *Boaz v. Schneider*, 69 Tex. 128, 6 S. W. 402.

§ 1739. **Circumstantial evidence.**—Direct testimony is not necessary to establish or disprove the facts stated in an affidavit for an attachment, for either the plaintiff or defendant may rely upon competent circumstantial evidence.¹⁶ This evidence is often more effective than any other, for when circumstances can be proved which show that a creditor intends to leave the state or is concealing property for the purpose of defrauding creditors, it will carry more weight than mere statements of the defendant. The plaintiff may show that transfers were made at such a time and under such circumstances as those just stated, or he may show in a proper case, an agreement between defendant and others whereby pretended sales are made for the purpose of covering up property from creditors.¹⁷ It has been held that any circumstances occurring either before or after the attachment up to the time of the hearing which will show or tend to prove the truth or falsity of the allegations, may be shown.¹⁸ But evidence will not be heard which would be new ground for a new proceeding; and the evidence must relate to the grounds for an attachment existing at the time the suit was filed.¹⁹ Acts and circumstances that have occurred since the issuing of the attachment and not related to the grounds for which the attachment was issued cannot ordinarily, at least, be considered in evidence.²⁰ When, however, the plaintiff alleges that the debtor is about to abscond or do any other act which would afford grounds for an attachment, he may show that he has actually left the state,²¹ and other acts which strongly tend to show the intent of the party at the time, although subsequent thereto, have also been held admissible.²² Circumstantial evidence as well as direct testimony is competent for the purpose of showing the real intent of the debtor when the question of intent is of importance. Where the ground relied upon is an intent to defraud creditors, the intent is important; and the defendant may show by circumstantial evidence that he did not

¹⁶ *Barney v. Scherling*, 40 Miss. 320; *Chatham Nat. Bank v. Goldsoll*, 14 Mo. App. 586; *Ruthven v. Beckwith*, 84 Iowa 715, 51 N. W. 153.

¹⁷ *Parker v. Luce*, 14 Mich. 8; *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877.

¹⁸ *Burnham v. Johnson*, 5 Kans. App. 321, 48 Pac. 460; *Friedlander v. Pollock*, 5 Cold. (Tenn.) 490.

¹⁹ *Geneva Nat. Bank v. Ballor*, 48 Neb. 866, 67 N. W. 865, 866; *Denegre v. Milne*, 10 La. Ann. 324.

²⁰ *Hobbs v. Greenfield*, 103 Ga. 1, 30 S. E. 257.

²¹ *Pierse v. Smith*, 1 Minn. 82.

²² *Burnham v. Johnson*, 5 Kans. App. 321, 48 Pac. 460; *Friedlander v. Pollock*, 5 Cold. (Tenn.) 490.

part of it.⁵⁸ Where the fraud consists of false representations,⁵⁷ the plaintiff must show that they were made to him⁵⁸ by defendant⁵⁹ with intent to deceive⁶⁰ and that he (the plaintiff) relied upon such statements and thus extended the credit.⁶¹ Evidence of the insolvency of defendant at the time of the sale,⁶² or false statements concerning solvency,⁶³ or false allegations concerning the ownership of certain property,⁶⁴ has been held admissible on the part of the plaintiff in establishing fraud.

§ 1745. **Fraudulent transfer.**—Where a fraudulent transfer⁶⁵ or disposition of property⁶⁶ is made ground for an attachment,⁶⁷ the plaintiff must generally show a voluntary⁶⁸ alienation of title⁶⁹ by defendant of a material portion of his property⁷⁰ after plaintiff's claim was in existence;⁷¹ and the burden of proving a fraudulent intent is

⁵⁸ *Weiller v. Schreiber*, 63 How. Pr. (N. Y.) 491.

⁵⁹ *Stanhope v. Swafford*, 77 Iowa 594, 42 N. W. 450; *May v. Newman*, 95 Mich. 501, 55 N. W. 364; but see, *Cheyenne First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743.

⁶⁰ *Winter v. Davis*, 48 La. Ann. 260, 19 So. 263; *Emerson v. Detroit Steel Co.*, 100 Mich. 127, 58 N. W. 659; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 800, 56 N. W. 389.

⁶¹ *Lodge v. Rose Valley Mills*, 1 Pa. Dist. 811, 11 Pa. C. C. 667.

⁶² *Liveright v. Greenhouse*, 61 N. J. L. 156, 38 Atl. 697.

⁶³ *Penoyar v. Kelsey*, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248; *Curtis v. Hoxie*, 88 Wis. 41, 59 N. W. 581; *Mayer v. Zingre*, 18 Neb. 458, 25 N. W. 727; *Mayer v. Zingre*, 18 Neb. 458, 25 N. W. 727.

⁶⁴ *Landauer v. Espenhain*, 95 Wis. 169, 70 N. W. 287; *Kelsey v. Harrison*, 29 Kans. 143.

⁶⁵ *Rosenthal v. Wehe*, 58 Wis. 621, 17 N. W. 318; *Sedalla Third Nat. Bank v. Cramer*, 78 Mo. App. 476.

⁶⁶ *Askwith v. Allen*, 33 Neb. 418, 50 N. W. 267; *Young v. Cooper*, 12

Neb. 610, 12 N. W. 91; *Cohen v. Grimes*, 18 Tex. Civ. App. 327, 45 S. W. 210.

⁶⁷ *Culbertson v. Cabeen*, 29 Tex. 247; *Kendall v. Kennedy*, 8 Ky. L. R. 532.

⁶⁸ *Matthews v. Boydstun*, (Tex. Civ. App.) 31 S. W. 814; *Bullene v. Smith*, 73 Mo. 151.

⁶⁹ *Cooley v. Abbey*, 111 Ga. 439, 36 S. E. 786; *Archer v. Strachan*, Mich. 1901, 88 N. W. 465; *Dawley v. Sherwin*, 5 S. Dak. 594, 59 N. W. 1027.

⁷⁰ *McMorran v. Moore*, 113 Mich. 101, 71 N. W. 505; *Johnson v. Heldenhelmer*, 65 Tex. 263.

⁷¹ *Cox v. Peoria Mfg. Co.*, 42 Neb. 660, 60 N. W. 933; *Chicago Union Bank v. Mead Mercantile Co.*, 151 Mo. 149, 52 S. W. 196; *Winner v. Kuehn*, 97 Wis. 394, 72 N. W. 227.

⁷² *Wildman v. Gelder*, 60 Hun (N. Y.) 443, 14 N. Y. S. 914, 39 N. Y. 162, 21 N. Y. Civ. Proc. 143.

⁷³ *Prunk v. Williams*, 28 Ind. 523; *Hobbs v. Greenfield*, 103 Ga. 1, 30 S. E. 257; *Allen v. Fuget*, 42 Kans. 672, 22 Pac. 725; *McQuade v. Williams*, 101 Tenn. 334, 47 S. W. 427; *Roach v. Brannon*, 57 Miss. 490;

upon the party relying upon it.⁷² This intent may, however, be proved by circumstantial evidence,⁷³ and by the acts and declarations of the one transferring.⁷⁴ A fraudulent assignment,⁷⁵ mortgage,⁷⁶ or sale, may be shown as ground for an attachment.⁷⁷ The debtor may offer evidence in defense to explain his action and show his purpose to use the proceeds of the sale or mortgage to pay debts.⁷⁸ Where a fraudulent transfer is alleged the plaintiff may show the relationship between the parties to the conveyance as a fact regarding the good faith of the parties and for the consideration of the jury,⁷⁹ but such evidence will not, ordinarily, of itself, be sufficient to prove fraud.⁸⁰ As a general rule, any proper evidence which will show an intent of the debtor to secure himself and to defeat creditors is competent as showing a fraudulent transfer.⁸¹ In some jurisdictions, a general assignment

Hershfield v. Lowenthal, 35 Kans. 407, 11 Pac. 173.

⁷²*Hasie v. Connor*, 53 Kans. 713, 37 Pac. 128; *Strauss v. Abrahams*, 32 Fed. (U. S.) 310.

⁷³*Adams v. Kellogg*, 63 Mich. 105, 29 N. W. 679; *Parmer v. Keith*, 16 Neb. 91, 20 N. W. 103; *McNeil v. Plows*, 83 Ill. App. 186.

⁷⁴*Roddey v. Erwin*, 31 S. Car. 36, 9 S. E. 729; *Buckingham v. Tyler*, 74 Mich. 101, 41 N. W. 863; *Angell v. Pickard*, 61 Mich. 561, 28 N. W. 680; *McMorran v. Moore*, 113 Mich. 101, 71 N. W. 506; but see, *Bumberger v. Gerson*, 24 Fed. (U. S.) 257; *Lewis v. Rice*, 61 Mich. 97, 27 N. W. 867.

⁷⁵*Brickham v. Lake*, 51 Fed. (U. S.) 392; *Whedbee v. Stewart*, 40 Md. 414; *Roy v. Union Mercantile Co.*, 3 Wyo. 417, 26 Pac. 996.

⁷⁶*Marbourg v. Lewis Cook Mfg. Co.*, 32 Kans. 629, 5 Pac. 181; *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440.

⁷⁷*Robinson Notion Co. v. Ormsby*, 33 Neb. 665, 50 N. W. 952; *Cheyenne First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743; *Shellabarger v. Mottin*, 47 Kans. 451, 28 Pac. 199, 27 Am. St. 306; *Jordan v. White*, 38

Mich. 253; *Blum v. Davis*, 56 Tex. 423; *McDonald v. Hoover*, 142 Mo. 484, 44 S. W. 334, holds that the seller may receive value and still the sale be fraudulent.

⁷⁸*Iosco County Sav. Bank v. Barnes*, 100 Mich. 1, 58 N. W. 606; *Tenney v. Diss*, 32 Neb. 61, 48 N. W. 877; *New Iberia State Bank v. Martin*, 52 La. Ann. 1628, 28 So. 130; *Smith v. Eaton*, 54 Md. 138, 39 Am. R. 355; *Willis v. Lowry*, 66 Tex. 540, 2 S. W. 449; *Harbour-Pitt Shoe Co. v. Dixon*, 22 Ky. L. R. 1169, 60 S. W. 186; *Reed Bros. Co. v. Weeping Water First Nat. Bank*, 46 Neb. 168, 64 N. W. 701.

⁷⁹*Hough v. Dickinson*, 58 Mich. 89, 24 N. W. 809.

⁸⁰*Iosco County Sav. Bank v. Barnes*, 100 Mich. 1, 58 N. W. 606; *Carson v. Solomon*, 33 Neb. 652, 50 N. W. 1054; *Winter v. Davis*, 43 La. Ann. 260, 19 So. 263; *Marx v. Leinkauff*, 93 Ala. 453, 9 So. 818.

⁸¹*Hobbs v. Greenfield*, 103 Ga. 1, 30 S. E. 257; *Hill v. Wertheimer Swarts Shoe Co.*, 150 Mo. 483, 51 S. W. 702; *Keith v. Armstrong*, 65 Wis. 225, 26 N. W. 445; *Dyer v. Rosenthal*, 45 Mich. 588, 8 N. W. 560.

by a debtor showing on its face a disposal of property⁸² or any relevant statements or letters of the defendant, may be used against him as a circumstance tending to prove fraudulent disposition of property;⁸³ but an offer to compromise cannot be used against the debtor for the purpose of supporting the attachment.⁸⁴

§ 1746. **Fraudulent intent to dispose of property.**—Where a debtor's disposal of his property for the purpose of defrauding creditors is made a ground for attachment,⁸⁵ the fraudulent intent must be shown either directly⁸⁶ or from circumstances such as acts and conduct of the debtor,⁸⁷ but these acts must, ordinarily at least, have transpired at such a time as to be connected with, and form a part of, the *res gestae*;⁸⁸ and the burden is upon the plaintiff to show such intent.⁸⁹ Fraudulent intent must actually be proved and not inferred from the mere consequences of the act⁹⁰ apart from other circumstances, but fraudulent intent may be presumed or inferred when the transfer is gratuitous,⁹¹ or for an insignificant price,⁹² or where threats are made not to pay.⁹³ Fraudulent intent is not sufficiently established by evidence merely to the effect that the debtor attempted to

⁸² *Meyer Sons Co. v. Black*, 4 N. Mex. 190, 16 Pac. 620, but this could not be the rule where an assignment is properly made under the voluntary general assignment laws for the benefit of creditors.

⁸³ *Gries v. Blackman*, 30 Mo. App. 2.

⁸⁴ *Chaffe v. Mackenzie*, 43 La. Ann. 1062, 10 So. 369.

⁸⁵ *Johnson v. Rankin*, (Tenn. Ch.) 59 S. W. 638; *Abrams v. Teague*, 24 La. Ann. 567; *Dunnenbaum v. Schram*, 59 Tex. 281.

⁸⁶ *Correy v. Lake, Deady* (U. S.) 469, 6 Fed. Cas. No. 3253.

⁸⁷ *Askwith v. Allen*, 33 Neb. 418, 50 N. W. 267; *Washburn v. McGuire*, 19 Neb. 98, 26 N. W. 709; *Blass v. Lee*, 55 Ark. 329, 18 S. W. 186; *Meyers v. Boyd*, 37 Mo. App. 532; *Liveright v. Greenhouse*, 61 N.

J. L. 156, 38 Atl. 697; *Armstrong v. Cook*, 95 Mich. 257, 54 N. W. 873.

⁸⁸ *Symms Grocery Co. v. Snow*, 58 Neb. 516, 78 N. W. 1066; *Orr Shoe Co. v. Harris*, 82 Tex. 273, 18 S. W. 308; *Hardee v. Langford*, 6 Fla. 13; *Brown v. Blanchard*, 39 Mich. 790; *Lewis v. Kennedy*, 3 Greene (Iowa) 57.

⁸⁹ *Chaffee v. Runkel*, 11 S. Dak. 333, 77 N. W. 583; *Hoy v. Weiss*, 24 La. Ann. 269.

⁹⁰ *Seldentopf v. Annabil*, 6 Neb. 524.

⁹¹ *Askwith v. Allen*, 33 Neb. 418, 50 N. W. 267; *Johnson v. Rankin*, (Tenn. Ch.) 59 S. W. 638.

⁹² *Boyd v. Labranche*, 35 La. Ann. 285.

⁹³ *Hanks v. Andrews*, 53 Ark. 327, 13 S. W. 1102; *Livenmore v. Rhodes*, 3 Rob. (N. Y.) 626; *Walker v. Hagerty*, 20 Neb. 482, 30 N. W. 556.

borrow money,⁹⁴ or that he has not paid debts,⁹⁵ or that he refused to secure a creditor.⁹⁶ The act to carry with it an inference of fraud must, usually at least, be such as to defeat or injuriously affect creditors.⁹⁷

§ 1747. **Removal of property with intent to defraud.**—When the plaintiff relies upon the statutory ground that the debtor is about to remove his property with intent to defraud his creditors, he must prove that the debtor is going to remove and that he intends to defraud his creditors, but here, as elsewhere, the evidence may be circumstantial as well as direct; and the defendant may disprove such intent by circumstantial evidence and he may testify himself that at the time of the attachment he did not know that he owed plaintiff or any one else.⁹⁸ The defendant, it has been held, may also show, where the charge is that he is about to remove property from the state, that he or his partner or one of the co-defendants has unincumbered property in the state sufficient to meet all outstanding liabilities.⁹⁹ It is not necessary for the plaintiff to show just when the defendant is to remove his property from the state, but proof that the intention existed to remove at the time the attachment was issued, and was to be carried into effect then or presently, will be sufficient.¹⁰⁰

§ 1748. **Removal and concealment of property.**—Most states make the actual or contemplated removal of property from the jurisdiction of the court and a concealment of property ground for attachment.¹⁰¹ The plaintiff must prove that the debtor has removed or is about to remove a material part of his property.¹⁰² The burden of producing evidence is upon the defendant, when it has been shown that he is

⁹⁴ *Galligan v. Groten*, 18 Misc. (N. Y.) 428, 42 N. Y. S. 22, 26 N. Y. Civ. Proc. 78.

⁹⁵ *Meyers v. Boyd*, 37 Mo. App. 532; *Parsons v. Stockbridge*, 42 Ind. 121.

⁹⁶ *Ellison v. Bernstein*, 60 How. Pr. (N. Y.) 145.

⁹⁷ *New York &c. Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524.

⁹⁸ *Hyde v. Nelson*, 11 Mich. 353; Civ. Code of Ga., § 5179.

⁹⁹ *White v. Wilson*, 10 Ill. 21, 25.

¹⁰⁰ *Perryman v. Pope*, 102 Ga. 502, 31 S. E. 37; *Stix v. Pump*, 36 Ga. 526.

¹⁰¹ *Steele v. Dodd*, 14 Neb. 496, 16 N. W. 909; *Haslett v. Rodgers*, 107 Ga. 239, 33 S. E. 44; *Walker v. Welch*, 13 Ill. 674.

¹⁰² *Lowenstein v. Bew*, 68 Miss. 265, 8 So. 674, 24 Am. St. 269; *Goodbar v. Bailey*, 57 Ark. 611, 22 S. W. 568; *Wright v. Smith*, 19 Tex. 297.

removing property, to show that he has other property within the state sufficient to meet all demands.¹⁰³

§ 1749. **Non-residence.**—Where an attachment may issue upon the ground that the debtor is a non-resident of the state,¹⁰⁴ it is only necessary to establish the fact that the debt was due,¹⁰⁵ and that the debtor was a non-resident¹⁰⁶ at the time the writ was issued.¹⁰⁷ Where an attachment is sought because of non-residence of the debtor, proof that the debt is a joint debt and that one of the debtors lives within the state, will defeat the action.¹⁰⁸ Proof of mere casual or temporary absence from the state will not make the absentee a non-resident.¹⁰⁹

§ 1750. **Other ground for attachment.**—Various other grounds for attachment are specified in the statutes of a few of the states, but those already considered are the most common. As to the other grounds, the statutes differ so radically that it would be unprofitable to consider them at length. A reference to them and to some of the decisions is all that seems necessary. The death of a non-resident debtor leaving property in the state liable for his debts is a ground

¹⁰³ *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250; *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114; *Nesbit v. Schwab Clothing Co.*, 62 Ark. 22, 34 S. W. 79; see also, *Hoffman v. Henderson*, 145 Ind. 613, 44 N. E. 629.

¹⁰⁴ *Blair v. Winston*, 84 Md. 356, 35 Atl. 1101; *Munroe v. Williams*, 37 S. Car. 81, 16 S. E. 533, 19 L. R. A. 665; *German &c. Bank v. Kauter*, 55 Neb. 103, 75 N. W. 566, 70 Am. St. 371.

¹⁰⁵ *Lederer v. Rosenthal*, 99 Wis. 235, 74 N. W. 971; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874, this may not be required in all cases under all statutes.

¹⁰⁶ *Blair v. Winston*, 84 Md. 356, 35 Atl. 1101; *Stafford v. Mills*, 57 N. J. L. 570, 31 Atl. 1023; *Ritter v. Phenix &c. Ins. Co.*, 32 Kans. 504, 4 Pac. 1032.

¹⁰⁷ *Witbeck v. Marshall-Wells Hard-*

ware Co., 188 Ill. 154, 58 N. E. 929; *Stafford v. Mills*, 57 N. J. L. 570, 31 Atl. 1023; *Barth v. Burnham*, 105 Wis. 548, 81 N. W. 809.

¹⁰⁸ *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847; *McHaney v. Cawthorn*, 4 Heisk. (Tenn.) 508.

¹⁰⁹ *Keller v. Carr*, 40 Minn. 428, 42 N. W. 292; *Johnson v. May*, 49 Neb. 601, 68 N. W. 1032; *Stafford v. Mills*, 57 N. J. L. 570, 31 Atl. 1023; *Springfield People's Bank v. Williams*, (Tenn. Ch.) 36 S. W. 983; *Cooper v. Smith*, 8 Wis. 171; as to what persons are considered non-residents, see, *Wrigley, In re*, 8 Wend. (N. Y.) 134; *Carden v. Carden*, 107 N. Car. 214, 22 Am. St. 876, and note; *Monroe v. Williams*, 19 L. R. A. 665, and note; *Cousins v. Alworth*, 10 L. R. A. 504.

for attachment in at least one state;¹¹⁰ refusal to secure a debt¹¹¹ or the valuelessness of the security is made a ground in some states;¹¹² failure to pay for work and labor at the time of performance,¹¹³ or for goods on delivery,¹¹⁴ is made a ground in others, and the want of sufficient property in the state, subject to execution, is made a ground, as to certain kinds of debts, in another state.¹¹⁵

§ 1751. *Claims of third parties.*—Where a third party interpleads or brings an independent action claiming a superior right to the attached property, the burden, in most jurisdictions, is upon such party to show his better claim.¹¹⁶ But possession of the property by the intervening claimant has been held to raise the presumption that he has the title.¹¹⁷ In some states where the property is in the possession of a third party, the attaching plaintiff is required to show that the

¹¹⁰ *Bacchus v. Peters*, 85 Tenn. 678, 4 S. W. 833; *Hubbard v. Epps*, 9 Ky. L. R. 790; *Burdett v. Phillips*, 78 Ky. 246; *Owensboro Deposit Bank v. Smith*, 22 Ky. L. R. 808, 58 S. W. 792; *Johnson v. Louisville City Nat. Bank*, 22 Ky. L. R. 118, 56 S. W. 710; *Dunn v. McAlpin*, 90 Ky. 78, 11 Ky. L. R. 884, 13 S. W. 363; *Downs v. Ringgold*, 101 Ky. 392, 19 Ky. L. R. 639, 41 S. W. 317; *Covington First Nat. Bank v. Kiefer Milling Co.*, 95 Ky. 97, 15 Ky. L. R. 457, 23 S. W. 675; *Burdett v. Phillips*, 78 Ky. 246.

¹¹¹ *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96; *State v. Morris*, 50 Iowa 203; *Ruthven v. Beckwith*, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

¹¹² *Elling v. Kirkpatrick*, 6 Mont. 119, 9 Pac. 900; *Parberry v. Woodson Sheep Co.*, 18 Mont. 317, 45 Pac. 278; see also, *Ryles, Wilson Co. v. Shelby Mfg Co.*, 93 Mo. App. 178.

¹¹³ *De Lappe v. Sullivan*, 7 Colo. 182, 2 Pac. 926. If no stipulated time of payment of wages, but payment from time to time, either party may terminate contract, and if defendant discharges plaintiff, the latter may maintain an attachment for wages due and unpaid; see also, *Drake v. Avanzini*, 20 Colo. 104, 36 Pac. 846.

¹¹⁴ *Miller v. Godfrey*, 1 Colo. App. 177, 27 Pac. 1016; *Young v. Lynch*, 30 Kans. 205, 1 Pac. 503; *Richardson's Express Co. v. Cunningham*, 25 Mo. 396; *Harlow v. Sass*, 38 Mo. 24.

¹¹⁵ *Wolfstein v. Steinharter*, 10 Ky.

¹¹⁶ *Burr v. Clement*, 9 Colo. 1, 9 Pac. 633; *Lagomarcino v. Quattrochi*, 89 Iowa 197, 56 N. W. 435; *Standard Implement Co. v. Parlin Co.*, 51 Kans. 566, 33 Pac. 363; *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286; *Wallace v. Robeson*, 100 N. Car. 206, 6 S. E. 650; *Stone v. Spencer*, 77 Mo. 356; *Hollenback v. Todd*, 119 Ill. 543, 8 N. E. 829.

¹¹⁷ *Doane v. Glenn*, 1 Colo. 495; *Wear v. Sanger*, 91 Mo. 348, 2 S. W. 307; *Traders' Nat. Bank v. Day*, 7 Tex. Civ. App. 569, 27 S. W. 264; *Roswald v. Hobbie*, 85 Ala. 73, 4 So. 177, 7 Am. St. 23.

property belonged to the debtor and was thus subject to attachment,¹¹⁸ if the third party lays claim to it. So, where fraud is alleged in transferring the property to the interpleader, the burden of proof has been held to be upon the party alleging fraud in order to reach the property in the hands of the third party.¹¹⁹ A third party or intervening claimant, however, must depend upon the strength of his own title¹²⁰ and not the weakness of the defendant's, and he cannot show title in a party who has no connection with the suit,¹²¹ unless the claimant can show that his title in some way depends upon such outstanding title.¹²² The acts or declarations of an attachment defendant while in possession and which explain the character of his possession are admissible¹²³ in a proper case as a part of the *res gestae*,¹²⁴ but declarations after parting with the possession are not admissible to prove ownership.¹²⁵ Where a third party lays claim to property attached his admissions against his claim or title are admissible against him.¹²⁶ So, the testimony of the party in possession has been held competent to prove for whom he held possession.¹²⁷

§ 1752. **Intervening claimants have burden of proof.**—Where a petition of intervention to an attachment is filed, and the petition is based upon the fact that the property belongs to the one intervening, and claims that the intervener acquired it by purchase prior to date of attachment, the burden is upon such intervener to show that he owned it before the filing of the attachment and

¹¹⁸ *Wollner v. Lehman*, 85 Ala. 274, 4 So. 643; *Compton v. Marshall*, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059.

¹¹⁹ *Reinecke v. Gruner*, 111 Iowa 731, 82 N. W. 900; *Mansur-Tabbetts Implement Co. v. Ritchie*, 143 Mo. 587, 45 S. W. 634; *Ellis v. Valentine*, 65 Tex. 532; *Meyberg v. Jacobs*, 40 Mo. App. 128; *Martin v. Davis*, 76 Iowa 762, 40 N. W. 712.

¹²⁰ *Hutchinson Nat. Bank v. Crow*, 56 Ill. App. 558; *Martin v. Mayer*, 112 Ala. 620, 20 So. 963; *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286; *Dallas Nat. Bank v. Davis*, 78 Tex. 14, S. W. 706; *Cottingham v. Armour Packing Co.*, 109 Ala. 421, 19 So. 842.

¹²¹ *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286; *Seisel v. Folmar*, 103 Ala. 491, 15 So. 850.

¹²² *Wollner v. Lehman*, 85 Ala. 274, 4 So. 643; *Jackson v. Bain*, 74 Ala. 328.

¹²³ *Maus v. Bome*, 123 Ind. 522, 24 N. E. 345; *Wright v. Smith*, 66 Ala. 514.

¹²⁴ *McCrae v. Young*, 48 Ala. 622; *French v. Sale*, 60 Miss. 516.

¹²⁵ *Smith v. Harre*, 58 Ga. 446.

¹²⁶ *Sawyer Paper Co. v. Mangan*, 68 Mo. App. 1; *Bleven v. Freer*, 10 Cal. 172; *People's Nat. Bank v. Harper*, (Ga.) 40 S. E. 717.

¹²⁷ *Max v. Watkins*, 30 Ga. 682.

to prove by what manner he acquired title to it, or any other interest he may claim.¹²⁸ If the intervener claims to own the property attached as a purchaser, taking the property upon a debt owing and due him from the attachment defendant, he must prove that the debt was just and that the goods were sold in payment of the debt and at a fair value.¹²⁹ The burden of proof is usually upon the intervening claimant to prove that the property belongs to him if in the hands of the attachment defendant,¹³⁰ and this is true even though the property is not actually in his possession,¹³¹ but only constructively so,¹³² or if in the hands of his agent or of a carrier.¹³³ The plaintiff has the burden of showing that at the time of seizure the sale was completed and title had passed.¹³⁴ Some states by their statutes and decisions require that the attaching creditor shall first show that the property attached belonged to the attachment defendant in order to maintain his attachment when the title of the property is called in question by other creditors,¹³⁵ and a creditor who has attached property claimed by another under purchase from the debtor prior to the attachment, has been held to have the burden of showing that the claimant is not a bona fide purchaser.¹³⁶ Where property is attached and an intervening claimant appears and lays claim to the property the proof required depends largely upon who had possession of the property at the time of the attachment. The attachment judgment is prima facie evidence of the attachment defendant's ownership if he was in possession,¹³⁷ but if the property was in the hands of the claimant other proof has been held necessary.¹³⁸ The claimant is required to make out a prima facie case of ownership¹³⁹ and that he was the

¹²⁸ *Lagomarcino v. Quattrochi*, 89 Iowa 197, 56 N. W. 435; *Parlin and Orendorff Co. v. Spencer*, 51 Kans. 566, 33 Pac. 363; *Swofford Bros. v. Smith-McCord*, 1 Indian Ter. 314, 37 S. W. 103; *Hollenback v. Todd*, 119 Ill. 543, 8 N. E. 829; *Thompson v. Waterman*, 100 Ga. 586, 28 S. E. 286.

¹²⁹ *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137; *Curtis v. Wortsman*, 25 Fed. (U. S.) 893.

¹³⁰ *Burr v. Clement*, 9 Colo. 1, 9 Pac. 633; *Pierson v. Tom*, 10 Tex. 145.

¹³¹ See § 1751.

¹³² *Pierson v. Tom*, 10 Tex. 145.

¹³³ *Wear v. Sanger*, 91 Mo. 348, 2 S. W. 307.

¹³⁴ *Buckingham v. Tyler*, 74 Mich. 101, 41 N. W. 868.

¹³⁵ *Mandell v. McLure*, 14 S. & M. (Miss.) 11; *Irion v. Hume*, 50 Miss. 419.

¹³⁶ *Bernhelm v. Dibbrell*, (Miss.) 11 So. 795; *Richards v. Vaccaro*, 67 Miss. 516, 7 So. 506, 19 Am. St. 322.

¹³⁷ *Moore v. Penn*, 95 Ala. 200, 10 So. 343.

¹³⁸ *Sexey v. Adkinson*, 34 Cal. 346, 91 Am. Dec. 698.

¹³⁹ *Baer v. Groves*, 46 Mo. App.

owner before attachment proceedings were instituted;¹⁴⁰ however, this does not mean that he shall prove his ownership beyond a reasonable doubt.¹⁴¹

§ 1753. **Lien of third party.**—Where the attaching creditor is attempting to enforce a statutory lien and the intervening claimant tries to defeat his lien by showing title in himself prior to the levy of the attachment, the attaching plaintiff may show his prior right and for this purpose may introduce the instrument creating the lien,¹⁴² or, according to some decisions, the record of attachment proceedings, including the writ, affidavit and all the pleadings may be used in establishing the priority.¹⁴³ But it has been held by the Supreme Court of the United States that such papers and record in the original attachment proceedings are not admissible against the interpleading claimant, who was not a party thereto, as evidence of the fraudulent intent and fraudulent character of the conveyance to them.¹⁴⁴

§ 1754. **Defense of title in another.**—Evidence which shows that the property attached does not belong to the defendant or that it belongs to his wife and was received by her from a third party, has been held competent and a complete defense to the action;¹⁴⁵ but, it is generally held that whenever the defendant claims that the property belongs to his wife, as a bar to the action, the burden is upon him to make his case clear and satisfactory in order to have the attachment discharged.¹⁴⁶ Evidence that the property was listed with the tax assessor as the husband's is admissible as tending to contradict his statements that it belongs to his wife.¹⁴⁷ In most jurisdictions, property already in custodia legis cannot be attached, and it is, therefore,

245; *John Deere Plow Co. v. Sullivan*, 158 Mo. 440, 59 S. W. 1005.

¹⁴⁰ *Foster v. Goodwin*, 82 Ala. 384, 2 So. 895.

¹⁴¹ *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201; *Wollner v. Lehman*, 85 Ala. 274, 4 So. 643.

¹⁴² *Boswell v. Carlisle*, 55 Ala. 554.

¹⁴³ *Mayer v. Clark*, 40 Ala. 259; *Guy v. Lee*, 81 Ala. 163, 2 So. 273.

¹⁴⁴ *Hulskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899; *Albert v. Besel*, 88 Mo. 150.

¹⁴⁵ *Barney v. Scherling*, 40 Miss. 320.

¹⁴⁶ *Kirk v. Stevenson*, 59 Ohio St. 556, 53 N. E. 49; *Baer & Co. v. Otto*, 34 Ohio St. 11; *McLaren v. Hall*, 26 Iowa 297; *Draddy v. Heile*, 17 Ky. L. R. 1182, 33 S. W. 1107.

¹⁴⁷ *Arnold v. Cofer*, 135 Ala. 364, 33 So. 539; it is also held in the same case that a question to the husband calling upon him to state for whom he bought the property was objectionable as calling for a conclusion as to a secret intent.

a complete defense to show that certain money or property attached is in the custody of an officer of the court as an executor or administrator and that it is therefore exempt from attachment.¹⁴⁸

§ 1755. **Actions on bond.**—It has been held that the party attached may show, by competent evidence, the falsity of the affidavit accompanying the attachment, in a suit against the sureties upon an attachment bond,¹⁴⁹ and that this may be done by either parol evidence or other affidavits, and for this purpose the original affidavit itself may be used.¹⁵⁰ It has also been held that when the defendant questions the sufficiency of the attachment bond, the burden is upon him to show the inability of the sureties to pay, and evidence that the surety has returned no property for taxation in the county of his residence would authorize an inference that he was without sufficient property to make the bond good.¹⁵¹ The recital in an attachment bond usually forms part of the bond, and, in such a case it has been held that the plaintiff is estopped to deny the recitals by other evidence.¹⁵² It is also the general rule that the sureties on the bond are bound by the judgment in attachment unless fraud, collusion or mistake is shown.¹⁵³

§ 1756. **Wrongful attachment—Generally.**—Whenever a party seeks to recover damages for wrongful attachment, the burden of proving that the attachment is wrongful, is upon the party setting up such cause of action.¹⁵⁴ The plaintiff must show that he has been in-

¹⁴⁸ *Gorman v. Stillman*, 24 R. I. 264, 52 Atl. 1088; *Conway v. Armington*, 11 R. I. 116; *Taylor v. Carryl*, 24 Pa. St. 259; see also, *Wilder v. Bailey*, 3 Mass. 289; *Drake Attachment*, § 281; but compare, *Wehle v. Conner*, 88 N. Y. 231; *Conover v. Ruckman*, 33 N. J. Eq. 303.

¹⁴⁹ *Murphy v. Montandon*, 2 Idaho 1048, 29 Pac. 851, 35 Am. St. 279; *McLaren v. Hall*, 26 Iowa 297; contra, *Wyman v. Hallock*, 4 S. Dak. 469, 57 N. W. 197.

¹⁵⁰ *Murphy v. Montandon*, 2 Idaho 1048, 29 Pac. 851, 35 Am. St. 279.

¹⁵¹ *Reid v. Armour Packing Co.*, 93 Ga. 696, 21 S. E. 131; *Gregory v. Clark*, 73 Ga. 546.

¹⁵² *Summers v. Glancy*, 3 Blackf. (Ind.) 361.

¹⁵³ *Jaynes v. Platt*, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. 810; *McAllister v. Eichengreen*, 34 Md. 54; *Nevin v. Fouche*, 77 Ga. 47; *Ferguson v. Glidewell*, 48 Ark. 195; *Inman v. Strattan*, 4 Bush. (Ky.) 445.

¹⁵⁴ *Armstrong v. Ames*, 17 Tex. Civ. App. 46, 43 S. W. 302; *Jandt v. Deranlean*, 57 Neb. 497, 78 N. W. 22; *Nordhaus v. Peterson*, 54 Iowa 68, 6 N. W. 77; *Storz v. Kinklestein*, 48 Neb. 27, 66 N. W. 1020, 30 L. R. A. 644; *Michigan Stove Co. v. Waco Hardware Co.*, 22 Tex. Civ. App. 293, 54 S. W. 357; *Dent v.*

jured,¹⁵⁵ and also, it has been held, that there was a want of probable cause.¹⁵⁶ He must prove whatever ground he relies upon, as, for example, if he relies upon an exemption, he must show that his property was exempt when seized.¹⁵⁷ If a party relies upon the fact to sustain his suit for wrongful attachment that no demand was ever made and therefore no refusal, he has the burden of proving such facts.¹⁵⁸ This burden may, however, be sustained by circumstances tending to establish the facts.¹⁵⁹

§ 1757. **Wrongful attachment—Judgment as evidence.**—The record of the attachment suit which shows the termination and adverse finding and decision is competent and admissible in such a case. Where the attachment defendant attempts to recover damages for a wrongful attachment, evidence is not competent in some jurisdictions which tends to show that¹⁶⁰ grounds for an attachment existed at the commencement of the suit, or that in suing out the writ the attachment plaintiff acted in good faith;¹⁶¹ but the judgment in the attachment suit is held to be conclusive evidence of a wrongful attachment if used in the subsequent suit to recover damages.¹⁶² This rule is modified in many states, and it is held that if an attachment was dismissed or defeated, that such fact is only *prima facie* evidence that the attachment defendant was wrongfully attached. This question may be investigated in the later action;¹⁶³ and the attachment plaintiff may rely upon other statutory grounds than those named in the affidavit.¹⁶⁴ It is also held that if the attachment is dismissed or defeated because of some informality in the affidavit and not because of its falseness, the judgment will not be conclusive, but it will be necessary to show the wrongfulness of the attachment.¹⁶⁵

Smith, 53 Iowa 262, 5 N. W. 143; Calhoun v. Hannan, 87 Ala. 277, 6 So. 291.

¹⁵⁵ Graham v. Reno, 5 Colo. App. 330, 38 Pac. 835.

¹⁵⁶ Raver v. Webster, 3 Iowa 502, 66 Am. Dec. 96; see also, Blanchard v. Brown, 42 Mich. 46, 3 N. W. 246.

¹⁵⁷ Gordon v. Clapp, 133 Mass. 335; Sanger v. Thomasson, (Tex. Civ. App.) 44 S. W. 408.

¹⁵⁸ Veiths v. Hagge, 8 Iowa 163.

¹⁵⁹ Burrows v. Lehndorff, 8 Iowa 96.

¹⁶⁰ Blanchard v. Brown, 42 Mich.

46, 3 N. W. 246; Hundley v. Chadick, 109 Ala. 575, 19 So. 845; Drummond v. Stewart, 8 Iowa 341.

¹⁶¹ Vurpillat v. Zehner, 2 Ind. App. 397, 28 N. E. 556; Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306; Hoge v. Norton, 22 Kans. 374.

¹⁶² Hayden v. Sample, 10 Mo. 215.

¹⁶³ Jandt v. Deranleau, 57 Neb. 497, 78 N. W. 22; Sloan v. Langert, 6 Wash. 26, 32 Pac. 1015.

¹⁶⁴ Lockhart v. Woods, 38 Ala. 631.

¹⁶⁵ Boatwright v. Stewart, 37 Ark. 614.

§ 1758. **Wrongful attachment—Admissions of attaching creditors.**—Where the attachment defendant brings suit to recover damages for wrongful attachment, evidence of admissions and declarations which tend to show the truth of plaintiff's affidavit is admissible;¹⁶⁶ and where the plaintiff in the subsequent suit introduces evidence that he was not intending to dispose of his property or do other acts which would give grounds for an attachment suit, it has been held proper for plaintiff in attachment to show any declarations and business transactions of defendant, not only before and after the attachment, but about the time thereof, and even if unknown to plaintiff at the time, which will support his contention as set out in his affidavit in attachment.¹⁶⁷ But declarations of the plaintiff in attachment, made after commencement of suit and not directly connected with his action in bringing the suit cannot be used in the suit for damages for wrongful attachment.¹⁶⁸

§ 1759. **Circumstantial evidence of wrongful attachment.**—Where suit is brought to recover damages for wrongful attachment, although the plaintiff has the burden of proving the wrongfulness of the attachment, he may do this by circumstantial evidence, or such as will cause an inference that the affidavit is untrue.¹⁶⁹ And the defendant may resort to the same kind of evidence to establish the grounds of the attachment, when that question is open to him.¹⁷⁰ A debtor may be intending to dispose of his property and thus defeat his creditors without saying a word as to his intentions; and his acts and conduct tending to show such intent may be proved, and in some cases, whether occurring before or after the attachment.¹⁷¹

§ 1760. **Defenses in actions for wrongful attachment.**—Where an attachment creditor is sued for wrongful attachment, he may show

¹⁶⁶ *Raver v. Webster*, 3 Iowa 502.

¹⁶⁷ *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557.

¹⁶⁸ *Burton v. Knapp*, 14 Iowa 196.

¹⁶⁹ *Yarbarough v. Weaver*, 6 Tex. Civ. App. 215, 25 S. W. 468; *Durr v. Jackson*, 59 Ala. 203; *Ruthven v. Beckwith*, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

¹⁷⁰ *Citizens' Nat. Bank v. Converse*, 105 Iowa 669, 7 N. W. 506; *Bowman v. Western Furniture Mfg. Co.*, 96 Iowa 188, 64 N. W. 775.

¹⁷¹ *O'Neill v. Will's Point Bank*, 67 Tex. 36, 2 S. W. 754; *Mayne v. Council Bluffs Sav. Bank*, 80 Iowa 710, 45 N. W. 1057; *Troy v. Rogers*, 113 Ala. 131, 20 So. 999.

relevant declarations and acts of the attachment defendant.¹⁷² This is true when the attachment defendant was about to remove from the state,¹⁷³ or where he was about to dispose of property fraudulently,¹⁷⁴ or as to any other grounds of attachment.¹⁷⁵ But it has been held that in an action for damages for wrongful attachment, the attaching creditor, cannot set up his alleged cause of action when his petition was dismissed in the action on which the attachment was issued, on the ground that he had no cause of action, as a defense to the suit for damages or in mitigation of damages.¹⁷⁶

§ 1761. **Wrongful attachment—Financial condition of debtor.**—In an action for damages for a wrongful and malicious attachment of plaintiff's goods, it has been held that the plaintiff may show that he was able to pay his debts, or that he had property liable to satisfy the claim; and he may show what he has paid upon the debt,¹⁷⁷ or give evidence of the amount of his business, his profits, credits and the effect of the attachment upon the defendant;¹⁷⁸ and the defendant has been held competent to testify as to the value of the goods and the amount of damages,¹⁷⁹ but he cannot show profits made on certain goods in order to show his financial ability.¹⁸⁰ And where the attachment defendant asks damages for a wrongful attachment, he cannot show his reputation and general credit, except in rebuttal, but may sustain them when assailed.¹⁸¹ It has also been held that, by way of rebuttal, the creditor may show the financial straits of the debtor, but only when the question has been put in issue by evidence of the

¹⁷² *Ruthven v. Beckwith*, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; *Troy v. Rogers*, 113 Ala. 131, 20 So. 399; *Baldwin v. Walker*, 94 Ala. 514, 10 So. 391.

¹⁷³ *Citizens' Nat. Bank v. Converse*, 105 Iowa 669, 75 N. W. 506.

¹⁷⁴ *Birmingham Dry Goods Co., v. Finley*, 122 Ala. 534, 26 So. 138; *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557.

¹⁷⁵ *Adam Roth Co. v. Hopkins*, 16 Ky. L. R. 678, 29 S. W. 293.

¹⁷⁶ *Burton v. Smith*, 49 Ala. 293, says: "As the issue was the fraudulent withholding of property, how better can the plaintiff disprove the

fact than by showing a large amount of property in his possession, subject to and sufficient for the payment of his debts? The amount, description and value of his property were proper matters of inquiry." *Birmingham & Co. v. Finley*, 122 Ala. 534, 26 So. 138.

¹⁷⁷ *Hayes v. Union Mercantile Co.*, 27 Mont. 264, 70 Pac. 975.

¹⁷⁸ *Cline v. Hackbarth*, (Tex. Civ. App.) 71 S. W. 48.

¹⁷⁹ *Jefferson Co. Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386.

¹⁸⁰ *Goldsmith v. Picard*, 27 Ala. 142.

debtor.¹⁸² And where the grounds for the attachment were that the debtor was about to dispose of his property with intent to defraud creditors, it was held that he might show, in support of his damage suit, that all his profits, excepting necessary living expenses, was applied upon his debts,¹⁸³ but he cannot show subsequent acts such as that he has paid many of his debts since the attachment.¹⁸⁴

§ 1762. **Wrongful attachment—Damages.**—Evidence may be introduced to show the actual damages sustained by the attached debtor, by reason of the wrongful attachment, in a suit for damages by reason thereof.¹⁸⁵ But the damages must be proved with a reasonable degree of certainty, and, it has been held that, the amount of business done after the attachment cannot be used to aid in fixing the damages,¹⁸⁶ and that loss of prospective credit cannot be proved.¹⁸⁷ Where property has depreciated while in the possession of the attaching creditor or court, such fact may be shown by proving the value of the property at the time of the issuing of the writ¹⁸⁸ and the value at the time of the restoration.¹⁸⁹ The plaintiff can only prove such attorney fees, even when attorney's fees are a proper element of damages, as were incurred in defending in the attachment suit;¹⁹⁰ but fees for prosecuting the damage suit cannot be proved.¹⁹¹

§ 1763. **Mitigation of damages.**—To mitigate damages for a wrongful attachment the defendant may show the appropriation of the same property under a second valid attachment,¹⁹² or that it was

¹⁸² *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Floyd v. Hamilton*, 33 Ala. 235.

¹⁸³ *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048.

¹⁸⁴ *Lister v. Campbell*, (Tex. Civ. App.) 46 S. W. 876.

¹⁸⁵ *Williams v. Kane*, (Tex. Civ. App.) 55 S. W. 974; *Ruthven v. Beckwith*, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

¹⁸⁶ *Adams v. Thornton*, 82 Ala. 260, 3 So. 20.

¹⁸⁷ *Hayden Saddlery Co. v. Ramsay*, 14 Tex. Civ. App. 185, 36 S. W. 595; *Williams v. Kane*, (Tex. Civ.

App.) 55 S. W. 974; *Jamison v. Weaver*, 81 Iowa 212, 46 N. W. 996.

¹⁸⁸ *Knapp & Spaulding Co. v. Barnard*, 78 Iowa 347, 43 N. W. 197; *Estes v. Chesney*, 54 Ark. 463, 16 S. W. 267; as to evidence of value generally, see, *Tobias v. Treist*, 103 Ala. 664, 15 So. 914; *Wollner v. Lehman*, 85 Ala. 274, 4643.

¹⁸⁹ *Byford v. Girtton*, 90 Iowa 661, 57 N. W. 588.

¹⁹⁰ *Yarborough v. Weaver*, 6 Tex. Civ. App. 215, 25 S. W. 468.

¹⁹¹ *Earl v. Spooner*, 3 Denio (N. Y.) 246; *Grisham v. Bodman*, 111 Ala. 194, 20 So. 514.

of less value than claimed;¹²³ but the defendant cannot show that the debtor would have sold at a reduced price, for one whose property is injured by a wrongful attachment is entitled to damages to the extent of the injury, and the fact that he was going to sacrifice it or give it away, would not be proper in mitigation of damages.¹²⁴

¹²³ *Armstrong v. Ames*, 17 Tex. Civ. App. 46, 43 S. W. 302.

¹²⁴ *Estes v. Chesney*, 54 Ark. 463, 16 S. W. 267.

CHAPTER LXXXVII.

BAILMENTS.

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1778. Sufficiency, validity and terms of contract—Burden of proof.	1795. Evidence in particular classes—Gratuitous bailments.
1779. Sufficiency, validity and terms of contract—Presumptions.	1796. Evidence in particular classes—Warehousemen.
1780. Sufficiency, validity and terms of contract—Question of law or fact.	1797. Evidence in particular classes—Innkeepers.
	1798. Pledges.

§ 1764. **Meaning of term.**—A bailment is a delivery of goods or personal property, by one person to another, in trust for the execution

of a special object upon, or in relation to, such property, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.¹ Sir William Jones has divided bailments into five sorts, viz.: *Depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without payment; *pignori acceptum*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another.² There are cases where the benefits derived from the contract are reciprocal: there is an advantage to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and service, as when one person delivers material to another to be manufactured, the bailee is paid for his service and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed. A bailee for hire is supposed to take such care of property as a reasonably prudent man would take of his own. The common law does not recognize the rule of the civil law, that the bailor for hire is bound to keep the thing in repair, and in the absence of provision the question as to which party is bound to repair depends largely on custom and usage.³ The borrower, on the other hand, who receives the entire benefit of the bailment, must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect. He must apply it only to the very purpose for which it was borrowed, cannot permit any other person to use it, cannot keep it beyond the

¹ Black Law Dict.; Schouler Bailments, 2; Hale Bailments, 3.

² Black Law Dict.; Jones Bailments, 36.

³ Bouv. Law Dict. (Rawle's ed.).

time limited and cannot keep it as a pledge for demands otherwise arising against the bailor.⁴

§ 1765. **Burden of proof—Generally.**—As to the burden of proof in question on the law of bailments there is a diversity of opinion among the authorities. Much of this conflict arises on account of the courts failing to distinguish between the duty of going forward with evidence and the duty of establishing the case. The burden of proof on such matters is more particularly considered under the different subjects in the chapter.^{4*} But, as a general rule it may be said that the burden is upon the plaintiff or moving party to establish his case,⁵ although the burden of going forward with evidence in order to escape defeat, as, for instance, where a presumption of negligence arises, may at times be upon the defendant.⁶

§ 1766. **Presumptions—Generally.**—The following presumptions among others, have been indulged in cases of bailments: that goods or articles were in proper condition when received by the bailee,⁷ a presumption of proper diligence when it was shown that the bailee had taken the same care of the property that he did of his own property,⁸ and a presumption of negligence where the property was received in good condition and either not returned at all or returned in a bad condition.⁹ A presumption also that the bailee has acted negligently arises upon the bailor showing a loss or damaged condition that is out

⁴ Bouv. Law Dict. (Rawle's ed.).

^{4*} See ante, Vol. I, Ch. VII.

⁵ James v. Orrell, 68 Ark. 284, 57 S. W. 921, 82 Am. St. 293; Malaney v. Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. 135; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Willett v. Rich, 142 Mass. 356, 7 N. E. 776; Cooper v. Barton, 3 Campb. 5, note; Lancaster Mills v. Merchants' &c. Co., 89 Tenn. 1, 24 Am. St. 586 and note; Higman v. Camody, 112 Ala. 257, 57 Am. St. 33, and note.

⁶ Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725; Haas v. Taylor, 80 Ala. 459; 2 So. 633; Knights v. Piella, 111 Mich. 9, 69 N. W. 92, 66 Am. St.

375; see also, Treacy v. Barclay, 9 Ky. L. R. 707, 6 S. W. 433; Shearer v. Gunderson, 60 Minn. 525, 63 N. W. 103, and authorities cited in last note, supra.

⁷ Higman v. Camody, 112 Ala. 267, 20 So. 430, 57 Am. St. 33.

⁸ Erie Bank v. Smith, 3 Brewst. (Pa.) 9; Carlisle &c. Bank v. Graham, 79 Pa. St. 106, 21 Am. R. 49.

⁹ Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189; Baren v. Cain, 15 Ill. App. 387; Logan v. Matthews, 6 Pa. St. 417; Simmon v. Sikes, 24 N. Car. 98; but see, Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725.

of the ordinary and not usual where the requisite degree of care is used.¹⁰

§ 1767. Question of law or fact—Generally.—Questions as to bailments in many cases are mixed questions of law and of fact. When the question concerns the legal effect of the agreement, or of certain acts under the agreement, or the degree of care which the law requires to be exercised, it is usually one of law for the court.¹¹ When the question is as to what has in fact been done or omitted, or the intention of the parties, or the cause of an act, or whether the care required by law has in fact been exercised, it is ordinarily a question of fact for the jury.¹²

§ 1768. What may be introduced or considered—Generally.—In the law of bailments it may be stated in general that all evidence is admissible which is logically relevant to the issues, unless it comes within one or more of the rules of exclusion. Among the many miscellaneous matters which have been held admissible are the following: It has been held that on a claim by the owner of a yacht against a person in whose care it was left during the winter for safe-keeping, it is competent for the owner to show by an expert that injuries were not the result of ordinary wear and tear.¹³ So, in a suit against a miller for failing to manufacture out of plaintiff's wheat such flour as could have been manufactured by the exercise of ordinary diligence and skill, evidence of the quality of flour which other millers in the neighborhood were accustomed to manufacture out of the wheat of the kind which plaintiff furnished, was held admissible.¹⁴ On a question of diligence and ordinary care, in the storing and keeping of cotton, it is competent to prove the custom of the place where the con-

¹⁰ *Canfield v. Baltimore & C. R. Co.*, 93 N. Y. 532, 45 Am. R. 268; *Arnot v. Branconier*, 14 Mo. App. 431.

¹¹ *Watkins v. Roberts*, 28 Ind. 167; *Brock v. King*, 48 N. Car. 45; so if the facts are undisputed and there is but one reasonable inference; see, *Mason v. St. Louis Union Stockyards Co.*, 60 Mo. App. 93; *Briggs v. Taylor*, 28 Vt. 180; *Lyman v. Southern R. Co.*, 132 N. Car. 721, 44 S. E. 550.

¹² *Green v. Hollingsworth*, 5 Dana (Ky.) 173, 30 Am. Dec. 680; *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49; *McNabb v. Lockhart*, 18 Ga. 495; *Skelley v. Kahn*, 17 Ill. 170; *Citroen v. Adam*, 24 N. Y. St. 263, 5 N. Y. S. 669.

¹³ *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999.

¹⁴ *McKibben v. Bakers*, 40 Ky. 120.

tract was made, as to the manner of storing and keeping that article there.¹⁵ So, where cotton left with defendant to be ginned was lost, it was held that he might show that he left it under a shed in the gin lot, ready for delivery, in accordance with the usage known to its owner.¹⁶ But on the question whether plaintiff could recover for the use of his horse, evidence that he had allowed others to use it about the same time without charging them was held inadmissible.¹⁷

§ 1769. **Bailment—Sale or gift—Distinctions.**—Bailment is to be discriminated from sale. The difference is to be found in the fact that the contract of bailment always contemplates the return to the bailor of the specific article delivered either in its original form or in a modified or altered form, or the return of an article which, though not identical, is of the same class, and is equivalent. But sale never involves the return of the article itself, but only as a general thing, a consideration in money.¹⁸ Bailment is to be discriminated from gift in that the latter transaction involves no return or no recompense for the thing transferred.¹⁹

§ 1770. **Bailment—Sale or gift—Burden of proof.**—Where an article is left at a warehouse under a contract that is apparently one of bailment and the owner sets up that it was a sale and not a bailment, it has been held that the burden is upon him to establish that it was a sale and not a bailment.²⁰ Thus, where a warehouseman received certain grain from the owner upon a written agreement reciting that such warehouseman was to pay the market price per bushel at any time up to a designated date, and that it was held subject to the owner's risk of loss by fire or heating; and the grain was placed in bins with other grain of like quality, but the warehouseman at all

¹⁵ *Morehead v. Brown*, 51 N. Car. 367; see also, *McKibben v. Bakers*, 1 B. Mon. (Ky.) 120; ante, Vol. I, §§ 172, 607.

¹⁶ *Kelton v. Taylor*, 79 Tenn. (11 La.) 284, 47 Am. R. 284; see also, *Knowles v. Railroad Co.*, 38 Me. 55; *Conway Bank v. American Ex. Co.*, 8 Allen (Mass.) 512; *Arthur v. St. Paul &c.*, 38 Minn. 95, 35 N. W. 719.

¹⁷ *Harris v. Howard*, 56 Vt. 695; see also, *Lobenstein v. Pritchett*, 8 Kana. 213; ante, Vol. I, § 160.

¹⁸ *Haskins v. Dern*, 19 Utah 89, 56 Pac. 953; *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517; *Galt, In re*, 120 Fed. (U. S.) 64; *Barnes v. McCrea*, 75 Iowa 267, 39 N. W. 392, 9 Am. St. 473; *Donnelly v. Mitchell*, 119 Iowa 432, 93 N. W. 369, distinguished from conditional sale; *Hale Bailments*, 6.

¹⁹ *Black Law Dict.*

²⁰ *McGrew v. Thayer*, 24 Ind. App. 578, 57 N. E. 262.

times had on hands sufficient grain of like character and quality to redeliver to all depositors the grain deposited by them, it was held that the bailee, setting up that it was a sale, had the burden of proof as to that fact.²¹ And where a bailor made a deposit and the bailee set up that it was an absolute gift since the bailor intended to relinquish a right to demand the return of the deposit, it was held the burden of proof was upon the bailee to establish that fact.²²

§ 1771. **Bailment—Sale or gift—Presumptions.**—Where a bailor permits another to deal with the goods as though they were the latter's, a presumption may arise against the former that they are the latter's and he may be estopped to deny it. Thus, where one claiming to be a bailor of certain goods permitted the alleged bailee to go to expense for the care and preservation of the goods as though they belonged to the alleged bailee, it is competent for the latter to prove by way of estoppel that he was a donee and not a bailee of the goods.²³ In determining whether a transaction is a sale or a bailment, it has been held that the custom of a warehouseman unrebutted or unmodified by other evidence is not sufficient proof one way or the other.²⁴

§ 1772. **Bailment—Sale or gift—Question of law or fact.**—The question whether a certain transaction is a sale or a bailment is generally a mixed question of law and fact. In such case the jurors are to determine the questions under the court's instruction.²⁵ But in some instances, as, where the contract is in writing, it may be a question of construction for the court.²⁶ It is for the jury to determine as a question of fact as to what were the terms of the contract. Thus, it is a question of fact for the jury to determine where a bailor made a deposit whether he intended to relinquish all right to demand its return and so make it an absolute gift.²⁷ But the court determines as a question of law as to what is the legal effect of the agreement.²⁸ If a receipt is given for the property delivered and such receipt does not disclose whether the transaction is a sale or a bailment, proper ex-

²¹ *McGrew v. Thayer*, 24 Ind. App. 578, 57 N. E. 262. 69 N. W. 92, 66 Am. St. 375; *Selleck v. Selleck*, 107 Ill. 389.

²² *Selleck v. Selleck*, 107 Ill. 389.

²³ *Hunt v. Moultrie*, 1 Bosw. (N. Y.) 531.

²⁴ *Weiland v. Krejnick*, 63 Minn. 314, 65 N. W. 631.

²⁵ *Knights v. Piella*, 111 Mich. 9,

²⁶ *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 520; *Woodward v. Edmunds*, 20 Utah 118, 57 Pac. 848.

²⁷ *Selleck v. Selleck*, 107 Ill. 389.

²⁸ *Harris v. Coe*, 71 Conn. 157, 41 Atl. 552; *Woodward v. Boone*, 126 Ind. 122, 25 N. E. 812.

trinsic evidence may be resorted to, and it has been held in such a case, that parol evidence of the general and known course of dealing in the particular business with reference to which the receipt was given, is admissible.²⁰

§ 1773. **Kind or class of bailment—Generally.**—It has been noted in another section²⁰ that there are several sorts or classes of bailments. We shall now consider how it is to be determined to which class of bailments a certain transfer belongs. It is necessary to determine this because often different liabilities and responsibilities attach to the different classes.

§ 1774. **Kind or class of bailment—Burden of proof.**—Ordinarily it is said, where one who belongs to one class seeks to relieve himself of liability by placing himself in another class, the burden of proof is on him to prove that fact. Thus, where a carrier set up that his liability was only that of a warehouseman it was held that the burden is on him to prove that fact.²¹ So also where goods have been deposited with a certain party and he sets up that he is entitled to a lien since he holds them as pledgee, the burden has been held to be on him to establish the fact that he is a pledgee.²² It has been held, however, that in an action against one as a bailee for hire for ordinary negligence, the burden is on the bailor to prove that the bailment is one for compensation,²³ and this seems to be the correct rule where one has acted as bailee in a matter not within the scope of his ordinary occupation.²⁴ But where the bailment is in the line of the bailee's business, for which he has regularly received compensation, the intention and right to receive compensation will usually be implied.²⁵ There is at least one jurisdiction whose decisions are contrary to some of the preceding cases. In that jurisdiction it is held that even where the party sued as a warehouseman under the ordinary contract of a warehouseman

²⁰ *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; see also, ante, Vol. I, § 607. ²¹ *Union Compress Co. v. Nunnal*, 67 Ark. 284, 54 S. W. 872.

²² *Dart v. Lowe*, 5 Ind. 131.

²³ See ante, § 1764.

²⁴ *Wardlaw v. Railroad Co.*, 11 Rich. L. (S. Car.) 337; contra, *Gay v. Bates*, 99 Mass. 263. ²⁵ *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. (U. S.) 362; *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452; *Pattison v. Bank*, 4

²⁵ *Citroen v. Adam*, 24 N. Y. St. 263, 5 N. Y. S. 669. *Thomp. & C. (N. Y.)* 96.

admits the alleged injury to the goods and sets up an agreement that the plaintiff assumed all risks, the burden is still on the plaintiff.³⁶

§ 1775. **Kind or class of bailment—Question of law or fact.**—There is a diversity of opinion among the authorities as to whether the determination of the class of bailment to which a particular transaction belongs is a question of fact for the jury or of law for the court. Many authorities hold that the question is one of fact for the jury, since it depends mainly upon the intention of the parties.³⁷ Thus, it has been held that whether a bailment was gratuitous, or for hire, depends upon the intention of the parties, and such intention is a question of fact.³⁸ The same has been held in the case of an innkeeper.³⁹ On the other hand it has been said that the question as to the nature of a bailment is one of law for the court.⁴⁰ It would seem that neither of these views is unqualifiedly correct and that the better rule is that the question is ordinarily a mixed question of law and fact or one of fact for the jury to determine under proper instructions from the presiding judge.⁴¹ There are many respectable authorities holding this view.⁴² In other words, it is usually for the court to instruct the jury as to what, in law, would bring a case within the one class or the other and for the jury to determine what the facts are; but if the facts and intentions are clear and undisputed, and but one reasonable or legal inference could be drawn the question as to their legal effect would become one of law for the court.⁴³

§ 1776. **Kind or class of bailment—What may be introduced or considered.**—Transactions between the bailor or bailee and third persons having no relation to the case are not, ordinarily, admissible to determine the sort of bailment; this is, ordinarily, to be determined

³⁶ *Gay v. Bates*, 99 Mass. 263.

³⁷ *Shelden v. Robinson*, 7 N. H.

³⁸ *James v. Orrell*, 68 Ark. 284, 57 S. W. 931, 82 Am. St. 293; see also, *Lobenstein v. Pritchett*, 8 Kana. 213; *Mariner v. Smith*, 5 Helsk. (Tenn.) 203.

157, 26 Am. Dec. 726.

³⁹ *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. 825, 53 Am. R. 242; *Samms v. Stewart*, 20 Ohio 69, 55 Am. Dec. 445; *Murray v. National Line S. S. Co.*, 170 Mass. 166, 48 N. E. 1093.

⁴⁰ *Kincheloe v. Priest*, 89 Mo. 240, 1 S. W. 235, 58 Am. R. 117.

⁴¹ *Denver &c. R. Co. v. Peterson*, 30

⁴² *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 33 Pac. 772, 35 Am. St. 199.

Colo. 77, 69 Pac. 578; *Merchants' Nat. Bank v. Gilmartin*, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.

⁴³ *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49.

by the contract between the bailor and bailee.⁴⁴ But where the bailee is regularly in the habit and business, or regularly and knowingly permits his agent to enter into such transactions for him, this may usually be shown.⁴⁵ So, to prove that one was liable as a warehouseman and not a mere gratuitous bailee, it is competent to show that in his bill of lading he calls his place a warehouse and reserves the right to charge storage.⁴⁶ Evidence of custom has also sometimes been held admissible in determining the liability of innkeepers,⁴⁷ and evidence of a special contract is admissible.⁴⁸

§ 1777. **Nature and elements—Delivery and acceptance.**—That a transaction may be a bailment there must be a delivery to the bailee, either actual or constructive.⁴⁹ And it is essential that there be an acceptance of the subject matter, although it may be constructive or implied, as the duties and responsibilities of a bailee cannot be thrust upon a person without his knowledge and against his consent.⁵⁰ Since a delivery and an acceptance are essential to the contract of bailment these facts must be proved.⁵¹ The burden of proving both delivery and acceptance of a bailment by the bailee is on the bailor.⁵² It has been held that delivery to the innkeeper may be inferred upon proof of the mere fact that goods were left in the customary way within an inn by a guest.⁵³ So, an established custom of a carrier to receive goods at a certain place may be shown, where goods are properly deposited at such place, to show delivery and acceptance.⁵⁴

⁴⁴ *Merchants Nat. Bank v. Guil-*
martin, 88 Ga. 797, 15 S. E. 831, 17
L. R. A. 322.

⁴⁵ *Second Nat. Bank v. Graham*, 79
Pa. St. 106; *Chattanooga Nat. Bank*
v. Schley, 58 Ga. 369; *Lafourche &c.*
Nav. Co. v. Collins, 12 La. Ann. 119;
Pattison v. Syracuse Nat. Bank, 4
Thomp. & C. (N. Y.) 96.

⁴⁶ *Collins v. Burns*, 63 N. Y. 1.

⁴⁷ *Albin v. Presby*, 8 N. H. 408;
Meacham v. Galloway, 102 Tenn.
415, 52 S. W. 859, 73 Am. St. 886, 46
L. R. A. 319.

⁴⁸ *Metzger v. Schnabel*, 52 N. Y.
105; see also, *Vigo Agricultural Soc.*
v. Brumfiel, 102 Ind. 146, 52 Am. R.
657.

⁴⁹ *Fletcher v. Ingram*, 46 Wis. 191,
50 N. W. 424; *Hale Bailments*, 12.

⁵⁰ *Lloyd v. Bank*, 15 Pa. St. 175;
Cory v. Little, 6 N. H. 213; *Michi-*
gan Cent. R. Co. v. Carrow, 73 Ill.
348.

⁵¹ *Stearns v. Farrand*, 29 Misc.
292, 60 N. Y. S. 501.

⁵² *Scott v. Jester*, 13 Ark. 437;
Higman v. Camody, 112 Ala. 267, 20
So. 480, 47 Am. St. 33; *Gay v. Bates*,
99 Mass. 263.

⁵³ *Watson v. Loughran*, 112 Ga.
837, 38 S. E. 82; *Rockwell v. Proc-*
tor, 39 Ga. 105; *McDonald v. Edger-*
ton, 5 Barb. (N. Y.) 560.

⁵⁴ *Wright v. Caldwell*, 3 Mich. 51;
Lake Shore &c. R. Co. v. Foster, 104
Ind. 293, 4 N. E. 20; *Merriam v.*
Railroad Co., 20 Conn. 354.

§ 1778. **Sufficiency, validity and terms of contract—Burden of proof.**—The burden of proving that there actually is a contract of bailment is on the bailor.⁵⁶ But one may, in some instances, be held liable as a bailee although there is no express contract. In such cases no express contract need be shown, but the burden is nevertheless upon the plaintiff to make out his case according to the theory of his declaration or complaint.

§ 1779. **Sufficiency, validity and terms of contract—Presumptions.**—It is said that it will be presumed that printed matter on the face of a storage receipt is read by the depositor.⁵⁶ Whether a delivery and acceptance of chattels by a bailee raises any presumption as to compensation is usually a question of fact for the jury.⁵⁷ Some authorities, however, hold that it is presumed, when there is a delivery and nothing is said about compensation, that a compensation will be given,⁵⁸ and this, as already shown, is generally true where the transaction is in the line of the bailee's usual business and he regularly receives compensation therefor. It has also been held that a presumption of a contract to give ordinary care arises where a warehouseman receives goods and there is no express contract.⁵⁹ So, in the absence of any special contract, it has been held that one who borrows a carriage of a liveryman is presumed to carry the load that the carriage or team was intended to carry.⁶⁰ The rules as to presumptions, as to redelivery are thus stated, in substance, by one authority:⁶¹ "When a contract of bailment does not specify the time at which the bailment terminates, it is presumed to terminate on the accomplishment of the purpose of the bailment, or after a reasonable time,"⁶² but it has been held that a loan of a chattel for hire without specification as to time,

⁵⁶ *Higman v. Camody*, 112 Ala. 267, 20 St. 480, 57 Am. St. 33; *Union Compress Co. v. Nunnally*, 67 Ark. 284, 54 S. W. 872; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586.

⁵⁷ *Taussig v. Bode*, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774.

⁵⁸ *Lobenstein v. Pritchett*, 8 Kans. 213; *Mariner v. Smith*, 5 Helsk. (Tenn.) 203, 89 Mo. 240, 1 S. W. 235.

⁵⁹ *Shelden v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Andrews v. Keith*, 168 Mass. 558, 47 N. E. 423.

⁶⁰ *Gay v. Bates*, 99 Mass. 263; see also and compare, *Sutherland v. Albany &c. Co.*, 55 App. Div. (N. Y.) 212, 66 N. Y. S. 835.

⁶¹ *Harrington v. Snyder*, 3 Barb. (N. Y.) 330.

⁶² *Ency. Ev.* Vol. II, 188.

⁶³ *Cobb v. Wallace*, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435.

raises no presumption whatever as to the length of the time the loan is to continue.⁶³

§ 1780. **Sufficiency, validity and terms of contract—Question of law or fact.**—The terms of the contract are usually for the jury to determine.⁶⁴ Thus, what degree of care was contracted to be exercised by the bailee, is, when the facts are disputed, a question of fact for the jury.⁶⁵ The question as to what is ordinary care and diligence, where the law fixes no standard, and it depends on circumstances, is a question of fact for the jury when evidence of the circumstances is submitted, but it may be a question of law when there is no such evidence, and a standard is fixed by the law.⁶⁶ Whether or not the bailee has a lien on the chattels deposited with him is usually a question of law for the court to determine.⁶⁷ But where a bailee retained possession beyond the period of bailment, the question as to whether the bailment had been terminated was held to be of fact for the jury;⁶⁸ whether there has been a waiver of the clause of the contract specifying the time for the redelivery, has also been held to be a question of fact for the jury.⁶⁹ So, the question as to whether or not a bailee had redelivered the property to the bailor so as to loose his lien, is one of fact and for the jury;⁷⁰ and whether he refused to return the chattels upon other grounds and thus waived his lien has likewise been held to be a question of fact.⁷¹ It has also been held to be a question of fact for the jury whether a bailment for hire when no hire is actually paid is a necessary incident of the business in which the bailee himself profits.⁷²

§ 1781. **Sufficiency, validity and terms of contract—What may be introduced or considered.**—Where there is no agreement as to com-

⁶³ Gleason v. Morrison, 20 Misc. 4, 25 App. Div. (N. Y.) 518, 49 N. Y. 44 N. Y. S. 909. S. 949.

⁶⁴ Carlidge v. Slone, 124 Ala. 596, ⁶⁵ Benje v. Creagh, 21 Ala. 151.

⁶⁶ So. 918; Cobb v. Wallace, 5 Cold. ⁶⁷ Treacy v. Barclay, 9 Ky. L. R. (Tenn.) 539, 98 Am. Dec. 435. 707, 6 S. W. 433.

⁶⁸ Higman v. Camody, 112 Ala. ⁶⁹ Dixon v. Yates, 5 B. & A. 313, 27 267, 20 So. 480, 57 Am. St. 33; Saun- E. C. L. 86.

⁷⁰ Scott v. Jester, 13 Ark. 437.

⁷¹ American Brewing Co. v. Tal- ⁷² Woodruff v. Painter, 150 Pa. St. bot, 141 Mo. 674, 42 S. W. 679, 64 91, 24 Atl. 621, 30 Am. St. 786, 16 L. Am. St. 538. R. A. 451.

⁷³ Grieve v. New York & C. R. Co.,

pensation, proof of custom has been held competent.⁷³ It has also been held that in order to increase the liability of the bailee it is competent for the bailor to prove that the bailee had notice of the nature and condition of the chattels bailed. In one case it is said: "It may be admitted that the degree of care required of a bailee is proportioned to the nature, intrinsic value, etc., of the article intrusted to his keeping. A man will not be expected to take the same care of a bag of oats, as of a bag of dollars; of a bale of cotton, as of a box of diamonds or other jewelry; of a load of wood as of a box of rare paintings; of a rude block of marble, as of an exquisitely sculptured statue. The bailee therefore ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part, and to the watchfulness necessary to the preservation of the article. Hence, as dollars, jewelry and fine paintings, present a greater temptation to the thief, and are more easily secreted, than oats, cotton or wood, and as a finished statue is more liable to injury than rough marble, a bailee should bestow more diligence in their safe keeping."⁷⁴ In order that evidence of a variation of the ordinary liability of a bailee may be competent to relieve the bailee from liability, it is necessary in the absence of an express contract that the bailee should show that the bailor had notice of such variation.⁷⁵ And where there is a contract to handle fruit with the clause, "most approved manner" inserted, evidence of the manner in which the majority of competent dealers handle fruit is competent.⁷⁶ The bailee is, ordinarily, estopped to deny the original title of the bailor.⁷⁷ So, it has been held that a bailee cannot purchase an adverse title and dispute the original title of the bailor.⁷⁸ And it has been held that a bailee is estopped to deny the original title as against the bailor's assignee.⁷⁹ But it has been held correctly that the bailee may dispute the present title of the bailor by showing that his bailor transferred his interest in the property after making the bailment to the bailee, or the like.⁸⁰

⁷³ *Shelden v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726.

⁷⁴ *Hatchett v. Gibson*, 13 Ala. 587.

⁷⁵ *La Salle &c. v. McMasters*, 85 Ill. App. 677.

⁷⁶ *Arnold v. Producers' Fruit Co.*, 128 Cal. 637, 61 Pac. 283.

⁷⁷ *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Davies, Ex*

parte, L. R. 19 Ch. Div. 86; *Gosling v. Birnie*, 7 Bing. 339.

⁷⁸ *Nudd v. Montayne*, 38 Wis. 511, 20 Am. R. 25.

⁷⁹ *Marvin v. Smith*, 56 Barb. (N. Y.) 600; *see*,

⁸⁰ *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Kelly v. Patchell*, 5 W. Va. 585.

§ 1782. **Parol evidence—Admissibility to vary writing.**—The terms of a written contract of bailment as to the compensation cannot be varied by parol evidence.⁸¹ So, a written contract of bailment cannot be varied or modified by parol proof to make it have the effect of an absolute gift.⁸² While oral evidence is competent to show that a mere receipt for merchandise though containing such words as, “at \$1.00 per bushel” or “consigned for six months” was given on a sale, and to prove the terms of the sale it is not competent to vary by parol an instrument that expressly imports a bailment or storage, unless shown to have been delivered subsequently to a completed sale.⁸³ It is held the former is not a written contract within the rule excluding parol evidence to explain or vary it, while the latter is such a contract.⁸⁴ This general subject, has, however, been considered in another volume, and a reference to that,⁸⁵ and to the views of another writer will be sufficient. The following rules are laid down by a learned writer:⁸⁶ “A stipulation to return cannot be varied by oral evidence of contemporaneous agreement as to risk;⁸⁷ but a mere memorandum of length of time and rate of payment, does not exclude a separate oral agreement as to risk,⁸⁸ nor does a written power exclude evidence of a separate and not inconsistent⁸⁹ agreement as to the condition, in respect to time, price, etc., on which it might be executed.⁹⁰ A receipt expressed to be for storage, cannot be shown by parol to represent a sale.⁹¹ A mere receipt without indicating the nature of the transaction may be explained or contradicted.⁹² A warehouse receipt is usually subject to oral explanation unless plaintiff has made advance or incurred responsibility on the faith of it.⁹³ If the terms of the receipt

⁸¹ *Union Storage Co. v. Speck &c.*
Co., 194 Pa. St. 126, 45 Atl. 48.

⁸² *Selleck v. Selleck*, 107 Ill. 389.

⁸³ *Shelden v. Peck*, 13 Barb. (N. Y.) 217; *George v. Joy*, 19 N. H. 544.

⁸⁴ *Stapleton v. King*, 33 Iowa 28, 11 Am. R. 109; *Domestic Sew. Mach. Co. v. Anderson*, 23 Minn. 57.

⁸⁵ Vol. I, §§ 610, 617.

⁸⁶ *Abbott Tr. Ev.* (2d ed.) 683.

⁸⁷ *Brown v. Hitchcock*, 28 Vt. 452.

⁸⁸ *Jeffrey v. Walton*, 1 Stark. 267.

⁸⁹ *Dykens v. Allen*, 7 Hill (N. Y.) 497; *Markham v. Jaudon*, 41 N. Y. 235.

⁹⁰ *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337.

⁹¹ *Wadsworth v. Allcott*, 6 N. Y. 64.

⁹² *Robinson v. Frost*, 14 Barb. (N. Y.) 536.

⁹³ *Second Nat. Bank of Toledo v. Walbridge*, 19 Ohio St. 419; *Beebe v. Moore*, 3 McLean (U. S.) 387; compare, *Peck v. Armstrong*, 38 Barb. (N. Y.) 215; *Hoyt v. Baker*, 15 Abb. Pr. N. S. (N. Y.) 405; *McCombie v. Spader*, 1 Hun (N. Y.) 193.

are ambiguous,⁹⁴ as for instance, 'received on account of A. (the plaintiff), for B'—evidence of usage is admissible to explain."⁹⁵

§ 1783. Grounds of action against bailees.—In actions against bailees the pleadings and evidence involve one or more of three elements: (1.) Breach of express contract; (2.) breach of implied duty; (3.) conversion. If the action is founded on express contract to deliver, evidence of breach and of resulting damages, is *prima facie* sufficient until the bailee gives evidence to exonerate himself: and evidence of actual negligence, or of conversion is competent, so far as involved in proving the actual breach of contract. If the action is founded on breach of implied duty, the proof of negligence or other cause of loss varies with the nature of the bailment and the degree of diligence required. In this class of cases the contract, if any, must usually be proved in order to define the duty; and evidence of conversion is competent as in cases of express contract. If the action is founded on conversion, the contract must be proved if necessary to define the duty, otherwise it is not essential; but the action is not always sustained by proof of mere breach of contract or implied duty, or of negligence.⁹⁶

§ 1784. Breach of duty—Negligence—Burden of proof.—The question as to the burden of proof as to the fact of negligence is one of some difficulty on account of the diversity of decisions in the various jurisdictions. One writer⁹⁷ makes the following statement: "On the question where the burden of proof belongs in an action between the bailor and bailee for damage, or loss, or non-return of the subject of a bailment, the authorities are in a direct and almost irreconcilable conflict.⁹⁸ The rulings of the court seem to be governed by the form of the action⁹⁹ and the stage of the proceedings where the question arises,¹⁰⁰ they depend also upon: First, what doctrine the court holds as to whether the burden of proof ever shifts;¹⁰¹ or second, whether the court is governed by the strict rule that the burden is upon the

⁹⁴ *Agawam Bank v. Strever*, 18 N. Y. 502.

⁹⁵ *Bowman v. Horsey*, 2 M. & Rob. 85.

⁹⁶ *Abbott Tr. Ev.* (2d ed.) 682.

⁹⁷ *Ency. Ev.*, Vol. 2, 190, 191.

⁹⁸ *Hildebrand v. Carroll*, 106 Wis. 324, 82 N. W. 145, 80 Am. St. 29.

⁹⁹ *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112; *contra*, *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. R. 684.

¹⁰⁰ *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112; *Clark v. Shrimski*, 77 Mo. App. 166.

¹⁰¹ See, *Willett v. Rich*, 142 Mass.

affirmative of the issue,¹⁰² or will consider the circumstances of the case, and the relative convenience of producing evidence.¹⁰³ The nature of the liability of the bailee, i. e., whether it is that of insurer or not, also affects the question." Another writer¹⁰⁴ thus treats the subject of the burden of proof as to breach of duty: "If the action is founded solely on an express contract to return, the plaintiff must prove the contract and the breach, or failure to redeliver, and this is enough;¹⁰⁵ the burden then rests on defendant to show due diligence, or a loss for which he is not liable.¹⁰⁶ If the action is founded on negligence or other tort, plaintiff, in addition to the duty, must prove the tort. Slight proof, however, is sufficient to sustain an inference of negligence.¹⁰⁷ Whether evidence of the loss or the non-delivery of the thing throws on a bailee the burden of proving diligence depends on the degree of his duty.¹⁰⁸ In case of bailees for hire generally, such as common carriers, forwarders,¹⁰⁹ warehousemen,¹¹⁰ including carriers holding possession as warehousemen,¹¹¹ collecting bankers,¹¹² and innkeepers, non-delivery¹¹³ without anything to indicate a cause of loss, or injury consistent with due diligence, or return of the thing if in a damaged condition without explanation,¹¹⁴ is sufficient to go to the jury as evidence of negligence.¹¹⁵ Evidence that the thing had disappeared from the possession of the bailee, without anything to indicate how, is sufficient.¹¹⁶ As a general rule, plaintiff need not, in the first instance, prove that the thing was free from latent defects when delivered to the bailee." If the plaintiff's evi-

¹⁰² 256, 7 N. E. 776, 56 Am. R. 684; Kaiser v. Latimer, 75 N. Y. 555, 41 N. Y. S. 94.

¹⁰³ Kinchelo v. Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. R. 117; Taussig v. Bode, 134 Cal. 260, 66 Pac. 259, 44 L. R. A. 774.

¹⁰⁴ Bennett v. O'Brien, 37 Ill. 250.

¹⁰⁵ Abbott Trial Ev., (2d ed.) pp. 684, 685 and 686.

¹⁰⁶ Merchants' Bank & Co. v. Rawls, 7 Ga. 191.

¹⁰⁷ Dinamore v. Abbott, 89 Me. 373, 26 Atl. 621.

¹⁰⁸ Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999.

¹⁰⁹ Collins v. Bennett, 46 N. Y. 490.

¹¹⁰ Bush v. Miller, 13 Barb. (N. Y.) 481.

¹¹¹ Arent v. Squire, 1 Daly (N. Y.) 347.

¹¹² Fairfax v. New York Cent. R. Co., 67 N. Y. 11; contra, Jackson v. Sacramento & Co. R. Co., 23 Cal. 268.

¹¹³ Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641.

¹¹⁴ Boles v. Hartford R. Co., 37 Conn. 272, 9 Am. R. 347.

¹¹⁵ Funkhouser v. Wagner, 62 Ill. 59; Logan v. Matthews, 6 Pa. St. 417.

¹¹⁶ Hynes v. Hickey, 109 Mich. 188, 66 N. W. 1090.

¹¹⁷ Fairfax v. New York Cent. & Co. R. Co., 67 N. Y. 11, 73 N. Y. 167.

dence goes farther, and traces loss or injury to a cause consistent with due diligence on defendant's part, such as fire,¹¹⁷ or if the defendant shows such a cause, plaintiff must give evidence of negligence, unless he stands upon a contract which holds defendant without it.¹¹⁸ Where ordinary care only is due, the happening of an accident of a kind which ordinary care does not suffice to prevent is no evidence of negligence, even though the apparatus was within defendant's control. "The presumption that legal duty has been discharged does not countervail evidence of injury or diminution of the thing intrusted to a bailee for hire." Fire, without evidence of its cause, is presumed not the act of God; but is not presumed to be caused by defendant's negligence. Theft and robbery, in the absence of further evidence, are not ordinarily proof of negligence. But the bailee's conduct in the hue and cry,¹¹⁹ and his failure to give prompt notice, are competent.¹²⁰ "The testimony of the servant in charge of the deposit, that he never delivered it to any one, is not sufficient evidence of the theft."¹²¹ Evidence of independent acts of negligence not connected with the loss is incompetent, except as tending to show the manner in which the business of the bailee was conducted at the time."¹²²

§ 1785. Burden of proof as to negligence—Prevailing and correct rule.—The prevailing rule seems to be that the burden of proof is upon the bailor to prove the contract of bailment, delivery and failure to return, or return in a damaged condition; that the burden is then, ordinarily, upon the bailee, or shifts to the bailee (in the sense of proceeding or going forward with evidence) to show the manner of the loss or injury, and if this is successfully done, the bailor must then show that it was due to the negligence of the bailee.¹²³ This, as explained, in some of the cases,¹²⁴ would seem to be the correct doc-

¹¹⁷ *Lamb v. Camden &c. R. Co.*, 46 N. Y. 271.

¹¹⁸ *Cass v. Boston R. Co.*, 14 Allen (Mass.) 448.

¹¹⁹ *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275.

¹²⁰ *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49.

¹²¹ *Fairfax v. New York Cent. &c. R. Co.*, 67 N. Y. 11, 73 N. Y. 167.

¹²² *Dearborn v. Union Nat. Bank*, 61 Me. 369.

¹²³ *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. 586, and note, 14 S. W. 317; *Higman v. Camody*, 112 Ala. 257, 20 So. 480, 57 Am. St. 33, and note; *Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. 786, and note; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595; *American Brewing Assn. v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. 538.

¹²⁴ *Knights v. Piella*, 111 Mich. 9,

trine. In other words, the burden of proof in the sense of ultimately establishing his case rests upon the bailor throughout, but the burden of proceeding or going forward with evidence shifts from the bailor to the bailee to exonerate himself by meeting the *prima facie* case made by the bailor, and then may shift back to the bailor.¹²⁵

§ 1786. *Breach of duty—Presumptions.*—The general rule is that proof of delivery to the bailee and of the failure of the bailee to redeliver, raises a presumption of negligence on the part of the bailee sufficient to make a *prima facie* case.¹²⁶ It has been held that in case of

69 N. W. 92, 66 Am. St. 375, 379; *Holt Ice Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 330, 57 N. E. 575.

¹²⁵ See ante, Vol. I, § 139. As said in *Holt Ice & Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 330, 57 N. E. 575: "Strictly speaking, perhaps there is no shifting of the burden of proof in such cases, though usually thus characterized. The plaintiff must make a *prima facie* case of negligence, and he has at all times the burden of proving facts to make this case. As is said in *Hale Bailments*, p. 30: The better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that when the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it badly injured, he has made out a *prima facie* case of negligence. When he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon defendant to prove that the injury was caused without his fault." And the court cites the following cases: *McDaniels v. Robinson*, 26 Vt. 316,

62 Am. Dec. 574; *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189; *Boies v. Hartford & C. R. Co.*, 37 Conn. 272, 9 Am. R. 347; *Collins v. Bennett*, 46 N. Y. 490; *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725; *Clafin v. Pollock*, 85 Pa. St. 391, 27 Am. R. 660; *Vaughn v. Webster*, 5 Har. (Del.) 256; *Funkhouser v. Wagner*, 62 Ill. 59; *Higman v. Camody*, 112 Ala. 267, 20 So. 480, 57 Am. St. 33; *Ford v. Simmons*, 13 La. Ann. 397; *Haas v. Taylor*, 80 Ala. 459, 2 So. 633; *Goodfellow v. Meegan*, 32 Mo. 280; *Thompson v. St. Louis & C. Co.*, 59 Mo. App. 37; *Hildebrand v. Carrol*, (Wis.) 82 N. W. 145; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, 150, note; *Parry v. Squair*, 79 Ill. App. 324; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Malaney v. Taft*, 60 Vt. 571, 15 Atl. 326; *Leidy v. Quaker City & C.*, 180 Pa. St. 323, 36 Atl. 851.

¹²⁶ *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323; *Lyons v. Thomas*, 34 Misc. 175, 68 N. Y. S. 802; *American Brew. Co. v. Talbot*, 141 Mo. 671, 42 S. W. 679, 64 Am. St. 538; *Bagley Elev. Co. v. American Ex. Co.*, 63 Minn. 142, 65 N. W. 264; *Ray v. Bank of Kentucky*, 10 Bush (Ky.) 344; *Parry v. Squair*, 79 Ill. App. 324; *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. 375; *Taus-*

conflicting presumptions as where chattels are lost while in the possession of an attaching officer, the presumption that he performed his duty outweighs the presumption of negligence arising from the fact of the loss.¹²⁷ Some jurisdictions hold that proof that the bailee has dealt with the property as with his own property, raises a presumption of ordinary diligence.¹²⁸ Proof of non-delivery by a bailee has also been held to be *prima facie* proof of negligence.¹²⁹ So, it has been held that where goods are in good condition when placed in the hands of a bailee, and are in a damaged condition when returned, or are not returned at all, the law will presume negligence on the part of the bailee, and impose upon him the burden of showing that he exercised such care as was required by the bailment.¹³⁰ It has been held that no presumption of law arises that a guest at an inn knows of the peculiar usage of that inn of which he had been given no notice.¹³¹ A bailor makes a *prima facie* case when he shows such loss or damage to the chattel as ordinarily does not happen where the care which the law requires in the particular kind of bailment is exercised.¹³²

§ 1787. **Breach of duty—Question of law or fact.**—Generally the question as to the breach of duty is considered a mixed question of law and fact; that is, it is a question for the jurors to determine under proper instructions from the trial judge. In case there is a conflict in the evidence, the question as to whether the proper care was exercised is a question of fact for the jurors;¹³³ the question whether the negligence of the bailee was the proximate cause of the injury is also, ordinarily, one of fact for the jury.¹³⁴

§ 1788. **Breach of duty—What may be introduced or considered.** In an action on a contract for non-delivery of goods bailed, it is

sig v. Bode, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774; see also, *Winttingham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725; *Western U. Tel. Co. v. Crall*, 38 Kans. 671, 17 Pac. 309.

¹²⁷ *Mills v. Gilbreth*, 47 Me. 320, 74 Am. Dec. 487.

¹²⁸ *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49.

¹²⁹ *Canfield v. Baltimore & c. R. Co.*, 93 N. Y. 532, 45 Am. R. 268.

¹³⁰ *Baren v. Cain*, 15 Ill. App. 387.

¹³¹ *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417.

¹³² *Arnot v. Branconier*, 14 Mo. App. 431.

¹³³ *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. R. 660; *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Saunders v. Hartsook*, 85 Ill. App. 55; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. R. 582.

¹³⁴ *Forsythe v. Walker*, 9 Pa. St. 148.

sufficient to prove the agreement, a failure to carry it out, and the damages resulting.¹³⁵ But it is essential that it be shown that the negligence relied upon, was the proximate cause of injury.¹³⁶ To determine the degree of care exercised, it has been held proper, in some instances, to prove by way of comparison, the custom in neighboring warehouses,¹³⁷ and the like.¹³⁸

§ 1789. **Eviction.**—Eviction by title paramount or its equivalent, generally suffices to terminate the relation of bailee, so that he is no longer estopped to deny the bailor's title; but notice of adverse claim does not.¹³⁹ "Even where the action is on a contract,¹⁴⁰ the better opinion is that the bailee is excused by showing that without his fault, act or connivance, the thing was seized and taken from his possession, by virtue of regular and valid legal process,¹⁴¹ out of a court having jurisdiction,¹⁴² either against the bailor,¹⁴³ or a third person,¹⁴⁴ and that he gave immediate notice to the bailor.¹⁴⁵ In such case it would seem that he is not bound to show the merits of the claim, or correctness of the decision on which the process was founded,¹⁴⁶ but only its regularity and validity. The process itself is the primary evidence, and the oral admission of the plaintiff is not a substitute for it.¹⁴⁷ If the bailee voluntarily surrenders, or fails to give such notice, he assumes the burden of showing that he was evicted by title paramount to that of the bailor.¹⁴⁸ If he shows actual delivery on the demand of the true owner, and that the latter had a right to the immediate possession, paramount to that of the bailor, neither legal proceedings nor

¹³⁵ *Tindall v. McCarthy*, 44 S. Car. 487, 22 S. E. 734.

¹³⁶ *Scott v. National Bank*, 72 Pa. St. 471, 13 Am. R. 711; *Carlidge v. Sloan*, 124 Ala. 596, 26 So. 918.

¹³⁷ *Taussig v. Bode*, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774.

¹³⁸ *Maynard v. Buck*, 100 Mass. 40; *McKibben v. Bakers*, 1 B. Mon. (Ky.) 120.

¹³⁹ *Abbott Tr. Ev.* (2d ed.) 683, 694; *Biddle v. Bond*, 6 Best & S. 225; and see, *Lund v. Seaman's Bank &c.*, 37 Barb. (N. Y.) 129; *Shelbury v. Scotsford*, Yel. 23; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

¹⁴⁰ *Edwards v. White Line Co.*, 104 Mass. 159, 6 Am. R. 213.

¹⁴¹ *Ohio &c. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. R. 727.

¹⁴² *Barnard v. Kobbe*, 54 N. Y. 516.

¹⁴³ *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Stamford Steamb. Co. v. Gibbons*, 9 Wend. (N. Y.) 327.

¹⁴⁴ *Cook v. Holt*, 48 N. Y. 275.

¹⁴⁵ See cases in note supra.

¹⁴⁶ *Contra, Merson v. Hope*, 2 Sweeny (N. Y.) 561.

¹⁴⁷ *Jenner v. Jolliffe*, 6 Johns. (N. Y.) 9.

¹⁴⁸ *Welles v. Thornton*, 45 Barb. (N. Y.) 390; see also, *Foltz v. Stevens*, 54 Ill. 180.

proof of fraud are necessary."¹⁴⁹ That the property was taken from the bailee by vis major is also a good defense to an action for failure to return it.¹⁵⁰ An allegation of conversion is not sustained by evidence that without the bailee's act, fault or connivance, the thing was taken from his possession by virtue of regular and valid legal process; but it is sustained by evidence that while retaining possession he refused to give it up on proper demand, on the pretext that it was bound in his hands by process against a third person.¹⁵¹

§ 1790. **Damages—Loss or destruction.**—When there has been a loss of a bailed article, the value of the article generally determines the amount of damages, and in order to show the value when lost, it has been held proper to admit evidence of the price of the article when bought.¹⁵² This, in the absence of other proof, is usually held sufficient to establish value at the time of loss.¹⁵³ The market value of property which has been lost may be proved to determine the amount of damages. This market value may under varying circumstances, be that at the time the loss occurred,¹⁵⁴ or at the time the bailee received the property,¹⁵⁵ or at the time the bailment came to an end.¹⁵⁶ It has also been held competent to show the value of property destroyed by a fire by proving the sum of insurance money recovered by the warehouseman.¹⁵⁷ In one case as to damages the following statement is made by the court: "The point is made that the recovery was excessive, because based upon the plaintiff's testimony of the price paid by her for the construction of this model, it being contended that the

¹⁴⁹ *Idaho, The*, 93 U. S. (3 Otto) 575, 11 Blatchf. 218; *Gerber v. Monie*, 56 Barb. (N. Y.) 652; see also, *Stephens v. Vaughan*, 4 J. J. Marsh. (Ky.) 206, 20 Am. Dec. 216; *Kelly v. Patchell*, 5 W. Va. 585; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Palmtag v. Deutrick*, 59 Cal. 154, 43 Am. R. 245.

¹⁵⁰ *Watkins v. Roberts*, 28 Ind. 167; *Meridian Fair &c. Asso. v. North Birmingham St. R. Co.*, 70 Miss. 808, 12 So. 555.

¹⁵¹ *Rogers v. Weir*, 34 N. Y. 463; see also, *Cook v. Holt*, 48 N. Y. 275. ¹⁵² *Bird v. Everhard*, 53 N. Y. St. 111, 210, 23 N. Y. S. 1008.

¹⁵³ *Jones v. Morgan*, 90 N. Y. 4,

43 Am. R. 131; see also, *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87; contra, *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82.

¹⁵⁴ *Clark v. Ford*, 7 Kana. App. 332, 51 Pac. 938; *Baltimore &c. Bank v. Boyd*, 44 Md. 47, 22 Am. R. 35.

¹⁵⁵ *Rey v. Toney*, 24 Mo. 600, 69 Am. Dec. 444; *Oregon Imp. Co. v. Seattle &c. Co.*, 4 Wash. 634, 30 Pac. 672.

¹⁵⁶ *Holt Ice &c. Co. v. Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575, at the time the bailee converted it; *Hubbell v. Blandy*, 87 Mich. 209, 49 N. W. 502, 24 Am. St. 154.

¹⁵⁷ *Sidaways v. Todd*, 2 Stark. 351.

defendant's evidence given to show that the reasonable value of the article was much less, should have been accepted as establishing the damages actually. It is true that the defendant's witness, a model maker, testified that he thought that this model should be replaced for the sum of \$30, but this was not controlling as against the plaintiff's testimony of the price actually paid by her for it. The article had no market value, and, from its nature, the actual value could be determined as well from the price paid as from the opinion of a witness of the cost of replacing it. Being the model of a new device, the personal requirements of the inventor had necessarily much to do with the matter of its construction; and while the defendant's witness may have been prepared to reproduce the article at less cost, to his own satisfaction, it does not follow that the result would reasonably have satisfied the plaintiff. The justice was quite well authorized to find the fact favorably to the plaintiff upon this conflict of evidence and to base the judgment upon the proof of value furnished by the testimony of the actual cost price under the circumstances of the case."¹⁵⁸ It has also been held that where bonds have been lost by a bailee, in order to prove the amount of damages suffered therefor, the bailor may introduce a copy of the judgment rendered against him on account of the loss of such bonds.¹⁵⁹

§ 1791. Damages—No loss or destruction, but injury.—The evidence admissible, and the method of proof in this class of cases, is somewhat similar to those in the preceding section. Thus, where a horse has been negligently injured it has been held competent to prove the market value immediately before and after the injury in order to determine the amount of damages.¹⁶⁰ So in arriving at the amount of damages recoverable for injury to articles left in a warehouse, it has been held competent to prove the price they sold for in their injured condition and the price they would have sold for without any injury, and the difference between them.¹⁶¹ So, also, it has been held competent to admit proof of the price paid for repairing the article;¹⁶² and that the person who repaired the damaged article may state the

¹⁵⁸ *Waterman v. American Pin Co.*, 19 Misc. (N. Y.) 638, 44 N. Y. S. 410.

¹⁵⁹ *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362, 21 Fed. Cas. No. 12, 602.

¹⁶⁰ *Mason v. St. Louis Un. St. Yds. Co.*, 60 Mo. App. 93.

¹⁶¹ *Marks v. New Orleans C. S. Co.*, 107 La. 172, 31 So. 671, 57 L. R. A. 271.

¹⁶² *Wintringham v. Hayes*, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725.

amount he charged, and that the sum was reasonable.¹⁶³ It has also been held that in a proceeding for the recovery of the hire for use of a hired article, evidence of the value of such article when received and when returned is admissible on the question of the value of the use.¹⁶⁴ So also, it may be shown in a proper case what would be a proper charge for the use of an article which had been hired;¹⁶⁵ and to determine the amount of damages from bailee's refusal to redeliver the thing bailed when demanded, and when there is a subsequent delivery and sale, it is competent to prove the market value of the goods at the time there was a refusal to redeliver, and the price the goods actually brought, and the difference between these prices.¹⁶⁶

§ 1792. **Damages—Actions against third parties.**—In an action by the bailee against a third party for damages for depriving the bailee of the possession of the property the bailee may recover the entire value of the property, but what he recovers beyond his special interest in the property he holds for the benefit of the bailor. In such case evidence of the entire value of the property is admissible.¹⁶⁷ The same rule permitting the bailee to recover the entire damage, holds true in case the action is for an injury to the thing bailed.¹⁶⁸ In case, however, the bailor interposes for his own protection it seems the bailee only recovers the value of his special interest.¹⁶⁹ Where the bailee sues a third party for damages to the thing bailed, evidence of the amount paid by the bailee to repair the damages has been held admissible.¹⁷⁰ It has also been held that in a suit by a bailor against a third party to recover the thing bailed, proof that would authorize a recovery against the bailee is usually sufficient.¹⁷¹

¹⁶³ *Lynch v. Kluber*, 20 Misc. (N. Y.) 601, 46 N. Y. S. 428.

¹⁶⁴ *Wilcox v. Palmeter*, 2 Hun (N. Y.) 517.

¹⁶⁵ *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87; but see where the contract stipulates amount of hire, *Negus v. Simpson*, 99 Mass. 388.

¹⁶⁶ *Scott v. Jester*, 13 Ark. 437; *Graves v. Moses*, 13 Minn. 335.

¹⁶⁷ *Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973; *American Dist. Tel. Co. v. Walker*, 72 Md. 454, 20 Atl. 1, 20 Am. St. 479; *Finn v. Western R.*

Corp., 112 Mass. 524, 17 Am. R. 128; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Mizner v. Frazier*, 40 Mich. 592, 29 Am. R. 562; *Knight v. Davis Carriage Co.*, 71 Fed. (U. S.) 662.

¹⁶⁸ See cases *supra*.

¹⁶⁹ *Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973.

¹⁷⁰ *Schoenholtz v. Third Ave. R. Co.*, 70 N. Y. St. 773, 36 N. Y. S. 15.

¹⁷¹ *Pugh v. Calloway*, 10 Ohio St. 488.

§ 1793. **Damages—Who may give evidence.**—Frequently, as already shown, damages are proved or are arrived at by the proof of market values. These market values may be proved by the testimony of persons shown to be familiar with such values.¹⁷³ And experts may give opinions as to the value of property lost,¹⁷³ as to market values,¹⁷⁴ and as to the probable cost of repairing injuries.¹⁷⁵ So admissions either written, as a receipt given by a bailee as to value,¹⁷⁶ or oral, as declarations relative to the value by the bailee¹⁷⁷ are admissible in a proper case.

§ 1794. **Evidence in particular classes—Generally.**—As stated in the first section of this chapter there are many classes of bailments. A few of the most common are briefly considered in the remaining sections of this chapter. The general treatment already given to the subject renders it unnecessary to consider each class of bailments in detail, and the most important are considered either in the following sections or in other chapters.

§ 1795. **Evidence in particular classes—Gratuitous bailments.**—Gratuitous bailments are those in which one person receives the goods of another to keep, carry, or do some act about them, without recompense. The law is that when one so receives goods, and he acts in good faith, keeping them as his own, he is not, as a rule, answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence; in other words, he is liable for misfeasance, but not for non-feasance. But this obligation may be enlarged or decreased by a special contract, which may, in some instances, be implied or inferred. Knowledge by the bailee of the character of the goods, and by the bailor of the manner in which the bailee will keep them are often important circumstances.¹⁷⁸ So, when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another,

¹⁷³ Parry v. Squair, 79 Ill. App. 324.

¹⁷⁷ Taussig v. Schields, 26 Mo.

App. 318.

¹⁷⁴ Parry v. Squair, 79 Ill. App. 324.

¹⁷⁸ Knowles v. Railroad Co., 38 Me. 55; Arthur v. St. Paul &c. Co., 38 Minn. 95, 35 N. W. 718; Ross v. Hill,

¹⁷⁵ Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. 725.

2 C. B. 877; so local custom may be important, Eddy v. Livingston, 35

¹⁷⁶ Clark v. Shrimski, 77 Mo. App. 166.

Mo. 487.

he is only liable for its injury or loss through his gross negligence. It is, ordinarily, enough if he keep or carry it, as he does his own property, and is not guilty of gross negligence.¹⁷⁹ On a trial before a jury, where one of the questions to be determined was whether the defendant was a gratuitous bailee of the plaintiff or not, it was held that the plaintiff should not be allowed to introduce evidence to show that the defendant, in a different transaction, with a person other than the plaintiff, and concerning a different bailment, was a bailee for compensation;¹⁸⁰ and it is also said that a gratuitous bailment will not be presumed merely from the production of evidence of the usual way of transacting business.¹⁸¹ It has been held that declarations made by a bailee at the time of a loss are competent as a part of the *res gestae*.¹⁸² If a presumption is raised as to the defendant's fault, he may show that he is not chargeable with gross negligence.¹⁸³ If he showed he used the same care as of his own things, that usually would be held sufficient.¹⁸⁴ And evidence that the bailee was known to the bailor to be a person incapacitated is said to be relevant and admissible.¹⁸⁵ As to the burden of proof, in one case¹⁸⁶ it is said: "The plaintiff alleges that the defendants refused to deliver to him the property stored, upon demand. The burden was upon the plaintiff, in the first instance, to prove such a refusal. If this had been done, he would have made out a *prima facie* case, and it would then have been incumbent upon the defendants to explain the cause of their refusal, such as showing the loss of the property by theft, or burglary, or its destruction by fire, or otherwise. Then it would have been incumbent upon the plaintiff to show that the loss or destruction occurred by reason of the defendant's failure to exercise such degree of care of the property as the law requires of a gratuitous bailee." The question as to whether the bailee has exercised due care depends largely upon the circumstances of the particular case. It is usually a question of fact for the jury under proper instructions.¹⁸⁷ So, as already in-

¹⁷⁹ *Anderson v. Foreman, Wright* (Ohio) 598; *Spooner v. Mattoon*, 40 Vt. 300.

¹⁸⁰ *Lobenstein v. Pritchett*, 8 Kans. 213.

¹⁸¹ *Samuels v. McDonald*, 42 How. Pr. (N. Y.) 360.

¹⁸² *Lampley v. Scott*, 24 Miss. 528; *McNabb v. Lockhart*, 18 Ga. 496.

¹⁸³ *Parry v. Roberts*, 3 Ad. & El. 118.

¹⁸⁴ *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49.

¹⁸⁵ *Story Bailments* 66.

¹⁸⁶ *Dinsmore v. Abbott*, 89 Me. 373, 36 Atl. 621.

¹⁸⁷ *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. St. 47; *Carrington v.*

icated, the nature of the property, the knowledge of the parties and even the known custom of the bailee or the place may often be relevant and important.¹⁸⁸

§ 1796. **Evidence in particular classes—Warehousemen.**—A warehouseman is one who, as a business, and for hire, keeps and stores the goods of others. The implied contract of such a person on receipt of chattels is that he will use ordinary care in keeping them.¹⁸⁹ In case of an action to recover on the part of the storer of the goods, that is, the bailor, on the ground of negligence, the burden of proof is on him to establish the negligence;¹⁹⁰ but as elsewhere shown, while the correct rule is that the burden, in one sense, remains throughout upon the plaintiff to establish his case, evidence of the failure or refusal to deliver may, according to most authorities, make a *prima facie* case, and thus shift to the defendant the burden in the cause of proceeding with evidence in explanation or exoneration.¹⁹¹ In one case¹⁹² it is stated: "The burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner, by merely alleging as an excuse that they have been stolen or burned. The facts must appear to be proved with reasonable certainty. Nor do we concur in the view that there is, in these cases, any real shifting of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff suing him for the loss of goods must, in all cases, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the court as *prima facie* evidence of negligence; but if, either in the course of his proof, or of that of defendant, it appears

Ficklin, 32 Gratt. (Va.) 670; Griffith v. Zipperwick, 28 Ohio St. 388; Doorman v. Jenkins, 2 Ad. & El. 256.

¹⁸⁸ *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275; *Eddy v. Livingston*, 35 Mo. 487.

¹⁸⁹ *Hale Bailments*, 238, 239; *Jones Bailments*, 97; *Story Bailments*, § 444.

¹⁹⁰ *Cross v. Brown*, 41 N. H. 283; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. R. 467; *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776; note to *Schmidt v. Blood*, 24 Am. Dec. 143, 153.

¹⁹¹ *Ante*, § 1785.

¹⁹² *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. R. 467.

that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." The general rules as to the effect of the receipt in respect to the quantity and condition of the goods, and the like, and the admissibility of parol evidence are the same as in case of carriers, and are elsewhere considered.¹⁹³ Evidence of the degree of care which other persons engaged in a similar business in the vicinity were in the habit of bestowing on property similarly situated, is competent;¹⁹⁴ but it should ordinarily relate to the calling generally, rather than to a particular person in it.¹⁹⁵ To charge warehousemen with a loss by negligence of their servants, it is necessary, it is said, that negligence within the scope of the employment must be shown; and the test is said to be: Would the servant be liable to the employer for neglect of duty?¹⁹⁶ Evidence of the general care with which the warehouse and its contents were guarded has been held not to be sufficient to raise a legal presumption of due diligence in the particular instance, although the defendant need not, ordinarily, show the precise manner in which loss occurred, any further than to show that it was consistent with non-liability.¹⁹⁷ Although a warehouseman is not, ordinarily, liable for a loss caused by an accidental fire, without fault on his part, even though he did not store them in a fireproof building, yet if he agrees to so store them in such a building, and the loss is caused by his failure to do so, he is liable.¹⁹⁸ The plaintiff may show that by his advertisements, receipts and declarations, the goods were to be stored in a fireproof building.¹⁹⁹ It has also been held that, where goods mildewed, the bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered by him; but the bailor may show that they were in the ordinary trade condition, and that the bailee knew this and also that they should have been aired and dried.²⁰⁰

§ 1797. Evidence in particular classes—Innkeepers.—An innkeeper is one who keeps an inn or house for the lodging and enter-

¹⁹³ Vol. 1, §§ 610, 617.

¹⁹⁴ *Cass v. Boston &c. R. Co.*, 14 Allen (Mass.) 448; *Kelton v. Taylor*, 11 Lea (Tenn.) 264, 47 Am. R. 284.

¹⁹⁵ *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49.

¹⁹⁶ *Aldrich v. Boston &c. R. Co.*, 100 Mass. 31, 1 Am. R. 76.

¹⁹⁷ *Lichtenhein v. Boston &c. R. Co.*, 11 Cush. (Mass.) 70.

¹⁹⁸ *Vincent v. Rather*, 31 Tex. 77; see also, *Jones v. Hatchett*, 14 Ala. 743; *Hatchett v. Gibson*, 13 Ala. 587.

¹⁹⁹ See *Abbott Tr. Ev.*, 693.

²⁰⁰ *Brown v. Hitchcock*, 28 Vt. 452.

tainment of all travelers, that is, the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation.²⁰¹ It has been held that a sign on a building, indicating that it is a common inn, is evidence of that fact, but a sign is not essential to prove that fact.²⁰² It may be proved by the acts or declarations of the party or by other proper evidence.²⁰³ But, admissions made by the servants of innkeepers are not admissible unless made within the scope of their employment.²⁰⁴ The fact that defendant was an innkeeper may be proved by parol, although the law requires him to have a license.²⁰⁵ The plaintiff may prove, in a proper case, the instructions he gave affecting the duty of the defendant or his servant.²⁰⁶ The declarations of the person discovering the loss, made at the time, have been held competent as part of the *res gestae*,²⁰⁷ but they do not prove any past fact narrated. Loss is generally presumptive,²⁰⁸ but not conclusive evidence of liability.²⁰⁹ At common law this presumption can only be repelled by proof that the loss is attributable to negligence or fraud of the guest, or to the act of God or the public enemy. A general denial of negligence will admit evidence of plaintiff's negligence.²¹⁰ Reasonable regulations or usages of the particular inn, of which plaintiff had notice, may be proved, but not the usage of another inn,²¹¹ and a guest is not bound by a usage of which he was rightfully ignorant.²¹² "The opinion of witnesses, unacquainted with the facts of the particular case, upon the propriety or safety of carrying or keeping, are inadmissible."²¹³

²⁰¹ Black Law Dict.; see for a learned discussion of the derivation, meaning and history of "inns" and "hotels," *Cromwell v. Stephens*, 2 Daly (N. Y.) 15. He is liable of such if he holds himself out as such; *Pinkerton v. Woodward*, 33 Cal. 557; *Hale Bailments*, 264. See also for comprehensive and modern definition 5 *Thompson Neg.*, title *Innkeepers*.

²⁰² *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

²⁰³ *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218.

²⁰⁴ *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303.

²⁰⁵ *Norcross v. Norcross*, 53 Me. 163.

²⁰⁶ *Jones v. Hill*, 26 Ga. 194.

²⁰⁷ *Pope v. Hall*, 14 La. Ann. 324.

²⁰⁸ *Hulett v. Swift*, 33 N. Y. 571.

²⁰⁹ *Hulett v. Swift*, 33 N. Y. 571.

²¹⁰ *Abbott Tr. Ev.* (2d ed.) 691; see also, *Albin v. Presby*, 8 N. H. 408.

²¹¹ *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417.

²¹² *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417.

²¹³ *Taylor v. Monnot*, 4 Duer (N. Y.) 116; *Abbott Tr. Ev.* (2d ed.) 691.

§ 1798. **Pledges.**—A pledge or pawn is a bailment of personal property to secure the payment of a debt, or the performance of an engagement, with a power (usually implied) of sale upon default.²¹⁴ The intention of the parties, as shown in the transaction, is usually of great importance, and where it imports nothing more than the giving of a security, without a sale or change of title, it will generally be considered as a pledge rather than a sale or a mortgage.²¹⁵ So, an apparently absolute bill of sale, may be shown by parol to be a pledge where it was so intended by the parties.²¹⁶ It has also been held that the presumption where a debtor assigns securities to his creditor is, that the transfer was as security rather than in payment of the debt.²¹⁷ In an action for conversion, the lien of the pledgee must usually first be paid or tendered,²¹⁸ and a demand and refusal to return the property must be shown.²¹⁹ It is a sufficient defense that the pledgor had no title, and that the pledgee had returned the property to its true owner, who was entitled to its possession.²²⁰ The measure of damages is usually the value of the property at the time of the loss or conversion,²²¹ but this may depend somewhat on circumstances, and

²¹⁴ Hale Bailments, 102; Jones Pledges, 1; Bank v. Marshall, 11 Fed. (U. S.) 19.

²¹⁵ Lucketts v. Townsend, 3 Tex. 119; Wilson v. Brannan, 27 Cal. 258, 271.

²¹⁶ Walker v. Staples, 5 Allen (Mass.) 34; Hazard v. Loring, 10 Cush. (Mass.) 267; Blodgett v. Blodgett, 48 Vt. 32; Shaw v. Wilshire, 65 Me. 485; Jones v. Rahilly, 16 Minn. 320; Bright v. Wagle, 3 Dana (Ky.) 252; Vol. 1, § 611.

²¹⁷ Jones v. Johnson, 3 W. & S. (Pa.) 276; Leas v. James, 10 S. & R. (Pa.) 307.

²¹⁸ Talty v. Freedmen's Sav. & Co., 93 U. S. 321; Causey v. Yates, 8 Humph. (Tenn.) 605; Doak v. State Bank, 6 Ired. L. (N. Car.) 309; Jarvis v. Rogers, 15 Mass. 389; Henry v. Eddy, 34 Ill. 508; see also, Cass v. Higenbotam, 100 N. Y. 248; Thompson v. St. Nicholas & Co. Bank, 113 N. Y. 325, 21 N. E. 57; but not always, Hallack Lumber & Co. v.

Gray, 19 Colo. 149, 34 Pac. 1000; Mead v. Bunn, 32 N. Y. 275.

²¹⁹ Yeatman v. New Orleans Sav. Inst., 95 U. S. 764; Luckey v. Gannon, 37 How. Pr. (N. Y.) 134; Hopper v. Smith, 63 How. Pr. (N. Y.) 34; see also, 1 Elliott Gen. Pr., § 313.

²²⁰ Idaho, The, 93 U. S. 575; Hayden v. Davis, 9 Cal. 573; Bates v. Stanton, 1 Duer (N. Y.) 79; Ogle v. Atkinson, 5 Taunt. 759; Sheridan v. New Quay Co., 4 C. B. N. S. 618.

²²¹ Third Nat. Bank v. Boyd, 44 Md. 47; Robinson v. Hurley, 11 Iowa 410; Loomis v. Stave, 72 Ill. 623; Rosenzweig v. Frazer, 82 Ind. 342; Blood v. Erie & Co., 164 Pa. St. 95, 30 Atl. 362; Hudson v. Wilkinson, 61 Tex. 606; see also, Fowle v. Ward, 113 Mass. 548; Pinkerton v. Manchester & Co. R. Co., 42 N. H. 424; Reynolds v. Witte, 13 S. Car. 5; Falk v. Fletcher, 18 C. B. N. S. 403.

there are cases in which the plaintiff has been held entitled to recover its highest value up to the time of redemption and demand or a reasonable time after he became aware of the conversion.²²² Proper matters, however, may be pleaded and proved as a set-off, or shown in mitigation.²²³ As a pledge is a bailment of mutual benefit, the pledgee is bound to exercise ordinary care, but not extraordinary care, and is liable to the pledgor for loss or injury proximately caused by the failure to exercise such ordinary care.²²⁴ But here, as elsewhere, the parties, so long as their agreement is not contrary to public policy or otherwise illegal, may stipulate for a different degree of care or liability.²²⁵ The general rules as to the presumption and burden of proof in actions against a pledgor for loss or injury by negligence,²²⁶ are much the same as in other similar cases.

²²² *Wilson v. Little*, 2 N. Y. 443; *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Galigher v. Jones*, 129 U. S. 200, 9 Sup. Ct. 335; *Bank v. Montgomery*, 26 Pa. St. 143; *Page v. Fowler*, 39 Cal. 412.

²²³ *Stearns v. Marsh*, 4 Denio (N. Y.) 227; *Baker v. Drake*, 53 N. Y. 211, 66 N. Y. 518; *Belden v. Perkins*, 78 Ill. 449; *Shaw v. Ferguson*, 78 Ind. 547.

²²⁴ *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Jarvis v. Rogers*, 15 Mass. 389; *Story Bailments*, § 332; *Jones Bailments*, §§ 23, 75.

²²⁵ *Drake v. White*, 117 Mass. 10; *Bank of British Columbia v. Marshall*, 11 Fed. (U. S.) 19.

²²⁶ *Scott v. Crews*, 2 S. Car. 522; *Winthrop Sav. Bank v. Jackson*, 67 Me. 570; *Mills v. Gilbreth*, 47 Me. 326; *Murphy v. Bartsch*, 2 Idaho 603, 23 Pac. 82; *Stuart v. Bigler*, 98 Pa. St. 80; *Arent v. Squire*, 1 Daly (N. Y.) 347; as to negligence of the pledge in enforcing the security, burden of proof and measure of damages in such cases, see, *Aldrich v. Goodell*, 75 Ill. 452; *Steger v. Bush, S. & M. Ch. (Miss.)* 172; *Marschuetz v. Wright*, 50 Wis. 175; *Westphal v. Ludlow*, 6 Fed. (U. S.) 348; *Vose v. Yulee*, 4 Hun (N. Y.) 628; *Gilbert v. Marsh*, 12 Hun (N. Y.) 519; *Hanna v. Holton*, 78 Pa. St. 334; *Dugan v. Sprague*, 2 Ind. 600; *Kennedy v. Rosier*, 71 Iowa 671, 33 N. W. 226; but see, *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Peacock v. Pursell*, 14 C. B. N. S. 728.

CHAPTER LXXXVIII.

BANKRUPTCY.

Sec.	Sec.
1799. Generally.	1811. Preferences.
1800. Burden of proof.	1812. Conclusive evidence of preference.
1801. Presumptions.	1813. Preference through legal proceedings.
1802. Evidence of intent.	1814. General assignment.
1803. Evidence of assets.	1815. Admissions of insolvency.
1804. Examination of witnesses.	1816. Discharge of bankrupt.
1805. Confidential relationship.	1817. Revocation of discharge.
1806. Examination of bankrupt.	1818. Proof of claims.
1807. Criminating evidence.	1819. Compositions.
1808. Requisites of order for examination.	1820. Record evidence.
1809. Depositions.	1821. Discharge in bankruptcy as a defense.
1810. Concealment and conveyances to defraud creditors.	

§ 1799. **Generally.**—The evidence that may be introduced in bankruptcy proceedings depends much upon the act itself. Certain rules of evidence have been laid down by the different bankruptcy acts and in many instances they are clear and well defined. For an interpretation of a particular act we must look mainly to the decisions bearing directly upon the act. We have had four United States bankruptcy acts, one in 1800, another in 1843, a third in 1867, and the law now in force in the United States, which went into effect in 1898, and which has since been amended in some important particulars. The decisions cited in this chapter consist almost entirely of those cases decided since this law went into effect; but as former decisions carry weight, in the absence of later decisions, upon points which apparently have not been materially changed they are cited upon such points. Many state statutes in the nature of insolvency or bankruptcy acts have been passed, but they are practically suspended, in most respects at least, during the life of the national bankruptcy act. The state laws are generally called insolvency laws, while the federal

acts are known as bankruptcy laws,¹ and this chapter will be confined to the latter.

§ 1800. Burden of proof.—The burden of proof is upon the petitioning creditors to show an act of bankruptcy, but the question of solvency is made by the statute a matter of defense,² in most cases. Creditors filing a petition in bankruptcy against a debtor, in order to succeed under the law, must show, where a preference is relied upon as an act of bankruptcy, that he has transferred property with intent to prefer creditors, and they have the burden of showing the transfer of the property, the debtor's intent to prefer certain creditors and his insolvency at the date of the transfer, except where the presumption of insolvency is raised against the debtor because of his refusal to produce his books and papers and submit to an examination.³

¹*Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. ed. 606; 11 Kent Comm. 391; *Mitchell v. Great Works Milling Co.*, 2 Story (U. S.) 648, 17 Fed. Cas. No. 9662; distinction between bankruptcy and insolvency, *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 4 L. ed. 529; *Sackett v. Andross*, 5 Hill (N. Y.) 327; *Black*, in re, 3 Ben. (U. S.) 196, 3 Fed. Cas. No. 1457, 1 Am. Bank. R. 39. As to suspension of state insolvency statutes, see, *Storck Lumber Co.*, in re, 114 Fed. (U. S.) 360; *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. 84; *Lengert Wagon Co.*, in re, 110 Fed. (U. S.) 927; *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. 147; *Ketcham v. McNamara*, 72 Conn. 706, 46 Atl. 146, 50 L. R. A. 641; *State v. Kings County Super. Ct.*, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; *Segnitz v. Garden City Banking & Co.*, 107 Wis. 171, 83 N. W. 327, 81 Am. St. 830; but compare, *Hilliard v. Burlington Shoe Co.*, (Vt.) 56 Atl. 283; *Singer v. National Bedstead & Co.*, (N. J. Ch.) 55 Atl. 968; *Downer v. Porter*, (Ky.) 76 S. W. 135.

²*Davis v. Stevens*, 104 Fed. (U. S.) 235. Bankruptcy Act 1898 provides that, whenever a person against whom a petition in bankruptcy has been filed takes issue with and denies the allegation of insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. *Bloch*, in re, 109 Fed. (U. S.) 790. Burden of proof on petitioners in case of an alleged trading corporation, see, *Philpot v. O'Brien*, 126 Fed. (U. S.) 167.

³*Rome Planing Mill*, in re, 96 Fed. (U. S.) 812; Bankruptcy Act 1898, § 3, d.; *Bloch*, in re, 109 Fed. (U. S.) 790; *Gilbert*, in re, 112 Fed. (U. S.) 951; or except where the act of bankruptcy itself consists of a conveyance to hinder, delay or defraud creditors. *West*, in re, 108 Fed. (U. S.) 940, 48 C. C. A. 155.

Where the petitioner attempts to throw the defendant into bankruptcy upon the grounds of his transferring property with intent to hinder or defraud other creditors, the burden rests upon the petitioner to prove the transfer with intent to defraud, but the solvency of the alleged bankrupt, if a defense, must be shown by him.⁴ Where the intent to prefer is proved, the burden is upon the debtor to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts in full.⁵ The debtor's insolvency, when required to be shown, must be shown at the date of the transfer and not at the time of filing the petition or other subsequent date.⁶ A simple denial of insolvency by an alleged bankrupt, who had assigned his property to creditors, unsupported by any other evidence or schedules, does not sustain the burden of proof, thrown upon him in such cases and does not raise such an issue of solvency as is contemplated by the act.⁷ When a defense is offered in an involuntary bankruptcy proceeding, that the debt is invalid or illegal, the burden of proving such facts, rests upon the defendant.⁸ In order to show that a partnership is insolvent, it must usually be shown, it seems, that every member of the co-partnership is individually insolvent.⁹ Parties objecting to the discharge of a bankrupt must prove by clear and convincing evidence their objection in order to authorize the refusal of a discharge.¹⁰ And in order to avoid the payment of a debt due

⁴ West, In re, 108 Fed. (U. S.) 940, 48 C. C. A. 155, 5 Am. Bank R. 734; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. ed. 1098; Bray v. Cobb, 91 Fed. (U. S.) 102; Schenkeln, In re, 113 Fed. (U. S.) 421, holds that, the burden of proving solvency is on the alleged bankrupt, if removing or concealing property is charged as the act of bankruptcy.

⁵ Toof v. Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481; Rome Planing Mill, In re, 96 Fed. (U. S.) 812; Schenkeln, In re, 113 Fed. (U. S.) 421.

⁶ Rome Planing Mill, In re, 96 Fed. (U. S.) 812; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 835.

⁷ Bray v. Cobb, 91 Fed. (U. S.) 102; Bankruptcy Act 1898, § 3, d.

⁸ Hill v. Levy, 98 Fed. (U. S.) 94; Bangs v. Hornick, 30 Fed. (U. S.) 97; Irwin v. Williar, 110 U. S. 507, 4 Sup. Ct. 160, 28 L. ed. 225.

⁹ Davis v. Stevens, 104 Fed. (U. S.) 235; Blair, In re, 99 Fed. (U. S.) 76, holds that, "a partnership cannot with strictness be said to be insolvent while any one of the partners is able to pay all the firm's liabilities."

¹⁰ Wetmore, In re, 99 Fed. (U. S.) 703; Gaylord, In re, 106 Fed. (U. S.) 833; Bryant, In re, 104 Fed. (U. S.) 789; Steed, In re, 107 Fed. (U. S.) 682; Smith v. Keegan, 11 Fed. (U. S.) 157; Chamberlain, In re, 125 Fed. (U. S.) 629; McGurn, In re, 102 Fed. (U. S.) 743, 4 Am. Bank R. 461; Hixon, In re, 93 Fed. (U. S.) 440; Idzall, In re, 96 Fed. (U.

before discharge of bankrupt, the burden of proving such discharge is upon the bankrupt, but if he produces a certified copy of the judgment of the court decreeing such discharge, signed and sealed by the judge, such evidence will be conclusive.¹¹ In a case of voluntary bankruptcy, the burden of proving residence within the district is upon the bankrupt and it has been held that this burden remains upon him where the adjudication is sought to be set aside by a creditor, and the question is raised at the first opportunity.¹² The burden of proving an intention to change domicile, when the court has once acquired jurisdiction, is upon the party questioning jurisdiction.¹³ It may be shown, however, in a proper case, that the court had no jurisdiction.¹⁴

§ 1801. Presumptions.—Intent to prefer creditors will usually be presumed from the fact of insolvency and the payment of certain creditors, yet the defendant will be permitted to show his ignorance of insolvency and a reasonable expectation that he would be able to pay all debts,¹⁵ but the burden is upon the defendant to show these facts.¹⁶ Where it is shown that the debtor, with knowledge of his insolvency, transfers a large portion of his property to certain creditors, to the exclusion of others, an intent to prefer them will be conclusively presumed,¹⁷ and a debtor is presumed to know his financial

S.) 314; *Feldstein, In re*, 115 Fed. (U. S.) 259, 53 C. C. A. 479, 8 Am. Bank. R. 160.

¹¹ *Hays v. Ford*, 55 Ind. 52; *Gregory v. Edgerly*, 17 Neb. 374, 22 N. W. 703; *Blake v. Bigelow*, 5 Ga. 437; *Cooper v. Copper*, 36 N. J. Eq. 121; *Boas v. Hetzel*, 3 Pa. St. 298.

¹² *Scott, In re*, 111 Fed. (U. S.) 144; *Waxelbaum, In re*, 97 Fed. (U. S.) 562. The creditor has to produce evidence, after the adjudication, to support his application, but the burden of ultimately establishing the issue of residence is upon the bankrupt. Bankruptcy Act 1898, §§ 23, 24.

¹³ *Magid-Hope Silk Mfg. Co., In re*, 110 Fed. (U. S.) 352; *Dressel v. North State Lumber Co.*, 107 Fed. (U. S.) 255; *Filer, In re*, 108 Fed. (U. S.) 209.

¹⁴ *Garneau, In re*, 127 Fed. (U. S.)

677; Bankruptcy Act 1898, U. S. R. S. 1901, § 3421.

¹⁵ *Bloch, In re*, 109 Fed. (U. S.) 790; *Wager v. Hall*, 16 Wall. (U. S.) 584, 21 L. ed. 504; *Parsons v. Topliff*, 119 Mass. 245; *Gilbert, In re*, 112 Fed. (U. S.) 951; *Rome Planing Mill, In re*, 96 Fed. (U. S.) 812; see also, *Clark v. Henne & Meyer*, 127 Fed. (U. S.) 288.

¹⁶ *Toof v. Martin*, 13 Wall. (U. S.) 40, 20 L. ed. 481, holds that, such a preferential transfer is conclusive unless ignorance is shown but this rule is modified; *Bloch, In re*, 109 Fed. (U. S.) 790, on the bottom of page 792 and in *Parsons v. Topliff*, 119 Mass. 245, 249; *West, In re*, 108 Fed. (U. S.) 940.

¹⁷ *Gilbert, In re*, 112 Fed. (U. S.) 951; *McGee, In re*, 105 Fed. (U. S.) 895.

condition, which, however, may be rebutted by evidence showing a want of knowledge.¹⁸ This presumption of an intent to prefer creditors when property is transferred by the insolvent is affected by the amount of the transfer and is not strong when the amount is but a trifle of debtor's property,¹⁹ while it would be almost conclusive if the transfer were all his property.²⁰ So, generally, if the natural consequence of a fraudulent transfer is to defraud creditors, the intent will usually be presumed.²¹

§ 1802. Evidence of intent.—Where a transfer of property by an insolvent debtor with intent to prefer certain creditors is made the basis of a petition in involuntary bankruptcy against the debtor, the intent of the debtor and not that of the creditors who receive the property is the question.²² But it is not required of the petitioner that he show any affirmative act on the part of the debtor. It is enough if he permits his property to be taken by one creditor at the expense of all others.²³ Where the debtor was insolvent and had knowledge of such fact, and made transfer to one creditor, to the exclusion of others, an intention to prefer will generally be conclusively presumed.²⁴

§ 1803. Evidence of assets.—Evidence to the effect that the debtor has sufficient assets to cover liabilities is admissible to defeat a petition in bankruptcy and proof of the value derived from actual sales

¹⁸ Gilbert, In re, 112 Fed. (U. S.) 951; Toof v. Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481; Rome Planing Mill, In re, 96 Fed. (U. S.) 812.

¹⁹ Gilbert, In re, 112 Fed. (U. S.) 951.

²⁰ Toof v. Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481; McGee, In re, 105 Fed. (U. S.) 895.

²¹ Toof v. Martin, 13 Wall. (U. S.) 40; Wager v. Hall, 16 Wall. (U. S.) 584; Johnson v. Wald, 93 Fed. (U. S.) 640, 35 C. C. A. 522.

²² Rome Planing Mill Co., In re, 96 Fed. (U. S.) 812, which also holds that the burden of proof is upon the petitioner, and that the debtor's intent in permitting a preference by legal proceedings is imma-

terial, it being sufficient that the creditor has obtained a preference and that the debtor has permitted it to remain undisturbed.

²³ Reichman, In re, 91 Fed. (U. S.) 624; Rome Planing Mill, In re, 96 Fed. (U. S.) 812; Duncan v. Landis, 196 Fed. (U. S.) 839, holds that there must be some conscious and voluntary act upon the part of the debtor, besides insolvency; that is, some act of the will, "whether by way of active procurement or voluntary acquiescence in the suffering and permitting of the preference."

²⁴ Gilbert, In re, 112 Fed. (U. S.) 951; Boyd v. Lemon & Co., 114 Fed. (U. S.) 647.

about the time in question should generally be admitted to determine the value of the stock of goods or assets available. Sales made a short time before may be shown to help estimate the value of the remaining stock.²⁸ But prospective profits must be well determined before they can be shown in evidence or listed as assets.²⁹

§ 1804. Examination of witnesses.—Any person who would be a competent witness under the laws of the state in which the suit is pending may be examined concerning the acts, conduct or property of a bankrupt whose estate is in the process of administration.²⁷ The examination before the referee may be conducted by the bankrupt or his attorney or by the party in person and the witness may be cross-examined the same as in any other court of law.²⁸ It has been held that where a witness is called by a creditor who opposes the discharge in bankruptcy, the bankrupt cannot cross-examine;²⁹ and where a witness is under examination at the instance of a creditor, other creditors cannot object to the questions asked.³⁰ A witness who is not a party to the investigation is not entitled to be represented by counsel.³¹ But a bankrupt while being examined can also be cross-examined by his counsel,³² and while the referee must pass upon all objections to testimony, he should cause the objections and all excluded testimony to be noted, and made parts of the record with the ruling upon the objection and the exception; and these shall go before the judge upon a review of the referee's order.³³

²⁷ *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032; *Bloch*, In re, 109 Fed. (U. S.) 790. What are assets, defined, *Baumann*, In re, 96 Fed. (U. S.) 946.

²⁸ *Bloch*, In re, 109 Fed. (U. S.) 790. As to making it appear that the bankrupt has possession or control of property before he will be ordered to surrender it, see, *Boyd v. Glücklich*, 116 Fed. (U. S.) 181; *Wilson*, In re, 116 Fed. (U. S.) 428.

²⁹ *Bankruptcy Act 1898*, § 21, as amended 1903; *Pursell*, In re, 114 Fed. (U. S.) 371; *Fixen*, In re, 96 Fed. (U. S.) 748.

³⁰ *Gen. Order in Bankruptcy*, No. 22; *De Gottardi*, In re, 114 Fed. (U. S.) 328; *Mayer*, In re, 101 Fed. (U.

S.) 695, holds that the alleged bankrupt is entitled to the assistance of counsel while being examined before referee. *Tanner*, In re, 1 Low. (U. S.) 215, 23 Fed. Cas. No. 13745.

³¹ *Duncan*, In re, 8 Ben. (U. S.) 541, 8 Fed. Cas. No. 4132.

³² *Howard*, In re, 95 Fed. (U. S.) 415; *Stuyvesant Bank*, In re, 6 Ben. (U. S.) 33, 23 Fed. Cas. No. 13582.

³³ *Stuyvesant Bank*, In re, 6 Ben. (U. S.) 33, 23 Fed. Cas. No. 13582.

³⁴ *Noyes*, In re, 2 Low. (U. S.) 352, 18 Fed. Cas. No. 10370; *Leachman*, In re, 15 Fed. Cas. No. 8157.

³⁵ *De Gottardi*, In re, 114 Fed. (U. S.) 328; *Gen. Order in Bankruptcy* No. 22.

§ 1805. **Confidential relationship.**—The wife of the bankrupt, under the amendment of the national bankrupt act, may be examined concerning the acts, conduct or property of her husband,³⁴ but she is only competent in regard to the transactions in which she took a part or was a party. Under the original act it was also held that the wife is not competent to disclose confidential communications made to her by her husband concerning his financial standing,³⁵ and the same rule was applied to others holding confidential relationships; as attorney and client,³⁶ physician and patient; but the court may by way of preliminary examination, in order to determine if the facts are privileged, examine the attorney or physician. The court, not counsel, shall determine whether or not the communication is privileged.³⁷ Under the bankrupt act of 1867, it was held that the register could not rule on the admissibility of evidence offered, but that he must report the testimony to the judge for his decision.

§ 1806. **Examination of bankrupt.**—The bankruptcy act provides that the alleged bankrupt may be examined and that he shall prepare under oath a true schedule of his property, showing the amount and kind of property, the location and value in detail and that he shall prepare a list of his creditors, giving their residences and amount due each of them. He shall also name the consideration received from each, the security held by each and his claim for an exemption.³⁸ The act further provides that when the alleged bankrupt is "present at the first meeting of his creditors, and, at such other times as the court shall order, submits to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property," and all matters which may affect the administration and settlement of his estate, no testimony given by him shall be offered

³⁴ Worrell, In re, 125 Fed. (U. S.) 159; Bankruptcy Act, 1898, as amended 1903, § 21a, Act Feb. 5, 1903, 22 St. (U. S.) 798; see, under the original act, Mayer, In re, 97 Fed. (U. S.) 328; Fowler, In re, 93 Fed. (U. S.) 417; Jefferson, In re, 96 Fed. (U. S.) 826.

³⁵ Jefferson, In re, 96 Fed. (U. S.) 826, holding that it would be violation of 4th Amendment to Constitu-

tion against unreasonable searches and seizures to compel the bankrupt's wife to disclose confidential communications made by him to her as to his property or income.

³⁶ Leland, In re, 8 Ben. (U. S.) 204, 15 Fed. Cas. No. 8232.

³⁷ People's Bank v. Brown, 112 Fed. (U. S.) 652.

³⁸ Bankruptcy Act 1898, § 7, sub. 8.

in evidence against him in any criminal proceeding.³⁹ This examination may be held at any time during the pendency of the proceedings,⁴⁰ and the bankrupt may be ordered before the referee for examination even before the first meeting of creditors or the appointment of a trustee.⁴¹ The statute provides that creditors must be given ten days' notice of an examination,⁴² but this may be dispensed with if the examination is solely to prepare the schedule.⁴³ The bankrupt may be examined by more than one creditor and may be compelled to answer questions even if he has answered the same questions in a former proceeding.⁴⁴

§ 1807. Criminating Evidence.—Neither the bankrupt nor any other witness in a bankruptcy proceeding can be compelled to answer any question which would tend to criminate the witness on the trial of pending indictments, and no testimony given by a witness shall be offered in evidence against him in a criminal proceeding.⁴⁵ But answers that might furnish evidence for a civil action against a witness are not protected, nor will the witness be allowed to interpose this protection to any and all questions concerning his business dealings.⁴⁶ All the statements of a witness, however, must be under oath and the constitutional privilege against giving criminating evidence does

- ³⁹ Bankruptcy Act 1898, § 7, sub. 9. (U. S.) 419, 10 Fed. Cas. No. 5659;
⁴⁰ Price, In re, 91 Fed. (U. S.) 635. Lewis, In re, 4 Ben. (U. S.) 67, 15 Fed. Cas. No. 8312; Nachman, 114 Fed. (U. S.) 995; Feldstein, In re, 103 Fed. (U. S.) 269; Rosser, In re, 96 Fed. (U. S.) 305; but see, Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.
⁴¹ Franklin Syndicate, In re, 101 Fed. (U. S.) 402.
⁴² Price, In re, 91 Fed. (U. S.) 635; Bankruptcy Act 1898, § 58a.
⁴³ Franklin Syndicate, In re, 101 Fed. (U. S.) 402.
⁴⁴ Vogel, In re, 23 Fed. Cas. No. 16984.
⁴⁵ Rosser, In re, 96 Fed. (U. S.) 305; Scott, In re, 95 Fed. (U. S.) 815, holds that the statutory provision is not so broad as the constitutional privilege against self-criminating evidence; see also, Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195; Bankruptcy Act 1898, § 7; Shera, In re, 114 Fed. (U. S.) 207; Graham, In re, 8 Ben. (U. S.) 328; Nachman, In re, 114 Fed. (U. S.) 995, holds that this claim should be made by the witness himself and his attorney should not be permitted to delay or obstruct the investigation by making objections for the witness, and any statement that the answer would tend to criminate him would, if false, subject the witness to prosecution for perjury.

not justify the bankrupt in refusing to be sworn.⁴⁷ It has also been held that a bankrupt cannot claim this protection and refuse to be questioned because his answers might bring him into disrepute or degrade him.⁴⁸ So, it has been held that where the bankrupt has filed a voluntary petition he cannot be excused from producing his books and documents on the ground that evidence contained in them might criminate him, but he must submit all of them.⁴⁹

§ 1808. **Requisites of order for examination.**—To secure an order for the examination of a witness, it must usually be made to appear to the satisfaction of the referee that the applicant is a creditor, but it is not necessary that the claim be proved in the regular form;⁵⁰ and the fact that his name is included in the bankrupt's list of creditors will be prima facie evidence of his right to the order.⁵¹ It is not necessary to give any notice of the questions to be asked or particulars to be inquired into,⁵² and it has been held that a witness may be examined upon the mere application of an interested party, such as a trustee or receiver.⁵³ Any proper testimony which will help to show that the bankrupt owned or had an interest in property at the beginning of the proceedings,⁵⁴ or any question as to his trade relations with the bankrupt before the proceedings began, is competent and will be received.⁵⁵ So, generally, any proper evidence which will show the

⁴⁷ Scott, In re, 95 Fed. (U. S.) 415; Fixen, In re, 96 Fed. (U. S.) 815. 748.

⁴⁸ Richards, In re, 4 Ben. (U. S.) 303, 20 Fed. Cas. No. 11769.

⁴⁹ Sapiro, In re, 92 Fed. (U. S.) 340, holds that if the bankrupt were privileged to withhold the books and documents, his voluntary petition operates as a waiver and as a transfer of the right of custody and the books may be produced even though they contain criminating evidence. Fixen, In re, 96 Fed. (U. S.) 748; Bankruptcy Act 1898, § 41, a & b.

⁵⁰ Jehu, In re, 94 Fed. (U. S.) 638; Price, In re, 91 Fed. (U. S.) 635.

⁵¹ Walker, In re, 96 Fed. (U. S.) 550.

⁵² Howard, In re, 95 Fed. (U. S.)

⁵³ Fixen, In re, 96 Fed. (U. S.) 748, holds that the examination is not intended as a means of procuring testimony pertinent to the issue on trial, but its object is to afford to creditors and the trustee or receiver full information touching the bankrupt's estate, in order that the necessary steps may be taken for its recovery and preservation; see also, Earle, In re, 8 Fed. Cas. No. 4244; Stuyvesant Bank, In re, 6 Ben. (U. S.) 32, 23 Fed. Cas. No. 13582; Harlow v. Tufts, 4 Cush. (Mass.) 448.

⁵⁴ Franklin Syndicate, In re, 114 Fed. (U. S.) 205; Brundage, In re, 100 Fed. (U. S.) 613.

⁵⁵ Earle, In re, 8 Fed. Cas. No.

transfers, business dealings, disposition of property, or the like, and will thus tend to show an attempt to defraud creditors may be introduced in the proceedings;⁵⁶ but a creditor cannot take advantage of his own fraudulent contracts.⁵⁷

§ 1809. Depositions.—"A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of a narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."⁵⁸

§ 1810. Concealment and conveyances to defraud creditors.—Evidence that an insolvent debtor has absconded and carried with him non-exempt property is admissible to prove a concealment⁵⁹ or removal of property with an intent to defraud creditors.⁶⁰ So, evidence that an insolvent debtor has made a voluntary conveyance of all his property to a trustee to be distributed among his creditors equally, is also admissible to prove an act of bankruptcy.⁶¹ Fraudulent concealment may be shown by circumstantial as well as direct evidence, and the manner and details of the alleged concealment of property are matters of evidence rather than of averment.⁶² The failure of a sur-

4244, 3 Nat. Bank R. 304; Trask, In re, 7 Ben. (U. S.) 60, 24 Fed. Cas. No. 14141; if the bankrupt purchases property and it can be shown that the title is placed in the wife's name, this may be shown, Schonberg, In re, 7 Ben. (U. S.) 211, 21 Fed. Cas. No. 12477; Craig, In re, 3 Ben. (U. S.) 353, 6 Fed. Cas. No. 3322.

⁵⁶ Brundage, In re, 100 Fed. (U. S.) 613; Koch, In re, 14 Fed. Cas. No. 7916.

⁵⁷ Wright, In re, 2 Ben. (U. S.) 509, 30 Fed. Cas. No. 18065.

⁵⁸ 89 Fed. (U. S.) p. X, Gen. Order of Sup. Ct. No. 22.

⁵⁹ Bankruptcy Act 1898, § 3, 30 Stat. L. 546, 1 Fed. Stat. Ann. 644, "Acts of bankruptcy by a person shall consist of his having conveyed, transferred, concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them," etc.

⁶⁰ Filer, In re, 108 Fed. (U. S.) 209.

⁶¹ Rumsey &c. Co. v. Novelty &c. Mfg. Co., 99 Fed. (U. S.) 699.

⁶² Bellah, In re, 116 Fed. (U. S.) 69.

living partner to oppose the appointment of a receiver of the partnership is not permitting the property to be concealed or removed with intent to hinder, delay or defraud creditors, so as to constitute an act of bankruptcy,⁶³ nor is the refusal of one partner to pay debts of an absconding partner.⁶⁴ Evidence of the transfer of property by a person who has been adjudged insane and is under guardianship will not support a petition by creditors to have such insane person declared a bankrupt,⁶⁵ over the objection of his guardian.

§ 1811. **Preferences.**—The burden of proof rests upon the petitioner to prove the intent⁶⁶ to create a preference,⁶⁷ but the petitioner need not show the intent of the creditor when he received the money, nor that the creditor knew or had reasonable grounds for knowing that a preference was intended;⁶⁸ and this intent will be presumed when the alleged bankrupt transfers, while insolvent, any considerable part of his property to certain creditors⁶⁹ to the exclusion of others, and especially if no attempt is made by the bankrupt to show an absence of intent. But the bankrupt may show ignorance of insolvency,⁷⁰ and this evidence in rebuttal is entirely competent,⁷¹ especially when the business of the bankrupt was in such a condition that he could reasonably expect to pay all his debts. Evidence that a debtor, while insolvent and within a few months of the filing of a

⁶³ *Vaccaro v. Security Bank*, 103 Fed. (U. S.) 436; *Davis v. Stevens*, 104 Fed. (U. S.) 235.

⁶⁴ *Davis v. Stevens*, 104 Fed. (U. S.) 235.

⁶⁵ *Funk*, In re, 101 Fed. (U. S.) 244.

⁶⁶ Bankruptcy Act 1898, § 3, sub. a, Div. 2; 30 Stat. L. 546, 1 Fed. Stat. Ann. 645, "Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

⁶⁷ *Clark v. Henne & Meyer*, 127 Fed. (U. S.) 288; *Nelson*, In re, 98 Fed. (U. S.) 76; *Roger's Planing Mill*, In re, 102 Fed. (U. S.) 687; Bankruptcy Act 1898, § 57; *Rods*, In

re, (U. S.) Fed. Cas. No. 11522; *Hunt*, In re, (U. S.) Fed. Cas. No. 6882; *Knost*, In re, 99 Fed. (U. S.) 409; *Electric Co. v. Worden*, 99 Fed. (U. S.) 400; 39 C. C. A. 582; *Test of preference* is defined in, *Swarts v. St. Louis Fourth Nat. Bank*, 117 Fed. (U. S.) 1.

⁶⁸ *Bloch*, In re, 109 Fed. (U. S.) 790; *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812.

⁶⁹ *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812; *Gilbert*, In re, 112 Fed. (U. S.) 951; *McGee*, In re, 105 Fed. (U. S.) 895; *Miller*, In re, 104 Fed. (U. S.) 764.

⁷⁰ *Gilbert*, In re, 112 Fed. (U. S.) 951; *Bray v. Cobb*, 91 Fed. (U. S.) 102.

⁷¹ *Bloch*, In re, 109 Fed. (U. S.) 790.

petition in bankruptcy against him, paid certain bills maturing, is insufficient to establish an act of bankruptcy, unless there is evidence of an intent to prefer, or contemplate bankruptcy.⁷² One who knows of his insolvency and who executes a mortgage to secure pre-existing debts, commits an act of bankruptcy,⁷³ and where a transfer is made to a relative at a time when the debtor should have known of his insolvent condition; this fact also may be shown, to prove an intent to prefer.⁷⁴ Proper evidence may always be introduced to show the giving of a preference to an existing or prior creditor or the securing in some way of a previous debt, when such preferment would diminish the available assets of the bankrupt.⁷⁵ An intention to prefer is not the same as an intention to defraud, nor is a preferential transfer necessarily the same as a fraudulent transfer.⁷⁶ In order to determine whether there has been a preference, any evidence that shows the payment, out of the bankrupt's estate, of a larger percentage of the claim of one creditor, than of others of the same class, is usually admissible.⁷⁷ In this connection it may also be noted that a preferred creditor cannot prove any claim against a bankrupt's estate, though it be a distinct and separate debt from the one preferred, until he surrenders the preference he has obtained.⁷⁸

§ 1812. Conclusive evidence of preference.—Evidence, which shows that a debtor knew of his insolvency and at the same time transferred property to defeat other creditors, will be conclusive of an act of bankruptcy.⁷⁹ And where the insolvent pays a creditor by convey-

⁷² *Clark v. Henne & Meyer*, 127 Fed. (U. S.) 228; *Nelson, In re*, 98 Fed. (U. S.) 76; *Bloch, In re*, 109 Fed. (U. S.) 790.

⁷³ *Wright Lumber Co., In re*, 114 Fed. (U. S.) 1011.

⁷⁴ *Grant, In re*, 106 Fed. (U. S.) 496.

⁷⁵ *Little River Lumber Co., In re*, 92 Fed. (U. S.) 585; *Schmechel Clock & Co., In re*, 104 Fed. (U. S.) 64, holds that as the insolvent debtor is presumed to intend the natural consequences of his act, the existence of intent in such cases on the part of the debtor may be *prima facie* inferred from the fact of the

transfer having been made while insolvent.

⁷⁶ *Githens v. Shiffer*, 112 Fed. (U. S.) 505.

⁷⁷ *Swarts v. St. Louis Fourth Nat. Bank*, 117 Fed. (U. S.) 1; *Schmechel Clock & Co., In re*, 104 Fed. (U. S.) 64.

⁷⁸ *Fishplate Clothing Co., In re*, 125 Fed. (U. S.) 986.

⁷⁹ *Wright Lumber Co., In re*, 114 Fed. (U. S.) 1011, holds that one who knows of his insolvency and who executes a mortgage to secure pre-existing indebtedness commits an act of bankruptcy.

ing to him property of greater value than the debt and receives back the difference in cash, evidence to this effect will ordinarily be considered conclusive of an act of bankruptcy.⁸⁰ The strength of the presumption of intent to prefer has been said to depend largely upon the relative amount of the transfer. The presumption would not be conclusive, and might not, perhaps, arise at all, where the payment was but a trifle,⁸¹ but where a large part has been transferred by an insolvent to one creditor, to the exclusion of all others, then the presumption is conclusive.⁸² Evidence has also been held conclusive where it shows that a debtor has conveyed property of greater value than the debt to one creditor and excluded other creditors.⁸³

§ 1813. Preference through legal proceedings.—Upon a petition in bankruptcy under the bankruptcy act of 1898, section three, subsection 3, the petitioners have the burden of showing that a preference was obtained through legal proceedings⁸⁴ and that the debtor allowed such judgment or preference and did not vacate or discharge it at least five days before the final disposition of the property; and they must also prove that he was insolvent at the time the preference was obtained.⁸⁵ The debtor's actual intent is wholly immaterial; it is sufficient under such circumstances if he allows his property to be taken by one creditor at the expense of others.⁸⁶

⁸⁰ *Johnson v. Wald*, 93 Fed. (U. S.) 640. Bankruptcy Act 1898, § 3, sub. a. div. 3; 30 Stat. L. 546; 1 Fed. Stat. Ann. 647.

⁸¹ *McGee*, In re, 105 Fed. (U. S.) 895.

⁸² *McGee*, In re, 105 Fed. (U. S.) 895; *Boyd v. Lemon Co.*, 114 Fed. (U. S.) 647; *Bloch*, In re, 109 Fed. (U. S.) 790; *Gilbert*, In re, 112 Fed. (U. S.) 951; *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812.

⁸³ *Johnson v. Wald*, 93 Fed. (U. S.) 640.

⁸⁴ "An act of bankruptcy arises where a debtor has "suffered or permitted, while insolvent, any creditors to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated, or discharged such preference."

⁸⁵ *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812; Fed. Stat. Ann. p. 647, 30 Stat. L. 546; *Storm*, In re, 103 Fed. (U. S.) 618; *Wilson v. Wilson*, 183 U. S. 191.

⁸⁶ *Reichman*, In re, 91 Fed. (U. S.) 624; *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812; *Ferguson*, In re, 95 Fed. (U. S.) 429; *Mayer*, In re, 93 Fed. (U. S.) 188; *Chapman*, In re, 99 Fed. (U. S.) 395; *Baker-Ricketson Co.*, In re, 97 Fed. (U. S.) 489; *Harper*, In re, 105 Fed. (U. S.) 900; "Legal Proceedings" defined in, *Rome Planing Mill*, In re, 96 Fed. (U. S.) 812; "Suffered or permitted" defined, *Kersten*, In re, 110 Fed. (U. S.) 929; but see, *Davis*

§ 1814. **General assignment.**—Evidence is conclusive of an act of bankruptcy if it shows that a general assignment⁸⁷ has been made for the benefit of creditors; and this is true even though the assignment is made without preference to creditors, without actual intent to defraud, and although the debtor be not insolvent.⁸⁸ Evidence tending to explain the motive which caused the debtor to make an assignment will not be heard, for such a defense in a case of general assignment has no legal force and effect.⁸⁹

§ 1815. **Admissions of insolvency.**—Admissions of the debtor that he is insolvent or words or letters to that effect are generally admissible to prove insolvency⁹¹ and are sufficient to sustain the issue unless overcome by other and stronger evidence; but to constitute an act of bankruptcy in itself, the admission must be in writing and must express a willingness of the debtor to be adjudged a bankrupt.⁹² The

v. Stevens, 104 Fed. (U. S.) 235; *Duncan v. Landis*, 106 Fed. (U. S.) 339; *Nelson*, In re, 98 Fed. (U. S.) 76.

"An act of bankruptcy exists when a debtor has made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States. Bankruptcy Act 1898, § 3, sub. a. div. 4 as amended in 1903.

"*West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836; *Clark v. American Mfg. Co.*, 101 Fed. (U. S.) 962; *Day v. Beck Hardware Co.*, 114 Fed. (U. S.) 834; *Meyer*, In re, 98 Fed. (U. S.) 976; *Davis v. Bohle*, 92 Fed. (U. S.) 325; *Grant*, In re, 106 Fed. (U. S.) 496; *Green*, In re, 106 Fed. (U. S.) 313; *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.*, 125 Fed. (U. S.) 974; *Bray v. Cobb*, 91 Fed. (U. S.) 102; *Vastbinder*, In re, 126 Fed. (U. S.) 417.

"*Green River Deposit Bank v. Craig*, 110 Fed. (U. S.) 137; *Bray v. Cobb*, 91 Fed. (U. S.) 102; *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836. The same was held under Act 1867; *Kraft*, In re, 4 Fed. (U. S.) 523; *Croft*, In re, 8 Biss. (U. S.) 188, 6 Fed. Cas. No. 3404.

"*Clark v. Henne & Meyer*, 127 Fed. (U. S.) 238; *Simonson v. Simshelmer*, 95 Fed. (U. S.) 948, 37 C. C. A. 337; *Carriage Co. v. Stengel*, 95 Fed. (U. S.) 637, 37 C. C. A. 210; *Romanow*, In re, 92 Fed. (U. S.) 510; *Perry v. Langley*, 19 Fed. Cas. No. 280.

"Bankruptcy Act 1898, § 3, sub. a. div. 5; 30 Stat. L. 546, 1 Fed. Stat. Ann. 649, an act of bankruptcy exists when the debtor admits in writing his inability to pay debts and his willingness to be adjudged a bankrupt on that ground.

"*Lange*, In re, 97 Fed. (U. S.) 197; *Marine Mach. Co.*, In re, 91 Fed. (U. S.) 630; *Mutual Mercantile Agency*, In re, 111 Fed. (U. S.) 929; *Rollins Gold &c. Min. Co.*, In re, 102 Fed. (U. S.) 982.

test, it has been held, is not that of ultimate ability or inability to pay debts, but of present inability to pay.⁹³ An admission by one of the members of a partnership of the inability of the firm to pay debts has been held binding upon the firm.⁹⁴ A corporation may admit its inability to pay through the officers or directors of the corporation. The statute requires no formal admission and no technical form of proof of asset from a corporation any more than it would of an individual,⁹⁵ but the admission of either must be in writing.

§ 1816. Discharge of bankrupt.—Creditors opposing the granting of a discharge to a bankrupt, upon the ground that the bankrupt knowingly and fraudulently concealed property belonging to the estate,⁹⁶ or made a false oath to the original schedule,⁹⁷ or did not keep proper books of account,⁹⁸ or failed to schedule certain debts,⁹⁹ or

⁹³ Kersten, In re, 110 Fed. (U. S.) 929.

⁹⁴ Kersten, In re, 110 Fed. (U. S.) 929, holding that the admission of one partner is not impaired or made of less binding effect upon the firm, because of an allegation as to the cause of the admission.

⁹⁵ Marine Mach. Co., In re, 91 Fed. (U. S.) 630; Rollins Gold &c. Min. Co., In re, 102 Fed. (U. S.) 982; but see, Baker-Ricketson Co., In re, 97 Fed. (U. S.) 489.

⁹⁶ Leslie, 119 Fed. (U. S.) 406; Baerncopf, 117 Fed. (U. S.) 975; Studebaker, In re, 127 Fed. (U. S.) 951; Scott, In re, 126 Fed. (U. S.) 981; Corn, In re, 106 Fed. (U. S.) 143; Bryant, In re, 104 Fed. (U. S.) 789; Grossman, In re, 111 Fed. (U. S.) 507; Howden, In re, 111 Fed. (U. S.) 723; Fitchard, In re, 103 Fed. (U. S.) 742; Roberts v. Buckley, 145 N. Y. 215, 39 N. E. 966; Wilcox, In re, 109 Fed. (U. S.) 628.

⁹⁷ Gailey, In re, 127 Fed. (U. S.) 538; Eaton, In re, 110 Fed. (U. S.) 731; Salisbury, In re, 113 Fed. (U. S.) 833; Blalock, In re, 118 Fed. (U. S.) 679, holds that the making

of a false oath by a bankrupt, in a proceeding in bankruptcy not against him, but against the corporation of which he was an officer and stockholder, was not ground for refusing his discharge.

⁹⁸ Brice, In re, 102 Fed. (U. S.) 114; Hixon, In re, 93 Fed. (U. S.) 440; Idzall, In re, 96 Fed. (U. S.) 314; Feldstein, In re, 8 Am. Bank. R. 160; Conley, In re, 120 Fed. (U. S.) 42, holds that the destruction by a bankrupt, at a time when he was contemplating the filing of a petition in bankruptcy, of the books of account of the firm, is ground for refusing a discharge. Chamberlain, In re, 125 Fed. (U. S.) 629, holds that although evidence may be introduced that a bankrupt failed to keep books fully showing his

⁹⁹ Beardsley, In re, 1 Nat. Bank. R. 457, 2 Fed. Cas. No. 1184; Kentucky Nat. Bank v. Carley, 127 Fed. (U. S.) 686; Blalock, In re, 118 Fed. (U. S.) 670; holds that omission of creditors from the schedule of a bankrupt is not ground for refusing his discharge.

made transfers in payment of fictitious debts,¹⁰⁰ or any other acts which would prevent his discharge from bankruptcy, have the burden of proving the grounds alleged by them.¹⁰¹ But when the opposing creditors have made out a *prima facie* case, by producing clear and convincing evidence,¹⁰² the bankrupt is then called upon to explain facts peculiarly within his own knowledge, and if he fails to do so, he is presumed to admit them.¹⁰³ He may show that property omitted from his schedule, when he asks to be discharged, is subject to exemption under state laws as being a homestead,¹⁰⁴ or that his wife claims a dower right in it, or the like.¹⁰⁵

true financial condition, yet the bankrupt may show that there was no concealment or destruction of books, no fraudulent disappearance or shrinkage of assets at any time; and the bankrupt may explain all his business transactions, and introduce as evidence such books and records as he did keep, and show that they contain no false or misleading entries; and the burden of proof is upon the opposing creditor to establish the ground for refusing a discharge by satisfactory and sufficient evidence that the bankrupt's failure to keep books of his financial standing was done with fraudulent intent to conceal the condition and in contemplation of bankruptcy; see also, *Van Ingen v. Schophofen*, 129 Fed. (U. S.) 352; *Allendorf*, In re, 129 Fed. (U. S.) 981.

¹⁰⁰ *Ferris*, In re, 105 Fed. (U. S.) 356; *Hudson v. Mercantile Nat. Bank*, 119 Fed. (U. S.) 346.

¹⁰¹ *Chamberlain*, In re, 125 Fed. (U. S.) 629; *Leslie*, In re, 119 Fed. (U. S.) 406; *Thomas*, In re, 92 Fed. (U. S.) 912; *Bauman v. Feist*, 107 Fed. (U. S.) 83; *Holman*, In re, 92 Fed. (U. S.) 512; *Hixon*, In re, 93 Fed. (U. S.) 440; *Hoffman*, In re, 102 Fed. (U. S.) 979; *Hirsch*, In re,

97 Fed. (U. S.) 571; *McGurn*, In re, 102 Fed. (U. S.) 743.

¹⁰² *T. R. McGurn*, 4 Am. Bank. R. 461, 102 Fed. (U. S.) 743; *Wetmore*, In re, 99 Fed. (U. S.) 703; *Bryant*, In re, 104 Fed. (U. S.) 789; *Gaylord*, In re, 106 Fed. (U. S.) 833; *Hirsch*, In re, 97 Fed. (U. S.) 571; *Chamberlain*, In re, 125 Fed. (U. S.) 629; *Semmel*, In re, 118 Fed. (U. S.) 487, holds that a bankrupt who in the schedules accompanying his petition, declares he has no property, yet claims certain property under state exemption, is not to be charged with concealing property, so as to lose his right to a discharge.

¹⁰³ *Wood*, In re, 98 Fed. (U. S.) 972; *Leslie*, In re, 119 Fed. (U. S.) 406; *Doyle*, In re, 3 Nat. Bank. R. 782, 7 Fed. Cas. No. 4052; *Meyers*, In re, 96 Fed. (U. S.) 408.

¹⁰⁴ *Todd*, In re, 112 Fed. (U. S.) 315; *Coddington*, In re, 126 Fed. (U. S.) 891; *Johnson*, In re, 118 Fed. (U. S.) 312; *Staunton*, In re, 117 Fed. (U. S.) 507; *Kane*, In re, 127 Fed. (U. S.) 552; *Le Vay*, In re, 125 Fed. (U. S.) 990; *Olewine*, In re, 125 Fed. (U. S.) 840; *Bankruptcy Act 1893*, § 6.

¹⁰⁵ *Cravens v. Shippen*, 25 Ky. L. R. 1322, 77 S. W. 929; *Parschen*, In

§ 1817. **Revocation of discharge.**—If creditors apply for a revocation of the discharge they must not be guilty of laches, and they must prove that the discharge was obtained through fraud of the bankrupt, or that the facts did not warrant the discharge, and that they did not know of the fraud in time to resist the discharge.¹⁰⁶ It has also been held that a creditor who has had ample opportunity to introduce evidence against a discharge cannot have a case reopened for the purpose of introducing additional evidence, a year or more after the proofs have been formally closed.¹⁰⁷

§ 1818. **Proof of claims.**—Whenever a creditor files his verified claim as directed by the statute, he has established the claim *prima facie*;¹⁰⁸ and the party objecting to such claim has the burden of showing that the sworn statement is incorrect or he must at least produce evidence which will equal in probative force the sworn statement of the claimant.¹⁰⁹ Any party in interest may object to a claim and is entitled to examine the claimant and other witnesses, if their

re, 119 Fed. (U. S.) 976; *Duffy*, In re, 118 Fed. (U. S.) 926.

¹⁰⁶ *Roosa*, In re, 119 Fed. (U. S.) 542; Bankruptcy Act 1898, § 15, 30 Stat. L. 546, U. S. Comp. St. 1901, p. 3421; *Hoover*, In re, 105 Fed. (U. S.) 354; *Hansen*, In re, 107 Fed. (U. S.) 252; see *Paine*, In re, 127 Fed. (U. S.) 246.

¹⁰⁷ *Kentucky Nat. Bank v. Carley*, 127 Fed. (U. S.) 686.

¹⁰⁸ Bankruptcy Act 1898, § 57, "(a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. (b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instru-

ment is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim."

¹⁰⁹ *Sumner*, In re, 101 Fed. (U. S.) 224, holds that, "the burden of proof is not upon the objector to disprove the claim, but he shall produce evidence whose probative force shall be equal to, or greater than the evidence offered in the first instance by the claimant. If the creditor shall have complied with section 57a, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted, unless from some circumstances the referee demands further evidence from him, or unless an objection is interposed . . . which shall overthrow the presumptive case made by the claimant." See also, as to verification of claim, *Pancoast*, In re, 129 Fed. (U. S.) 643.

attendance can be secured without material delay; but the proceedings of the court should not be suspended and delayed when the witness is beyond the jurisdiction of the court unless the evidence is necessary to a just determination of the case.¹¹⁰ When, however, the referee is not satisfied with the evidence introduced, he may suspend action for a reasonable length of time in order to examine the bankrupt, but if this cannot be done, then the referee should decide upon the evidence presented.¹¹¹ It was held under a former act that, in case the bankrupt is dead, the creditor is a competent witness against the estate,¹¹² and that a wife may prove her claim against her husband's estate by testimony of the bankrupt, and that she is a competent witness herself.¹¹³

§ 1819. **Compositions.**—Examinations of the alleged bankrupt for the purpose of assisting the creditors in determining whether or not they will accept certain compositions¹¹⁴ as fair to all creditors, may be demanded by any creditor who opposes the adoption of the offer; and such creditor may require the bankrupt to produce his books and papers for examination.¹¹⁵ Any creditor may show that the proposed composition is not to the best interest of all creditors and may examine witness to that effect.¹¹⁶ Evidence of a preferred claim of one creditor is not admissible where a composition offered by the bankrupt has been accepted, and where the creditor failed to claim divi-

¹¹⁰ Sumner, In re, 101 Fed. (U. S.) 224; Cliffe, In re, 97 Fed. (U. S.) 540; but see, Watkinson & Co., In re, 130 Fed. (U. S.) 218.

¹¹¹ Dreeben, In re, 101 Fed. (U. S.) 110; Bankruptcy Act 1898, § 57, sub. f., provides that, "Objections to claims shall be heard as soon as the convenience of the court and the best interests of the estates will permit."

¹¹² Merrill, In re, 17 Fed. Cas. No. 9466, holds the proving of a debt is a proceeding in rem and not an action against the bankrupt or his personal representative of the bankrupt dead.

¹¹³ Richards, In re, 20 Fed. Cas.

No. 11770; Bean, In re, 14 Nat. Bank. R. 182, 2 Fed. Cas. No. 1166.

¹¹⁴ Bankruptcy Act 1898, § 21, sub. f. & g. provide that, "A certified copy of an order of court confirming or setting aside a composition, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."

¹¹⁵ Godwin, In re, 122 Fed. (U. S.) 111; Bankruptcy Act 1898, § 12, sub. c.; Proby, In re, 17 Nat. Bank. R. 175, 20 Fed. Cas. No. 11439; Schwab, In re, 8 Ben. (U. S.) 353, 21 Fed. Cas. No. 12499.

¹¹⁶ Keller, In re, 14 Fed. Cas. No. 7654.

dends within a year, if the claim was omitted from the schedule in good faith.¹¹⁷

§ 1820. **Record evidence.**—"Certified copies of proceedings before a referee, or of papers, when issued by the clerk, or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence."¹¹⁸ The inventory of a voluntary bankrupt or a certified copy thereof has been held competent against him in another suit, to prove his financial standing.¹¹⁹ An adjudication in bankruptcy, correct in form, is conclusive of the fact decreed and cannot be attached collaterally unless the attaching party can show some fraud or collusion in obtaining the decree.¹²⁰ Testimony of witnesses taken before the referee upon other issues cannot be introduced as evidence in another proceeding as against a claimant unless he was a party to and was allowed the privilege of cross-examination.^{120*} But the testimony or deposition of a bankrupt, even if not signed or corrected by the bankrupt, given at any time during the course of the proceedings, either in resisting the petition to be thrown into bankruptcy or the hearing for discharge, may be admitted in later proceedings, where the person who took the notes testifies that they were truly and correctly taken.¹²¹

¹¹⁷ Lane, In re, 125 Fed. 772.

¹¹⁸ Bankruptcy Act 1898, § 21, sub. d.; Keller, In re, 109 Fed. (U. S.) 118; this includes approval of bond of trustee, confirmation or setting aside of a composition, granting or setting aside of a discharge, Act 1898, § 21, subs. e. f. g. div. 9.

¹¹⁹ Dupuy v. Harris, 6 B. Mon. (Ky.) 534.

¹²⁰ Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799; Michaels v. Post, 21 Wall. (U. S.) 398; Columbia Real Estate Co., In re, 101 Fed. (U. S.) 965; Graham v. Boston R. Co., 118 U. S. 161, 6 Sup. Ct. 1009; Roberts v. Shroyer, 68 Ind. 64; Livermore v. Swasey, 7 Mass. 213; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Blissell v. Post, 4 Day. (Conn.) 79.

^{120*} Keller, In re, 109 Fed. (U. S.) 118.

¹²¹ Bard, In re, 108 Fed. (U. S.) 208; Wiswall v. Campbell, 93 U. S. 347, 23 L. ed. 923, holds that, "a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankruptcy court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated." Wilcox, In re, 109 Fed. (U. S.) 628; Horgan, In re, 39 C. C. A. 118, 98 Fed. (U. S.) 414. As to the judgment of the referee being conclusive upon the parties until set aside, see, Rider, In re, 96 Fed. (U. S.) 811; Coyington,

§ 1821. **Discharge in bankruptcy as a defense.**—As a general rule, except in instances in which it is otherwise provided by the bankruptcy law itself, a discharge in bankruptcy releases the bankrupt from all his provable debts; but it is generally regarded as a personal defense to the bankrupt and his representatives and must be affirmatively pleaded and proved as such. The burden is upon him to show the discharge;¹²² but a certified copy of the order of the court granting the discharge is sufficient evidence thereof, and of the jurisdiction of the court, and of regularity of the proceedings.¹²³ Where a bankrupt defends on the ground of his discharge in bankruptcy, he must generally show that the debt sued on was scheduled in time for proof and allowance; but it is held that where it appears on its face to be such as is *prima facie* provable, he is not required to allege that it was provable in the bankruptcy proceedings.¹²⁴ Evidence is generally admissible, on the other hand, to show that the debts in question were not provable and were created by fraud, embezzlement, misappropriation or defalcation for the purpose of showing that they are not affected by the discharge.¹²⁵

In re, 110 Fed. (U. S.) 143; Stout, In re, 109 Fed. (U. S.) 794.

¹²² Gregory v. Edgerly, 17 Neb. 374, 22 N. W. 703; Cooper v. Cooper, 9 Stew. (N. J. Eq.) 566; Boas v. Hetzel, 3 Pa. St. 298.

¹²³ Hays v. Ford, 55 Ind. 52; Morse v. Cloyes, 11 Barb. (N. Y.) 100; Pennell v. Percival, 13 Pa. St. 197; Bankruptcy Act 1898, § 21, sub. f., states that a certified copy shall be evidence of jurisdiction of the court, regularity of proceedings and the fact that the order was made.

¹²⁴ Bailey v. Gleason, 56 Atl. 537; but it need not appear that they

were scheduled in time if the creditor had due notice or actual knowledge of the proceedings. Fider v. Mannheim, 78 Minn. 309, 81 N. W. 2.

¹²⁵ Ruff v. Milner, 92 Mo. App. 620; Bullis, In re, 68 App. Div. (N. Y.) 508, affirmed in 171 N. Y. 698, 64 N. E. 1119; Lewensohn, In re, 99 Fed. (U. S.) 73; Bennett v. Justices, 166 Mass. 126, 44 N. E. 121; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763; Cole, In re, 106 Fed. (U. S.) 837; Gerner v. Yates, 61 Neb. 100, 84 N. W. 596; Warren v. Robinson, 21 Utah 429, 61 Pac. 28.

CHAPTER LXXXIX.

BILLS AND NOTES.

Sec.	Sec.
1822. Generally.	1833. Mistake.
1823. Burden of proof.	1834. Fraud and duress.
1824. Presumptions.	1835. Presentment and demand.
1825. Execution.	1836. Waiver.
1826. Consideration.	1837. Protest and notice.
1827. Ownership.	1838. Notary's certificate.
1828. Bona fide holders.	1839. Acceptance.
1829. Possession.	1840. Payment.
1830. Indorsement.	1841. Usury.
1831. Circumstances attending execution.	1842. Declarations and admissions.
1832. Conditions.	1843. Parol evidence.

§ 1822. **Generally.**—It is said by Professor Greenleaf that: "As the acceptor of a bill of exchange and the maker of a promissory note stand in the same relation to the holder, the note being of the nature of a bill drawn by a man on himself, and accepted at the time of drawing, the rules of evidence are, in both cases, the same. The liabilities of the parties to the instruments are of three general classes:—(1) primary and absolute liability; such as that of the acceptor of a bill or maker of a note, to the payee, indorsee, and bearer; (2) secondary and conditional liability; such as that of the drawer of a bill, to the payee or indorsee, and of the indorser to the indorsee; (3) collateral and contingent liability; such as that of the acceptor to the drawer or indorser, and of the drawer to the acceptor. And, accordingly, the action upon a bill or note will be brought, either; (1) by the payee or bearer against the acceptor or maker; (2) by the indorsee against the acceptor or maker; (3) by the payee against the drawer of a bill; (4) by the indorsee against the drawer of a bill, or against the indorser of a bill or note; (5) by the drawer or indorser of a bill against the acceptor; (6) by the acceptor against the drawer."¹

¹ 2 Greenleaf Ev. § 154.

§ 1823. **Burden of proof.**—The material allegations on the part of the plaintiff generally involve four principal points, which, if not admitted, he must prove; first, the existence of the instrument, as described in the declaration or complaint; second, that the defendant was a party to it, and the nature of his contract;² third, the plaintiff's interest in and right of action upon the instrument;³ and fourth, the breach of the contract of the defendant.⁴ The plaintiff will not, however, be required to prove a consideration, unless in special cases, where his own title is impeached. As a general rule, the instrument must be produced at the trial.⁵ It seems formerly to have been the rule to require the plaintiff to prove the signature⁶ when not admitted, but this is not now ordinarily required, unless its genuineness is denied under oath or properly put in issue; and it is said in general terms that a promissory note or bill of exchange is *prima facie* evidence of a certain debt, and the burden of proof is generally upon the party who attacks the instrument.⁷ So, it has been held that a bill or note is admissible without proof of signature if not denied, and where it is denied but slight proof may justify its admission in evidence.⁸ The date of an instrument is *prima facie* evidence of the

²As to the manner and sufficiency of such proof, see *Sayer v. Kitchen*, 1 Esp. 209 (proving parol acceptance); *Roberts v. Bethell*, 14 Eng. L. Eq. 218; *Glossop v. Jacob*, 4 Campb. 227, 1 Stark, 69; *York v. Blott*, 5 M. & S. 71; *Norton v. Seymour*, 3 M. G. & Sc. 792.

³See *King v. Milsom*, 2 Campb. 5; *Royce v. Nye*, 52 Vt. 372; *Robinson v. Smith*, 62 Minn. 62, 64 N. W. 90.

⁴*Wallace v. McConnell*, 13 Pet. (U. S.) 136; *Story Bills*, §§ 112, 228.

⁵*Vanaucken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509; *Sebree v. Dorr*, 9 Wheat. (U. S.) 559; *Bank v. Tuck*, 96 Ga. 456, 23 S. E. 467; *Hansard v. Robinson*, 7 B. & C. 90, 9 D. & R. 860; *Ramuz v. Crowe*, 11 Jur. 715, 1 Exch. 167; see in case of loss, *Means v. Kendall*, 35 Neb. 693; *Swatts v. Bowen*, 141 Ind. 222, 40 N. E. 1057; *Holle v. Rathbone*, 98 Mich. 323, 57 N. W. 183.

⁶That this is sufficient to admit the whole note, see, *Simpson v. Davis*, 119 Mass. 269, 20 Am. R. 324; *Rickey v. Morrison* 69 Mich. 139, 37 N. W. 56, the execution and acknowledgment of a mortgage describing the note as signed by the mortgagor and maker is *prima facie* evidence of its genuineness; *Patton v. Lund*, 114 Iowa 201, 86 N. W. 296.

⁷*Shaw v. Jacobs*, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. 411, 21 L. R. A. 440; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Dean v. Ford*, 180 Ill. 309, 54 N. E. 417; *Threshing Mach. Co. v. Peterson*, 51 Kans. 713, 33 Pac. 470; *Dewey v. Toledo*, 91 Mich. 351, 51 N. W. 1063; *Harvey v. Harvey*, (Tex. Civ. App.) 40 S. W. 185; but see, *Cox v. Cox's Exrs.*, (Ky.) 79 S. W. 220.

⁸*Holmes v. Cook*, 50 Wis. 172, 6

time when it was made, and the burden is upon the party disputing the date.⁹ The burden, however, is upon the holder of a note to prove the authority of an agent to bind the principal, or to show that the principal has by his subsequent acts ratified the instrument.¹⁰ In an action upon a negotiable instrument, if the plaintiff produces the paper, proves the signature and indorsements, he may usually recover, unless the defendant is able to overthrow these facts or the presumptions therefrom by satisfactory proof.¹¹ In other words the negotiable instrument, when its execution is not denied, is *prima facie* evidence of the debt.¹²

§ 1824. **Presumptions.**—Possession is generally *prima facie* evidence of ownership, and the indorsee or holder of a negotiable instrument, where no indorsement is necessary, is presumed by the law merchant to have obtained it before maturity, for value and without knowledge of any defects, and the burden of producing evidence to the contrary is usually upon the party disputing this fact.¹³ The date of a negotiable instrument is *prima facie* evidence of the time the

N. W. 507; *Jewell v. Walker*, 109 Ga. 241, 34 S. E. 337.

⁹ *Cowing v. Altman*, 71 N. Y. 435, 27 Am. R. 70; *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197; *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57.

¹⁰ *Miller v. House*, 87 Iowa 737, 25 N. W. 899; *New York v. Iron Mine v. Citizens' Bank*, 44 Mich. 344, 6 N. W. 823.

¹¹ *Graves v. Bonham Nat. Bank*, 77 Tex. 555, 14 S. W. 163; *Mechanic's Bank v. Livingston*, 6 Misc. (N. Y.) 81, 26 N. Y. S. 25, 55 N. Y. St. 394.

¹² *Rickey v. Morrison*, 69 Mich. 139, 37 N. W. 56; *McCallum v. Driggs*, 35 Fla. 277, 17 So. 407.

¹³ *Swift v. Smith*, 102 U. S. 442; *Wayland University v. Boorman*, 56 Wis. 657, 14 N. W. 819; *Beer v. Clifton*, 111 Cal. 51, 43 Pac. 411; *Wyman v. Colorado Nat. Bank*, 5 Colo. 30, 40 Am. R. 133; *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 564; *Voorhees v. Fisher*, 9 Utah 303, 34 Pac. 64; *Atlas Bank v. Doyle*, 9 R.

I. 76, 98 Am. Dec. 368, 11 Am. R. 219; *Lamb v. Burke*, 132 Pa. St. 413, 20 Atl. 685; *Hall v. Emporia Bank*, 133 Ill. 234; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Hall v. Allen*, 37 Ind. 541; *Parker v. Gilmore*, 10 Kans. App. 527, 63 Pac. 20; *Hargis v. Louisville Trust Co.*, 17 Ky. L. R. 218, 30 S. W. 877; *Wing v. Martel*, 95 Me. 535, 50 Atl. 705; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Little v. Mills*, 98 Mich. 423, 57 N. W. 266; *Emanuel v. White*, 34 Miss. 56, 69 Am. Dec. 385; *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 27 S. W. 397, 46 Am. St. 424, 26 L. R. A. 568; *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449; *Middleton v. Griffith*, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. 617; *Davis v. Bartlett*, 12 Ohio St. 534, 80 Am. Dec. 375; *Mills v. Barber*, 1 M. & W. 425, note in 11 Am. St. 323, in which the authorities are also cited as to the effect of showing of fraud in the inception of the instrument.

instrument was executed.¹⁴ This is also true regarding an assignment or transfer; it is presumed to have been made at the date of the note and before maturity of the note.¹⁵ The burden is upon the party disputing such presumption.¹⁶ A note is presumed to be payable where it is executed, unless something is shown to the contrary.¹⁷ A bill of exchange is presumed to be accepted where dated,¹⁸ and the drawer is presumed to promise to pay at that place.¹⁹ The presumption concerning days of grace allowed upon a foreign bill of exchange or note will usually be the same as under the law merchant, until the statute of the foreign state is proved.²⁰ It has been held that a note payable at a bank is presumed to be subject to the known usage and customs of the bank so long as they are lawful,²¹ and these customs may be shown by parol. Negotiable instruments are presumed to be governed by and executed with reference to the law of the designated place of payment.²² This presumption, however, has been held to be

¹⁴ *Collins v. Driscoll*, 69 Cal. 550, 11 Pac. 244; *Elyton Co. v. Hood*, 121 Ala. 373, 25 So. 745.

¹⁵ *McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 305; *Pettis v. Westlake*, 4 Ill. 535; *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600; *Anderson v. Weston*, 37 Eng. Com. L. 206; *Hutchins v. Flintge*, 2 Texas 473, 47 Am. Dec. 659; *Colburn v. Averill*, 30 Maine 310, 50 Am. Dec. 630; *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; *Union Bank v. Willis*, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; see also, *Murto v. Lemon*, (Colo. App.) 75 Pac. 160.

¹⁶ *Mobley v. Ryan* 14 Ill. 51, 56 Am. Dec. 488; *Smith v. Newlin*, 89 Am. Dec. 194.

¹⁷ *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. R. 421; *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. R. 161; *Smith v. Philbrick*, 10 Gray (Mass.) 252, 69 Am. Dec. 315; *Bigelow v. Burnham*, 83 Iowa 120, 49 N. W. 104; *Strawbridge v. Robinson*, 10 Ill. 470, 50 Am. Dec. 420, where the maker resides; *Bailey v. Birkhofer*, (Iowa) 98 N. W. 594.

¹⁸ *Wittkowski v. Smith*, 84 N. Car. 671, 37 Am. R. 632; *Tuckerman v. Hartwell*, 3 Me. 147, 14 Am. Dec. 225.

¹⁹ *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. R. 239; *Prentiss v. Savage*, 13 Mass. 20; *Warner v. Citizens' Bank &c.*, 6 S. Dak. 152, 60 N. W. 746; *Brown v. Jones*, 113 Ind. 46, 13 N. E. 857, 152; *Tuckerman v. Hartwell*, 3 Me. 147, 14 Am. Dec. 225.

²⁰ *Wood v. Corl*, 4 Metc. (Mass.) 203; *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 21 Am. St. 227.

²¹ *Smith v. Whiting*, 12 Mass. 6, 7 Am. Dec. 25; *Harrison v. Crowder*, 6 S. & M. 464, 45 Am. Dec. 290; *Bowen v. Newell*, 2 Duer (N. Y.) 584, 13 N. Y. 290, 64 Am. Dec. 550; *Mills v. Bank of United States*, 11 Wheat. (U. S.) 431; *Wallace v. Gwin*, 15 La. 223, 35 Am. Dec. 202.

²² *Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 21 Am. St. 227; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 306; *Wiseman v. Chiappella*, 23 How. (U. S.) 368; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Shoe*

only *prima facie* and is not necessarily conclusive,²³ as between the original parties. A foreign law or the law of another place of payment must be proved as a fact, in order to have it govern the instrument.²⁴ In the absence of proof of the foreign law governing negotiable paper, it will be presumed, in many, but not in all jurisdictions, that the common law rules.²⁵ Other presumptions and other rules as to the burden of proof will be considered in connection with particular phases of the general subject in subsequent sections.

§ 1825. **Execution.**—Parol evidence is generally admitted to show that a negotiable instrument was executed on a day different from that named in the instrument and this evidence may show the cause of the difference between the apparent date and the time of its actual execution.²⁶ It may also be shown, in a proper case, that an assignment or transfer was on a day different from the date named, and that an indorsement in blank was executed at the time or before the date named.²⁷ Anything irregular or that would indicate fraud in the making or transferring of the instrument may cast the burden of proving good faith upon the holder.²⁸ Evidence that the maker was under duress, was sick or intoxicated at the time of making the note,

& *Leather &c. v. Wood*, 142 Mass. 563, N. E. 753; *Ellis v. Bank*, 7 How. (U. S.) 294, 49 Am. Dec. 63; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. R. 518; *Carter v. Union Bank*, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89; *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141; *Brown v. Gates*, (Wis.) 97 N. W. 221, 98 N. W. 205.

²³ *Thornton v. Dean*, 19 S. Car. 583, 45 Am. R. 796; *Bigelow v. Burnham*, 90 Iowa 300, 57 N. W. 865, 48 Am. St. 442; *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311; *Jones v. Fidelity Loan &c.*, 7 S. Dak. 122, 63 N. W. 553.

²⁴ *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434; *Hall v. Kimball*, 58 Ill. 58; *Pryor v. Wright*, 14 Ark. 189; see Vol. I, § 49.

²⁵ *Patterson v. Carrell*, 60 Ind. 128; *Brown v. Ferguson*, 4 Leigh. (Va.) 37, 24 Am. Dec. 707, the courts take judicial notice of the common law, including the law merchant: Vol. I, § 47. But the common law as understood by the courts of the state where the action is instituted will generally govern in such cases: Vol. I, § 46, n. 50, and § 49, n. 63.

²⁶ *Barlow v. Buckingham*, 68 Iowa 169, 26 N. W. 58; *Burns v. Moore*, 76 Ala. 339, 52 Am. R. 332; *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197; *Collins v. Driscoll*, 69 Cal. 550, 11 Pac. 244.

²⁷ *Blake v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53; *Colburn v. Averill*, 50 Am. Dec. 630.

²⁸ *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192; *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. 327; *Haggland*

that the note has been diverted from its purpose, that it was delivered in, or that it was given for, a patent right, has also been held to shift the burden of proving good faith on to the holder.²⁹

§ 1826. **Consideration.**—A promissory note imports a consideration, and the burden of proving the failure of consideration rests upon the defendant.^{30*} This same presumption is true concerning all negotiable instruments in the absence of evidence to the contrary.³⁰ A statement in a note "for value received" raises the presumption of a consideration, but it is not conclusive, and may be inquired into and

v. Stuart, 29 Neb. 69, 45 N. W. 263; *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 29 N. Y. St. 448, 16 Am. St. 836; *Davis v. Bartlett*, 12 Ohio St. 534, 80 Am. Dec. 375; *Dunn v. Canton Nat. Bank*, 11 S. Dak. 305, 77 N. W. 111; *McCaaker v. Enright*, 64 Vt. 488, 24 Atl. 249, 33 Am. St. 938; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487, 50 Am. St. 860; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. St. 600.

* *Holland v. Barnes*, 53 Ala. 83, 25 Am. R. 595; *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. R. 40; *Lamb v. Burke*, 132 Pa. St. 413, 20 Atl. 685; *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205, 72 N. W. 467.

** *Pritchett v. Sheridan*, 29 Ind. App. 81, 63 N. E. 865; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746; *Reed v. Pueblo Bank*, 23 Colo. 380, 48 Pac. 507; *Nickerson v. Sheldon*, 33 Ill. 372, 85 Am. Dec. 280; *McCormick Harvesting Mfg. Co. v. Jacobson*, 77 Iowa 582, 42 N. W. 499; *Small v. Clewley*, 62 Me. 155, 16 Am. R. 410; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. R. 322; *Huntington v. Shute*, 180 Mass. 371, 62 N. E. 380; *Manistee Bank v. Seymour*,

64 Mich. 59, 31 N. W. 140; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 54 Am. St. 653, 30 L. R. A. 286; *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376; *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487, 43 N. Y. St. 662; *Knight v. Pugh*, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99; *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 38 N. Y. St. 56, 24 Am. St. 424, 12 L. R. A. 845; *Lowrey v. Danforth*, 95 Mo. App. 441, 69 S. W. 39; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899.

* *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. 424, 12 L. R. A. 845; *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241; *Averett v. Booker*, 15 Gratt. (Va.) 163, 76 Am. Dec. 203; *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *First Nat. Bank v. Spear*, 12 S. Dak. 108, 80 N. W. 166; *Eckel v. Murphy*, 15 Pa. St. 488, 53 Am. Dec. 607; *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N. E. 713; *Germania Bank v. Michaud*, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286; *Robson v. Dayton*, 111 Mich. 440, 69 N. W. 834; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 74; *Small v. Clewley*, 62 Me. 155, 16 Am. R. 410.

contradicted by evidence.³¹ The burden is on the maker to show the failure of consideration,³² or any other defense concerning the consideration that will defeat the object of the instrument, if the instrument is regular on its face. The consideration is presumed to be a valid one until the contrary is proved, unless otherwise provided by statute.³³ Anything recited in a note and which is equivalent to the words "for value received" is prima facie evidence of a consideration whether the note is negotiable or not,³⁴ and any one alleging want of consideration as a defense has the burden of proving the want of consideration.³⁵ Where an indorser is sued upon an instrument, the burden is upon him to prove that he signed after maturity and without any new consideration if he attempts to use this as a defense.³⁶ Parol evidence is not admissible generally to vary or to contradict the consideration if it is a part of the contract;³⁷ but it has been held that parol evidence is admissible to prove a failure of consideration or to show that it was illegal.³⁸ If the original consideration is shown to have been illegal, the presumption is against the holder and he must

³¹ *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Parsons v. Frost*, 55 Mich. 230, 21 N. W. 303; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

³² *Scott v. Fleetford*, 13 Colo. App. 150, 51 Pac. 485; *McMicken v. Safford*, 197 Ill. 540, 64 N. E. 540; *Smith v. Griswold*, 95 Iowa 684, 64 N. W. 624; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Crosby v. Ritchey*, 47 Neb. 924, 66 N. W. 1605; *Sayre v. Mohney*, 35 Ore. 141, 50 Pac. 526.

³³ *McCallum v. Driggs*, 35 Fla. 277, 17 So. 407.

³⁴ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. 170; *Huntington v. Shute*, 180 Mass. 371, 62 N. E. 371; *Parsons v. Frost*, 55 Mich. 230, 21 N. W. 303; *Messmore v. Morrison*, 172 Pa. St. 300, 34 Atl. 45; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Conrad Seipp Brewing Co. v. McKlitricks*, 86 Mich. 191, 48 N. W. 1086;

Averett v. Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

³⁵ *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Towsey v. Shook*, 3 Blackf. (Ind.) 267, 25 Am. Dec. 108; *Smith v. Griswold*, 95 Iowa 684, 64 N. W. 624; *Jennison v. Stafford*, 1 Cush. (Mass.) 168, 48 Am. Dec. 594.

³⁶ *LaBelle Sav. Bank v. Taylor*, 69 Mo. App. 99.

³⁷ *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Allen v. Furbish*, 4 Gray (Mass.) 504, 64 Am. Dec. 87.

³⁸ *Farmers' Sav. Bank v. Hansmann*, 114 Iowa 49, 86 N. W. 31; *Bigelow v. Bigelow*, 93 Me. 439, 45 Atl. 513; *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57, 15 Am. St. 283, 1 L. R. A. 594; *Foster v. Clifford*, 44 Wis. 569, 28 Am. R. 603; *Anderson v. Lee*, 73 Minn. 397, 76 N. W. 24; *Roe v. Kiser*, 62 Ark. 92, 32 S. W. 534, 54 Am. St. 288.

prove that he purchased for value and without notice of illegality.³⁹ The failure or lack of consideration may be proved by parol, for it is a competent defense to an action upon the instrument.⁴⁰ Such evidence has also been held admissible to show that the instrument was given as collateral for a debt⁴¹ or that the note was to be credited to the maker's account.⁴²

§ 1827. **Ownership.**—Where a particular individual or firm is named as the payee of a note such party is generally presumed, in the absence of anything to the contrary, to be the owner, but where the bill or note is payable to⁴³ bearer, then the burden is upon the maker or drawer to show that the bearer or holder is not the owner.⁴⁴ When the payee indorses a negotiable instrument, it is presumed that he has transferred it to another.⁴⁵ A blank indorsement is presumed to rest title in the one to whom it is delivered.⁴⁶ An indorsement for collection is not presumed to pass any beneficial ownership.⁴⁷ Parol evidence, it has been held, may be used to show these facts or that the

³⁹ *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. R. 40; *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019; *Marion County v. Clark*, 94 U. S. 278; *Fuller v. Hutchings*, 10 Cal. 523, 70 Am. Dec. 746; *Paton v. Colt* 5 Mich. 505, 72 Am. Dec. 58.

⁴⁰ *Brady v. Henry*, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. R. 543; *Corlies v. Howe*, 11 Gray (Mass.) 125, 71 Am. Dec. 693; *Taylor v. Dansby*, 42 Mich. 82, 3 N. W. 267; *Walker v. Haggerty*, 30 Neb. 120, 46 N. W. 221; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. R. 85; *Van Haagen Soap Co.'s Estate*, 141 Pa. St. 214, 21 Atl. 598, 12 L. R. A. 223; *Trustees v. Saunders*, 84 Wis. 570, 54 N. W. 1094; *Labbee v. Johnson*, 66 Vt. 234, 28 Atl. 986; *Martin v. Stubbings*, 27 Ill. App. 121, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; *Dowden v. Wood*, 124 Ind. 233, 24 N. E. 1042; *Pembroke v. Hayes*, 114 Iowa 576, 87 N. W. 492; *Harris v. Alcock*, 10 G. & J. (Md.) 226, 32 Am. Dec. 158.

⁴¹ *Keeler v. Commercial Printing Co.*, 16 Wash. 526, 48 Pac. 239.

⁴² *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80.

⁴³ *Hayward v. Grant*, 13 Minn. 165, 97 Am. Dec. 228.

⁴⁴ *Gaskell v. Patton*, 58 Iowa 163, 12 N. W. 140. But it was held that no presumption of ownership arose where a note not payable to bearer and not indorsed was found among the papers of a deceased person who was not the payee. *Hair v. Edwards*, 104 Mo. App. 213, 77 S. W. 1089.

⁴⁵ *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99; *Farrar v. Gilman*, 19 Me. 440, 36 Am. Dec. 766.

⁴⁶ *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500; *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99.

⁴⁷ *Freeman's Bank v. National Tube Works*, 151 Mass. 413, 24 N. E. 779, 21 Am. St. 461, 8 L. R. A. 42; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. R. 429.

instrument was indorsed for some particular purpose and not to pass beneficial title.⁴⁸

§ 1828. **Bona fide holders.**—The owner of a negotiable instrument is presumed to have obtained it in good faith, for a valuable consideration, before maturity and without knowledge of any of the defenses against the maker, and the burden is upon the defendant who sets up the contrary.⁴⁹ And this presumption obtains in favor of one to whom the instrument is properly indorsed.⁵⁰ The burden has been held to be upon the holder, however, to show that he is a bona fide purchaser, when fraud is shown in the execution, or when payment is proved; and all of these defenses may be proved by parol.⁵¹

§ 1829. **Possession.**—Possession of a note or acceptance is generally prima facie evidence of ownership,⁵² but this presumption may be rebutted.⁵³ The party in actual possession of negotiable instruments is presumed to have authority to collect them, but the payment must be made in good faith to them in order to exclude the claims of another party who may claim ownership of the notes.⁵⁴ Payment will

⁴⁸ *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Breneman v. Furniss*, 90 Pa. St. 186, 35 Am. R. 657; *Dale v. Gear*, 38 Conn. 15, 9 Am. R. 353.

⁴⁹ *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 27 S. W. 397, 26 L. R. A. 568; *Little v. Mills*, 98 Mich. 423, 57 N. W. 266; *McGee v. Prouty*, 9 Metc. (Mass.) 547, 43 Am. Dec. 400; *Hall v. First Nat. Bank*, 133 Ill. 234, 24 N. E. 546; *Harger v. Worrell*, 69 N. Y. 370, 25 Am. R. 206.

⁵⁰ *Owens v. Snell*, 29 Ore. 483, 44 Pac. 827.

⁵¹ *Fulton Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, 35 Am. St. 376; *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. R. 40; *Skinner v. Raynor*, 95 Iowa 536, 64 N. W. 601; *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627; *Fawcett v. Powell*, 43 Neb. 437, 61 N. W. 586; *Commercial Bank v. Burgwyn*, 108

N. Car. 62, 12 S. E. 952, 23 Am. St. 49, 17 L. R. A. 326.

⁵² *Hogan v. Dreifus*, 121 Mich. 453, 80 N. W. 254; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Dickerson v. Cass Co.*, (Iowa) 89 N. W. 15; *Hall v. Allen*, 37 Ind. 541; *Bahnsen v. Gilbert*, 55 Minn. 334, 56 N. W. 1117; *Middleton v. Griffith*, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. 617; *Jackson v. Love*, 82 N. Car. 405, 33 Am. R. 685; *Murray v. Lardner*, 2 Wall (U. S.) 110; *Goodman v. Simonds*, 20 How. (U. S.) 367; *Brown v. Spofford*, 95 U. S. 477; *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Ad. & El. 784; *Middleton v. Bamed*, 4 Exch. 241.

⁵³ *Hovey v. Sebring*, 24 Mich. 232, 9 Am. R. 122; *Netterville v. Stevens*, 2 How. (Miss.) 642.

⁵⁴ *Long v. Thayer*, 150 U. S. 520,

generally be presumed if the instrument has matured and is in the hands of the maker or acceptor;⁵⁵ and in many states this is held to be the rule even before maturity.⁵⁶ It is also presumed that the bill or note was surrendered to the acceptor or maker when paid.⁵⁷ On the other hand it has been held that a bill or note is presumed to be unpaid when in the possession of the payee, and the burden is upon the party disputing this presumption.⁵⁸ An indorsee who is in possession, or any apparent lawful owner in possession of a negotiable instrument, is presumed to be the owner.⁵⁹ It is also generally presumed that the note has been delivered to the one in possession and upon the date named therein.⁶⁰ It has been held, however, that possession of a non-negotiable instrument without a written assignment is not evidence of ownership and the holder must prove ownership.⁶¹ Possession of an unindorsed note by a third person is not, ordinarily, evidence of ownership, and he must show ownership,⁶² but if the unindorsed note is payable to a particular person, then possession by such person is *prima facie* evidence of ownership, and when payable to

14 Sup. Ct. 189; *Bruce v. Bonney*, 12 Gray (Mass.) 107, 71 Am. Dec. 739; *Draper v. Rice*, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. R. 33.

⁵⁵ *Witte v. Williams*, 8 S. Car. 290, 23 Am. R. 294; *Love v. Dilley*, 64 Md. 238, 1 Atl. 59; *Emerson v. Mills*, 83 Tex. 385, 18 S. W. 805.

⁵⁶ *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Studebaker v. Langson*, 89 Wis. 200, 61 N. W. 773; *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959; *Sturgis v. Baker*, 39 Ore. 541, 65 Pac. 810; see also, *Ellis v. Blackerby*, (Ky.) 78 S. W. 181.

⁵⁷ *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. 900, 7 L. R. A. 93; *Seattle Bank v. Harris*, 7 Wash. 139, 34 Pac. 466; *Smith v. Gardner*, 36 Neb. 741, 55 N. W. 245; *McGee v. Prouty*, 9 Metc. (Mass.) 547, 43 Am. Dec. 409.

⁵⁸ *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St.

258; *Sturgis v. Baker*, 39 Ore. 541, 65 Pac. 810.

⁵⁹ *Bigelow v. Burnham*, 90 Iowa 300, 57 N. W. 865, 48 Am. St. 442; *O'Keeffe v. First Nat. Bank*, 49 Kans. 347, 30 Pac. 473, 33 Am. St. 370; *Soloman v. Brodrie*, 10 Colo. App. 553, 50 Pac. 1045; *Kells v. N. W. Live Stock Ins. Co.*, 64 Minn. 390, 67 N. W. 215.

⁶⁰ *Studebaker Bros. Mfg. Co. v. Langson*, 89 Wis. 200, 16 N. W. 773; *Wines v. State Bank*, 22 Ind. App. 114, 53 N. E. 389; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. 111; *Woodford v. Dorwin*, 3 Vt. 82, 81 Am. Dec. 573; *Garrigus v. Home Frontier &c.*, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. 262; *Schallehn v. Hibbard*, 64 Kans. 601, 68 Pac. 61.

⁶¹ *Pier v. Bullis*, 48 Wis. 429, 4 N. W. 381.

⁶² *Vastine v. Wilding*, 45 Mo. 89, 100 Am. Dec. 347; *Ross v. Smith*, 19 Tex. 171, 70 Am. Dec. 327.

bearer mere possession raises the presumption.⁶³ If the instrument is in the possession or control of the plaintiff he is generally bound to produce it or give good excuse for not producing it.⁶⁴

§ 1830. **Indorsement.**—It has been held that the presumption is that indorsers are liable in the order in which they sign their names;⁶⁵ but there is much conflict as to the presumption as to what relation a third person bears who places his name on the back of a note before the payee; and no attempt will be made to state the varying views in different jurisdictions.⁶⁶ The date named in an indorsement is presumed to be correct, until the contrary is shown, and if undated, it will, in some jurisdictions, be presumed to have been made at the same time as the note.⁶⁷ In some states, it will simply be presumed to have been made before dishonor or maturity.⁶⁸ An indorser who signs in blank has been presumed to be a regular indorser, and to have signed before maturity.⁶⁹ A regular indorsement in blank is a com-

⁶³ *Pettee v. Prout*, 69 Mass. 502, 63 Am. Dec. 778; *Kiff v. Weaver*, 94 N. Car. 274, 55 Am. R. 601.

⁶⁴ *Sebree v. Dorr*, 9 Wheat. (U. S.) 558; *Foltier v. Schroeder*, 19 La. Ann. 17, 92 Am. Dec. 521; *Vanaiken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Holmes v. DeCamp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293.

⁶⁵ *Crompton v. Spencer*, 20 R. I. 330, 38 Atl. 1002; *Palmer v. Field*, 76 Hun (N. Y.) 229, 27 N. Y. S. 736, 59 N. Y. St. 123.

⁶⁶ Many of the authorities upon the subject are classified in the note in 18 L. R. A. 33. See also, 4 Am. & Eng. Ency. of Law (2d ed.) 488, et seq., and the following recent cases: *Tinker v. Catlin*, 205 Ill. 108, 68 N. E. 773; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 69 N. E. 309; *Harnett v. Holdrege*, (Neb.) 97 N. W. 443; *Elliott v. Moreland*, 69 N. J. L. 216, 54 Atl. 224; *Camp v. First Nat. Bank*,

(Fla.) 33 So. 241; *Pearl v. Cortright*, (Miss.) 33 So. 72; *Lyndon Sav. Bank v. International Co.*, (Vt.) 54 Atl. 191.

⁶⁷ *Carroll v. Weld*, 13 Ill. 682, 56 Am. Dec. 481; *Rosenthal v. Rambo*, 28 Ind. App. 265, 62 N. E. 637; *New Orleans Canal Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 385; *National Pemberton Bank v. Lougee*, 108 Mass. 371, 11 Am. R. 367; *Collins v. Gilbert*, 94 U. S. 753; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465; *Murto v. Lemon*, (Colo. App.) 75 Pac. 160.

⁶⁸ *Ft. Scott Bank v. Elliott*, 46 Kans. 32, 26 Pac. 487; *Snyder v. Riley*, 6 Pa. St. 164, 47 Am. Dec. 452; *Smith v. Lawson*, 18 W. Va. 212, 41 Am. R. 688; *New Orleans Canal Co. v. Montgomery*, 95 U. S. 16.

⁶⁹ *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *National Pemberton Bank v. Lougee*, 108 Mass. 371, 11 Am. R. 367; *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465; *Martin*

plete contract in itself and the law merchant holds that this indorsement cannot be explained, varied or contradicted by parol evidence as against bona fide holders for value without notice of irregularities or conditions.⁷⁰ But as to irregular indorsements by third persons before delivery the weight of authority is to the effect that parol evidence may be admissible in a proper case, especially as between the original parties.⁷¹ When a third party indorses a note the presumption is that the indorsement was made at the time of the date of the note or that he agreed to sign it, and subsequently carried out his agreement.⁷² It is presumed that an indorsement was made at the place indicated by the instrument⁷³ and that the indorser of the note resides at the place indicated.⁷⁴ This presumption leads to another, which is that the parties contracted with reference to the law of that place.⁷⁵ An indorser will not be allowed to prove that he signed without recourse when the instrument is in the hands of a bona fide holder for value, without notice, unless he expressly uses the words "without

v. Boyd, 11 N. H. 385, 35 Am. Dec. 591; Cook v. Southwick, 9 Tex. 615, 60 Am. Dec. 181; see also, Gumz v. Giegling, 108 Mich. 295, 66 N. W. 48; Schroeder v. Turner, 68 Md. 546, 13 Atl. 331; Fullerton v. Hill, 48 Kans. 558, 29 Pac. 583, 18 L. R. A. 33; Good v. Martin, 1 Colo. 165, 91 Am. Dec. 706; Castle v. Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. R. 839.

⁷⁰ *Cake v. Pottsville Bank*, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. 600; *Taylor v. French*, 2 Lea (Tenn.) 257, 31 Am. R. 609; *Kiel v. Choate*, 92 Wis. 517, 67 N. W. 431, 53 Am. St. 936; *Adrian v. McCaskill*, 103 N. Car. 182, 9 S. E. 284, 14 Am. St. 788, 3 L. R. A. 759; *Holmes v. Lincoln First Nat. Bank*, 38 Neb. 326, 56 N. W. 1011, 41 Am. St. 733; *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; *Marshalltown First Nat. Bank v. Crabtree*, 86 Iowa 731, 52 N. W. 559; *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Spencer v. Sloan*, 108 Ind.

183, 9 N. E. 150, 58 Am. R. 35; *Dale v. Gear*, 38 Conn. 15, 9 Am. R. 353; see for the conflicting views and authorities on the general subject, Vol. I, § 616.

⁷¹ See Vol. I, § 616.

⁷² *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *Childs v. Wyman*, 44 Me. 433, 69 Am. Dec. 111; *Union Bank v. Willis*, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465; *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Samson v. Thornton*, 3 Metc. (Mass.) 275, 37 Am. Dec. 135; *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465.

⁷³ *Hall v. Harris*, 16 Ind. 180; *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314.

⁷⁴ *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. R. 161; *Taylor v. Snyder*, 3 Denio (N. Y.) 145; *Wheeler v. Field*, 6 Metc. (Mass.) 294.

⁷⁵ *Wallace v. Agry*, 4 Mason (U. S.) 336, 29 Fed. Cas. No. 17096; *Hall v. Harris*, 16 Ind. 180.

the plaintiff any money.⁹³ Where forgery is offered as a defense, it has been held that financial circumstances of the defendant may be taken into consideration as tending to show the improbability of his making such a note;⁹⁴ so, on the other hand, it has been held that any proper circumstances which might cause defendant to make such a note may be shown; for example, giving the note to satisfy plaintiff because of adultery with plaintiff's wife.⁹⁵ The actual date of execution may be shown by parol as between the original parties,⁹⁶ but not when the note is in the hands of an innocent purchaser when it will work to the latter's disadvantage.⁹⁷ If a note dated on Monday was really executed and delivered on Sunday, this, it has been held, will only be a defense as between the immediate parties.⁹⁸

§ 1832. **Conditions.**—Conditions expressed in the instrument are presumed to be a part of the obligation and are binding. An indorsement is upon the same basis and if it is conditional, the conditions expressed are presumed to have been made at the same time as the indorsement.⁹⁹ As a note made in a foreign state is presumed to be made with reference to the laws of the state where it is payable, so with any condition expressed either on the face of the instrument or in an indorsement.¹⁰⁰ The burden of proof is on the maker of a note to show that the condition which renders the note non-payable, has happened subsequent, and upon the holder to show that the contin-

23 N. E. 626; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

⁹³ *Gitchell v. Ryan*, 24 Ill. App. 372.

⁹⁴ *Nickerson v. Gould*, 82 Me. 512, 20 Atl. 86.

⁹⁵ *Crane v. Horton*, 5 Wash. 479, 32 Pac. 223.

⁹⁶ *Burns v. Moore*, 76 Ala. 339, 52 Am. R. 332; *Almich v. Downey*, 45 Minn. 460, 48 N. W. 197; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Barlow v. Buckingham*, 68 Iowa 169, 26 N. W. 58.

⁹⁷ *Cranson v. Goss*, 107 Mass. 439, 9 Am. R. 45; *Knox v. Clifford*, 38 Wis. 651, 20 Am. R. 28; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. 111; *Robertson v. Rowell*,

158 Mass. 94, 32 N. E. 898, 35 Am. St. 466; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *McCormick Harvesting Co. v. Faulkner*, 7 S. Dak. 363, 64 N. W. 163, 58 Am. St. 839.

⁹⁸ See § 105.

⁹⁹ *Specht v. Beindorf*, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429; *Grimison v. Russell*, 14 Neb. 521, 16 N. W. 819, 45 Am. R. 126; *Fletcher v. Blodgett*, 16 Vt. 26, 42 Am. Dec. 487; *Blake v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53; *Barnard v. Cushing*, 4 Metc. (Mass.) 230, 38 Am. Dec. 362.

¹⁰⁰ *Farmers' Trust Co. v. Sche-nuit*, 83 Ill. App. 267.

gency has happened, when the payment depends upon it.¹⁰¹ It has been held that parol evidence may be used to show, as between the parties, an oral agreement that the instrument was to become binding only upon a future contingency¹⁰² or that a note given for certain property should be returned if certain things happened to the property.¹⁰³ Conditional delivery may be shown by parol evidence as between the original parties or others having notice.¹⁰⁴ And an instrument dated on Sunday may be shown to have been made valid by delivery on another day.¹⁰⁵

§ 1833. **Mistake.**—The burden of proving that there is a mistake in an instrument is on the party alleging the mistake, but this, in general, can only be proved as between the original parties, or those having notice.¹⁰⁶ A defense that there was a mistake as to the rate of interest or amount named in a note can succeed only when proof of the mistake has been clearly established.¹⁰⁷ Circumstances, admissions or any other proper evidence tending to show the mistake may, however, be admitted as between the original parties.¹⁰⁸ Parol evidence may be introduced to show a mistake between the parties upon an instrument in settlement,¹⁰⁹ or to show the amount of actual indebtedness upon a note held by written agreement as collateral secur-

¹⁰¹ *Grimison v. Russell*, 20 Neb. 337, 30 N. W. 240; *Chandler v. Carey*, 64 Mich. 237, 31 N. W. 309; *Low v. Studabaker*, 110 Ind. 57, 10 N. E. 30; *McAfee v. Fisher*, 64 Cal. 246, 30 Pac. 811.

¹⁰² *Nutting v. Minnesota Fire &c. Co.*, 98 Wis. 26, 73 N. W. 432; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Penniman v. Alexander*, 111 N. Car. 427, 16 S. E. 408; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Eckel v. Murphey*, 15 Pa. St. 488, 53 Am. Dec. 607.

¹⁰³ *Labbe v. Johnson*, 66 Vt. 234, 28 Atl. 986; *Aultman v. Clifford*, 55 Minn. 159, 56 N. W. 593; *Denver Brewing Co. v. Baretts*, 9 Colo. App. 341, 48 Pac. 334; see, however, Vol. I. § 616.

¹⁰⁴ *McCormick Harvesting Co. v.*

Faulkner, 7 S. Dak. 363, 64 N. W. 163, 58 Am. St. 839; *Smith v. Mussetter*, 58 Minn. 159, 59 N. W. 995; *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898, 35 Am. St. 466; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. 111.

¹⁰⁵ *Lovejoy v. Whipple*, 18 Vt. 379; *King v. Fleming*, 72 Ill. 21, 22 Am. R. 131.

¹⁰⁶ *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37; *Buck v. Steffey*, 65 Ind. 58.

¹⁰⁷ *Hochstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547.

¹⁰⁸ *Byrd v. Campbell*, 94 Ga. 41, 20 S. E. 53.

¹⁰⁹ *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242; *Tapley v. Herman*, 95 Mo. App. 537, 69 S. W. 482; *Baxter v. Card*, 59 Fed. (U. S.) 165.

ity for the balance due on settlement.¹¹⁰ And it has also been held that parol evidence may be used to show that a note was to be held by a third person until settlement should be held between the maker and payee.¹¹¹

§ 1834. **Fraud and duress.**—Parol evidence may be introduced in a proper case to show that the execution¹¹² or indorsement of a note was obtained through fraud or misrepresentations;¹¹³ but to relieve the maker it must be clearly established.¹¹⁴ Fraud or duress may be proved by circumstances or admissions of the payee; and any proper state of facts or circumstances tending to show an absence of fraud or duress may be shown.¹¹⁵ A defense that the note was procured by duress or threats may be established by parol evidence,¹¹⁶ and while the burden is upon the party offering this as a defense, mere preponderance of evidence is sufficient.¹¹⁷

§ 1835. **Presentment and Demand.**—It has been held sufficient evidence of demand and refusal that no funds were provided to meet a note payable at a bank when properly presented when due, at the bank within banking hours.¹¹⁸ The burden is generally upon the holder

¹¹⁰ *Osborne & Co. v. Stringham*, 1 S. Dak. 406, 47 N. W. 408.

¹¹¹ *Lipscomb v. Lipscomb*, 32 S. Car. 243, 10 S. E. 929.

¹¹² *Larrabee v. Fairbanks*, 24 Me. 363, 41 Am. Dec. 389; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227, 41 Am. Dec. 503; *Middleton v. Griffith*, 57 N. J. L. 442, 31 Atl. 405, 51 Am. St. 617; *Walker v. Egbert*, 29 Wis. 194, 9 Am. R. 548; and proof of fraud in the inception for the instrument usually requires the holder to show that he became a bona fide holder for value and before maturity, note in 11 Am. St. 324, and numerous authorities there cited.

¹¹³ *Larrabee v. Fairbanks*, 24 Me. 363, 41 Am. Dec. 389; *Hill v. Ely*, 5 S. & R. (Pa.) 363, 9 Am. Dec. 376.

¹¹⁴ *Billingsly v. Craddock*, 82 Iowa 721, 47 N. W. 893; *Ross v. Webster*, 63 Conn. 64, 26 Atl. 476; *Stout v. Judd*, 10 Kans. App. 579, 63 Pac.

663; *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37.

¹¹⁵ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *Maxson v. Llewellyn*, 122 Cal. 195, 54 Pac. 732; *Cawker v. Seamans*, 92 Wis. 328, 66 N. W. 253.

¹¹⁶ *Bush v. Brown*, 49 Ind. 573, 19 Am. R. 695; *Stout v. Judd*, 10 Kans. App. 579, 63 Pac. 662; *French v. Talbot Pav. Co.*, 100 Mich. 443, 59 N. W. 166; *Borrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. 207; *Larrabee v. Fairbanks*, 24 Me. 363, 41 Am. Dec. 389.

¹¹⁷ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; see also, *Nebraska Mut. Bond Asso. v. Klee*, (Neb.) 97 N. W. 476.

¹¹⁸ *State Bank v. Napier*, 6 Humph. (Tenn.) 270, 44 Am. Dec. 308; *Shepherd v. Chamberlain*, 8 Gray (Mass.) 225; *Bank of United States v. Carneal*, 2 Pet. (U. S.) 543.

of a negotiable instrument in an action against an indorser or drawer to show that it was properly presented, and demand made¹¹⁹ and that notice was given of dishonor,¹²⁰ or the holder must show due diligence¹²¹ or good excuse in case of non-presentment¹²² and that it worked no injury,¹²³ or to show a waiver of presentment, protest or notice¹²⁴ or that a new promise was made for the old.¹²⁵ The burden, however, has been held to be upon the payee in certain cases to show that he was ready to pay at the proper date and at the proper place, any damage sustained,¹²⁶ to show that he was never notified of dishonor,¹²⁷ to prove that he had notified the holders of his change of residence,¹²⁸ or to show any neglect of the holder.¹²⁹ It is presumed when a bill of exchange is drawn that it is drawn against funds sufficient to meet it;¹³⁰ but it has been held that when there are no funds to meet it, then it is presumed that the drawer knew this and that he did not expect it to be paid, and that therefore it is not necessary to present and give notice as he could not be injured by such a failure.¹³¹ Posting a letter, properly addressed, containing a notice raises a presumption that the maker or indorser received notice. The envelope with postmark may be used as evidence and raises a presumption, which may be rebutted, concerning the date of mailing the notice.¹³²

¹¹⁹ *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

¹²⁰ *Dickens v. Beal*, 10 Pet. (U. S.) 572; *Tickner v. Roberts*, 11 La. 14, 30 Am. Dec. 706; *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

¹²¹ *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888.

¹²² *Baxter v. Graves*, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374.

¹²³ *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

¹²⁴ *Wilkins v. Gillis*, 20 La. Ann. 538, 96 Am. Dec. 425.

¹²⁵ *Hunt v. Wadleigh*, 26 Me. 271, 45 Am. Dec. 108.

¹²⁶ *Allain v. Lazarus*, 14 La. 327, 33 Am. Dec. 583.

¹²⁷ *Burgess v. Vreeland*, 24 N. J. L. 71, 59 Am. Dec. 408.

¹²⁸ *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003.

¹²⁹ *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 244, 56 Am. R. 255.

¹³⁰ *Adams v. Darby*, 28 Mo. 162, 75 Am. Dec. 115; *Heuertematte v. Morris*, 101 N. Y. 62, 4 N. E. 1, 54 Am. R. 657; *Baxter v. Graves*, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374; *Merchants' Bank v. Easley*, 44 Mo. 286, 100 Am. Dec. 287.

¹³¹ *Merchants' Bank v. Easley*, 44 Mo. 286, 100 Am. Dec. 287; *Baxter v. Graves*, 2 A. K. Marsh. (Ky.) 152, 12 Am. Dec. 374.

¹³² *Roberts v. Wold*, 61 Minn. 291, 63 N. W. 739; *Jensen v. McCorkell*, 154 Pa. St. 323, 23 Atl. 366, 35 Am. St. 843; *Dickins v. Beal*, 10 Pet. (U. S.) 572. See *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171; *Phoenix Brewing Co. v. Weiss*, 23 Pa. Super. Ct. 519.

The notice should be properly addressed and the postage be prepaid, but it has been held a mistake of the postmaster will not prejudice the party giving the notice.¹³³ The residence of the party entitled to notice of dishonor is generally presumed to be the place named in the instrument and to be the same as when the instrument was signed. This is true unless he notifies the holder or proper party of the change of address.¹³⁴

§ 1836. **Waiver.**—The burden is upon the holder of an instrument who sues an indorser thereon, and relies upon a waiver of demand and notice, to prove such waiver, for each indorser is entitled to it unless he waives notice and demand.¹³⁵ If the holder neglects to give notice or demand, the burden, it has been held, is upon him to prove that another promise was made and that this waiver or new promise was made with knowledge of laches on the part of drawer or indorser.¹³⁶ Proof of presentment and protest for non-payment shows that payment was refused, but proof of notice is unnecessary where there is an express waiver.¹³⁷

§ 1837. **Protest and notice.**—The burden of proof is upon the holder of a note in an action by him against the indorser to show that he has given notice of dishonor or has exercised reasonable diligence to give notice and that the notice was given in due time.¹³⁸ If the

¹³³ *Pier v. Heinrichshoffen*, 67 Mo. 163, 29 Am. R. 501; *Windham Bank v. Norton*, 22 Conn. 213; but see, *Schofield v. Bayard*, 3 Wend. (N. Y.) 488.

¹³⁴ *Utica Bank v. Phillips*, 3 Wend. (N. Y.) 408; *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. R. 239; *Warner v. Citizens' Bank*, 6 S. Dak. 152, 60 N. W. 746; *Selden v. Washington*, 17 Md. 379, 79 Am. Dec. 659; *Smith v. Philbrick*, 10 Gray (Mass.) 252, 69 Am. Dec. 315; *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. R. 161.

¹³⁵ *Johnson v. Parsons*, 140 Mass. 173, 4 N. E. 196; *Wilkins v. Gillis*, 20 La. Ann. 538, 96 Am. Dec. 425.

¹³⁶ *Hunt v. Wadleigh*, 26 Me. 271, 45 Am. Dec. 108; *Walker v. Rogers*, 40 Ill. 278, 89 Am. Dec. 348; *Schierl*

v. Baumel, 75 Wis. 69, 43 N. W. 724; contra: knowledge of laches will be presumed, and the payee or one who promises to pay after dishonor must prove that he did not know of the laches at the time he entered into the second promise, *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224, 56 Am. R. 255; as to a new promise, with knowledge of the facts being a waiver, see, *State Bank v. McCabe*, (Mich.) 98 N. W. 20, and authorities cited.

¹³⁷ *Burgess v. Vreeland*, 24 N. J. L. 71, 59 Am. Dec. 408.

¹³⁸ *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Tickner v. Roberts*, 11 La. 14, 30 Am. Dec. 706; *Robinson v. Aird*, 43 Fla. 30, 29 So. 633; *Whiteford v. Burck-*

drawer of a bill or the indorser of a negotiable note is not notified in due time of non-acceptance or of dishonor, he will be presumed to be prejudiced by such delay, especially if the acceptor or maker, as the case may be, was solvent at the maturity of the note or time for presentment.¹³⁹ The burden of explaining delay, or cause of failure to present when due, or to give notice of dishonor, is on the holder.¹⁴⁰ If, after a notice is dishonored the maker promises to pay, this promise may be prima facie evidence of due notice and raises a question of fact.¹⁴¹ By making the new promise, and giving a new instrument, or paying part, or compromising the claim, the indorser in effect admits that he received notice or waives the same, and the burden of proving the contrary is upon him.¹⁴²

§ 1838. **Notary's certificate.**—According to the statutes of many states the notary's certificate as to demand for payment, protest, and notice of dishonor, is prima facie evidence of such facts.¹⁴³ This certificate of protest has been said to raise a strong presumption, but is not conclusive evidence and may be rebutted.¹⁴⁴ Other evidence which tends to show demand or notice may also be admitted.¹⁴⁵ The certificate of protest only, raises the presumption as to those things

myer, 1 Gill (Md.) 127, 39 Am. Dec. 640; *Brown v. Ferguson*, 4 Leight (Va.) 37, 24 Am. Dec. 707; *Dickins v. Beal*, 10 Pet. (U. S.) 572; *Marks v. Boone*, 24 Fla. 177, 4 So. 532; *Apple v. Lesser*, 93 Ga. 749, 21 S. E. 171.

¹³⁹ *Austin v. Rodman*, 8 N. Car. 194, 9 Am. Dec. 630.

¹⁴⁰ *Asheville Nat. Bank v. Bradley*, 117 N. Car. 526, 23 S. E. 455; *United States v. Barker*, 12 Wheat. (U. S.) 559.

¹⁴¹ *Lewis v. Brehme*, 33 Md. 412, 3 Am. Dec. 63; *Hibbard v. Russell*, 16 N. H. 410, 41 Am. Dec. 733; *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224, 56 Am. R. 255.

¹⁴² *Hunt v. Wadleigh*, 26 Me. 271, 45 Am. Dec. 108; *Seymour v. Brainard*, 66 Vt. 320, 29 Atl. 462; *Colum-*

bia v. Mackall, 2 Cranch (U. S.) 631.

¹⁴³ *Martin v. Smith*, 108 Mich. 278, 66 N. W. 61; *Kern v. Von Phul*, 7 Minn. 426, 82 Am. Dec. 105; *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893; *Fales v. Wadsworth*, 23 Me. 553; *Hobbs v. Chemical Nat. Bank*, 97 Ga. 524, 25 S. E. 348; *Lewiston Falls Bank v. Leonard*, 43 Me. 144, 69 Am. Dec. 49; *Tate v. Sullivan*, 30 Md. 464, 96 Am. Dec. 597; *Legg v. Vinal*, 165 Mass. 555, 43 N. E. 518.

¹⁴⁴ *Clough v. Holden*, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. 393; *City Sav. Bank v. Kensington*, (Tenn.) 37 S. W. 1037.

¹⁴⁵ *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; *Coruthers v. Herbert*, 5 Coldw. (Tenn.) 362, 98 Am. Dec. 421.

in it which are properly stated, and duly certified.¹⁴⁶ As a certificate of protest can be changed, explained or even disputed, so it has been held that any defect in it may be corrected by other evidence.¹⁴⁷ A waiver of demand and notice may be shown by parol, and this has been held to be true even where there is a written waiver of notice.¹⁴⁸ If the notary's certificate of protest is silent as to the hour of demand, still it will be presumed to have been made during business hours.¹⁴⁹ The evidence of a notary or his clerk is admissible with his certificate of protest to explain presentment, demand, and notice of dishonor.¹⁵⁰ A notary's certificate of protest made in another state, of an instrument made payable in that state may be introduced as evidence upon the same basis as one in the state where executed.¹⁵¹ The records of a deceased notary, which have been regularly kept may be used to prove a demand and notice of non-payment of a note.¹⁵²

§ 1839. **Acceptance.**—An acceptance which is uncertain and ambiguous or which is not dated may be explained by parol,¹⁵³ but an acceptance which is absolute on its face cannot be changed or modified by parol.¹⁵⁴ Even when the condition attached to the acceptance is in writing, it will not be proper to admit such writing to defeat a

¹⁴⁶ *Seymour v. Brainerd*, 66 Vt. 320, 29 Atl. 462; *Ticonic Bank v. Stackpole*, 41 Me. 302, 66 Am. Dec. 246; *Reler v. Strauss*, 54 Md. 278, 39 Am. R. 390.

¹⁴⁷ *Burgess v. Vreeland*, 24 N. J. L. 71, 59 Am. Dec. 408.

¹⁴⁸ *Brent v. Metropolis Bank*, 1 Pet. (U. S.) 89, 7 L. ed. 65.

¹⁴⁹ *Folger v. Chase*, 18 Pick. (Mass.) 63; *Selden v. Washington*, 17 Md. 379, 79 Am. Dec. 659; *Smith v. Philbrick*, 10 Gray (Mass.) 252, 69 Am. Dec. 315; *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. R. 161.

¹⁵⁰ *Clough v. Holden*, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. 393; *Brailsford v. Williams*, 15 Md. 150, 74 Am. Dec. 559.

¹⁵¹ *Fletcher v. Arkansas Nat. Bank*, 62 Ark. 265, 35 S. W. 228, 54 Am. St. 294; *Whiteford v. Burckmyer*, 1 Gill. (Md.) 127, 39 Am. Dec.

640; *Johnson v. Brown*, 154 Mass. 105, 27 N. E. 994; *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. 98, 24 Am. St. 673; *Carruth v. Walker*, 8 Wis. 252, 76 Am. Dec. 235.

¹⁵² *Nicholls v. Webb*, 8 Wheat. (U. S.) 326.

¹⁵³ *Proctor v. Hartigan*, 139 Mass. 554, 2 N. E. 99; note in 1 Am. St. 137; *Gallagher v. Black*, 44 Me. 99; *Shackelford v. Hooker*, 54 Miss. 716; *Lamon v. French*, 25 Wis. 37.

¹⁵⁴ *Foster v. Clifford*, 44 Wis. 569, 28 Am. R. 603; *Penniman v. Alexander*, 111 N. Car. 427, 16 S. E. 408; *Diversy v. Moor*, 22 Ill. 331, 74 Am. Dec. 157; *Davis v. Randall*, 115 Mass. 547, 15 Am. R. 146; *Hunt v. Johnson*, 96 Ala. 130, 11 So. 387; *Lambert v. Sandford*, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. R. 829; *Smith*

bona fide holder, who has purchased for value and without knowledge of such condition.¹⁵⁵ But if there has been a mistake parol evidence may be used to show it.¹⁵⁶ A valid oral agreement to accept a bill is evidence of an acceptance;¹⁵⁷ and parol evidence is competent, in the absence of a statute requiring acceptance to be in writing, to prove a verbal acceptance of a bill, order, or draft.¹⁵⁸ Parol evidence may also be used to prove a waiver of acceptance, to explain an ambiguous acceptance,¹⁵⁹ or the relation of the parties.¹⁶⁰ So, it has been held in New York that where an agent accepts, it may be shown by parol that this acceptance was intended to bind the principal.¹⁶¹ Even when a bill shows an agent who has made or indorsed a bill to be acting under special written authority, yet parol evidence may establish his authority to execute note.¹⁶² An acceptor of a bill of exchange is presumed to know the signature of the drawer, but he may not know the signatures of the indorsers.¹⁶³ Where the acceptor attempts to show a conditional acceptance attached to the bill, the burden is upon him to show such conditions. But the burden is upon the holder to prove the happening of the condition, when the acceptance is conditional in order to entitle him to recover.¹⁶⁴

v. Clark, 12 Iowa 32; note in 1 Am. St. 137.

¹⁵⁵ Merritt v. Duncan, 7 Heisk. (Tenn.) 156, 19 Am. R. 612; Greer v. Bently, 19 Ky. L. R. 1251, 43 S. W. 219.

¹⁵⁶ Fishback v. Woodford, 1 J. J. Marsh. (Ky.) 84, 19 Am. Dec. 55; Johnson v. Williard, 83 Wis. 420, 53 N. W. 776.

¹⁵⁷ Burke v. Utah Nat. Bank, 47 Neb. 247, 66 N. W. 295; First Nat. Bank v. Clark, 61 Md. 400, 48 Am. R. 114; Garretson v. North Atchison Bank, 39 Fed. (U. S.) 163, 7 L. R. A. 423; James v. Lyons Co., 134 Cal. 189, 66 Pac. 210; Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985; Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158.

¹⁵⁸ Spurgeon v. Swain, 13 Ind. App. 188, 41 N. E. 397; Walton v. Mandeville, 56 Iowa 597, 5 N. W. 776, 9 N. W. 913, 41 Am. R. 123;

Jarvis v. Wilson, 46 Conn. 90, 33 Am. R. 18; Durkee v. Conklin, 13 Colo. App. 313, 57 Pac. 486; Barnet v. Smith, 30 N. H. 256, 64 Am. Dec. 290; Fisher v. Beckwith, 19 Vt. 31, 46 Am. Dec. 174.

¹⁵⁹ Laffin v. Rand Co. v. Sinsheimer, 48 Md. 411, 30 Am. R. 472.

¹⁶⁰ Lacy v. Loftin, 26 Ind. 324.

¹⁶¹ Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. 621; but see, Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 58 Am. R. 829.

¹⁶² Clark v. Peabody, 22 Me. 500.

¹⁶³ White v. Continental Nat. Bank, 64 N. Y. 316, 21 Am. R. 612; United States Bank v. Bank of Georgia, 10 Wheat. (U. S.) 333.

¹⁶⁴ Stabler v. Gund, 35 Neb. 648, 53 N. W. 570; Grant v. Shaw, 16 Mass. 341; Ford v. Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Palmer v. Rice, 36 Neb. 844, 55 N. W. 256; Lacon Bank

§ 1840. **Payment.**—The party claiming that the instrument has been paid has the burden of proof, in most jurisdictions, to show payment¹⁶⁶ and if the question depends in any way upon time he must usually prove when the payment was made.¹⁶⁶ Parol evidence is admissible, when the instrument is ambiguous to show what was the intention of the parties as to the method of payment and the method may also be disputed by parol,¹⁶⁷ but not to contradict or vary an unambiguous instrument.¹⁶⁸ A regular promissory note which calls for so many dollars cannot be changed by parol to call for payment in something else.¹⁶⁹ Parol evidence cannot be admitted to vary a bill or note by showing that it should be paid for in work,¹⁷⁰ in goods,¹⁷¹ in real-estate,¹⁷² or that it should be paid out of a particular fund.¹⁷³ Nor can parol be used to prove that other than lawful money of the United States was meant.¹⁷⁴ But the omission by mistake of the statement that payment was to be paid in a certain kind of money may be shown by parol,¹⁷⁵ in a proper case. Payment may be proved by a

v. Bensley, 9 Biss. (U. S.) 378, 2 Fed. 609; *Andrews v. Baggs*, Minor (Ala.) 173, 12 Am. Dec. 47.

¹⁶⁶ *Carver v. Forry*, 158 Ind. 76, 62 N. E. 697; *Anthony v. Mott*, 10 Kans. App. 105, 61 Pac. 509; *Marshall Bank v. Child*, 76 Minn. 173, 78 N. W. 1048; *Mullally v. Dingman*, 62 Neb. 702, 87 N. W. 543; *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93.

¹⁶⁷ *Carver v. Forry*, 158 Ind. 76, 62 N. E. 697; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Sampson v. Fox*, 109 Ala. 662, 19 So. 896, 55 Am. St. 950; *Barber v. Slade*, 30 Vt. 191, 73 Am. Dec. 299; *Van Buskirk v. Chandler*, 18 Neb. 584, 26 N. W. 356; *Goff v. Stoughton*, 84 Wis. 369, 54 N. W. 732.

¹⁶⁸ *Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185; *Pack v. Thomas*, 13 S. & M. 11, 51 Am. Dec. 135; *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66; *Clement, Bane & Co. v. Houck*, 113 Iowa 504, 85 N. W. 765; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 284; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

¹⁶⁹ Vol. I, § 616.

¹⁷⁰ *Phelps v. Abbott*, 114 Mich. 8, 72 N. W. 3; *Singer Mfg. Co. v. Potts*, 59 Minn. 240, 61 N. W. 23; *Pack v. Thomas*, 13 S. & M. (Miss.) 11, 51 Am. Dec. 135; *Riley v. Treanor*, (Tex. Civ. App.) 25 S. W. 1054; *LaFayette Mon. Corp. v. Ma- goon*, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761; *Kimball v. Bryan*, 56 Iowa 632 10 218.

¹⁷¹ *Stein v. Fogarty*, 4 Idaho 702, 43 Pac. 681.

¹⁷² *Cox v. Wallace*, 5 Blackf. (Ind.) 199.

¹⁷³ *Barhydt v. Bonney*, 55 Iowa 717, 8 N. W. 672.

¹⁷⁴ *Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185; *Murchie v. Peck*, 160 Ill. 175, 43 N. E. 356; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

¹⁷⁵ *Pack v. Thomas*, 13 S. & M. (Miss.) 11, 51 Am. Dec. 135.

¹⁷⁶ *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Thompson v. Sloan*, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542.

party to the note,¹⁷⁶ by admissions of the payee or holder,¹⁷⁷ by receipts,¹⁷⁸ by letters,¹⁷⁹ by memoranda¹⁸⁰ or by indorsed credits.¹⁸¹ So, generally, any proper evidence which will establish or contradict the presumption of payment may be used.¹⁸² A parol contract contemporaneous with the execution of the note, and which changes or extends the date of payment cannot, ordinarily, be shown.¹⁸³ Contracts which show that the payment was not to be made as indicated, or that it was to be renewed at maturity, or that the payee was not to bring suit within certain time, cannot be shown if such contract is oral or cannot be derived from the instrument itself.¹⁸⁴ Commercial paper is presumed to be payable at the place named in the instrument, and when a certain bank is designated, the demand may be made at such bank.¹⁸⁵ As possession carries with it the presumption of ownership, therefore, payment will be presumed if the instrument has matured and is in the hands of the maker or acceptor,¹⁸⁶ and this presumption of payment

¹⁷⁶ *State v. Brooks*, 85 Iowa 366, 52 N. W. 240.

¹⁷⁷ *Amqs v. Flournoy*, 80 Ga. 771, 6 S. E. 696.

¹⁷⁸ *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2; *Baird v. Abbey*, 73 Mich. 347, 41 N. W. 272; *Rawlings v. Fisher*, 110 Mich. 19, 67 N. W. 977.

¹⁷⁹ *Coe v. Anderson*, 92 Iowa 515, 61 N. W. 177.

¹⁸⁰ *Meyer v. Reichardt*, 112 Mass. 108.

¹⁸¹ *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2; *Rawlings v. Fisher*, 110 Mich. 19, 67 N. W. 977.

¹⁸² *State v. Brooks*, 85 Iowa 366, 52 N. W. 240; *Reynolds v. French*, 8 Vt. 85, 30 Am. Dec. 456; *Mack v. Leedle*, 78 Iowa 164, 42 N. W. 636; *Lockhart v. Fessenick*, 58 Wis. 588, 17 N. W. 302; *State v. Brooks*, 85 Iowa 366, 52 N. W. 240.

¹⁸³ *Getto v. Binkert*, 55 Kans. 617, 40 Pac. 925; *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; *Heaverin v. Donnell*, 7 S. & M. (Miss.) 244, 45 Am. Dec. 302; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389; *Clark v.*

Allen, 132 Pa. St. 40, 18 Atl. 1071; *Rockmore v. Davenport*, 14 Tex. 602, 65 Am. Dec. 132; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. 751.

¹⁸⁴ *Wallace v. Richards*, 16 Utah 52, 50 Pac. 804; *Dorsey v. Armor*, 10 Colo. App. 255, 50 Pac. 726; *Getto v. Binkert*, 55 Kans. 617, 40 Pac. 925; *Dow v. Tuttle*, 4 Mass. 414, 3 Am. Dec. 226.

¹⁸⁵ *Guignon v. Union Trust Co.*, 156 Ill. 135, 40 N. E. 556, 47 Am. St. 186; *People's Bank v. Keech*, 26 Md. 521, 90 Am. Dec. 118; *Malden Bank v. Baldwin*, 13 Gray (Mass.) 154, 74 Am. Dec. 627; *Goodloe v. Godley*, 13 S. & M. 233, 51 Am. Dec. 159; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *First Nat. Bank v. Union Nat.*, 3 Ind. App. 299, 29 N. E. 613; *Bailey v. Birkhofer*, (Iowa) 98 N. W. 594; as to the presumption where no place is named, see *Estes v. Tower*, 102 Mass. 65, 3 Am. R. 439; *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. R. 239; *Warner v. Citizens' Bank & Co.*, 6 S. Dak. 152, 60 N. W. 746.

¹⁸⁶ *Sarraille v. Calman*, 142 Cal.

is sometimes indulged even before maturity.¹⁸⁷ So, a bill or note is generally presumed to be unpaid when in the possession of the payee, and the burden is upon the party claiming payment.¹⁸⁸ The acceptance of a negotiable instrument for a simple debt, or as payment of purchase price, in some jurisdictions, creates a rebuttable presumption that it is given as payment and that the first debt is paid.¹⁸⁹ Many authorities, however, modify this rule by holding that the new note is only conditional, depending upon future payment. These cases say that the acceptance of the negotiable instrument for a previous debt raises no presumption of payment, but simply extends time of payment.¹⁹⁰ The burden is upon the maker of a new note, which is unsecured, to show that it was given as payment for a secured note, for the presumption is that the payee would not accept the individual note in place of one secured.¹⁹¹ Indorsement of payment will be presumed to have been made at the time indicated by the date of the indorsement and that the money was paid in cash.¹⁹² The presumption of payment from the lapse of time, from the surrender of the instrument to the maker, from a receipt or indorsement of payment is not conclusive, but may be rebutted.¹⁹³ This is also true concerning

638, 76 Pac. 497; *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. 900; *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959; *Richardson v. Cambridge*, 2 Allen (Miss.) 118, 79 Am. Dec. 767; *Seattle Bank v. Harris*, 7 Wash. 139, 34 Pac. 466; *Smith v. Gardner*, 36 Neb. 741, 55 N. W. 245.

¹⁸⁷ *Witte v. Williams*, 8 S. Car. 290, 28 Am. R. 294; *Love v. Dilley*, 64 Md. 238, 1 Atl. 59; *Emerson v. Mills*, 83 Tex. 385, 18 S. W. 805.

¹⁸⁸ *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Studebaker v. Langson*, 89 Wis. 200, 61 N. W. 773; *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959; *Sturgis v. Baker*, 39 Ore. 541, 65 Pac. 810; *Sarraille v. Calman*, 142 Cal. 638, 76 Pac. 497.

¹⁸⁹ *Davis & Rankin Mfg. Co. v. Vice*, 15 Ind. App. 117, 43 N. E. 889; *Bunker v. Barron*, 79 Me. 266, 8 Atl. 253, 1 Am. St. 282; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476.

¹⁹⁰ *State Bank of Midland v. Byrne*, 97 Mich. 178, 56 N. W. 355, 37 Am. St. 332, 21 L. R. A. 753; *Nash v. Meggett*, 89 Wis. 486, 61 N. W. 283; *Hornbrooks v. Lucas*, 24 W. Va. 493, 49 Am. R. 277; *Johnston v. Barrilla*, 27 Ore. 251, 41 Pac. 656, 50 Am. St. 717; *Saving Bank v. Central Market Co.*, 122 Cal. 28, 54 Pac. 723.

¹⁹¹ *Saving & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922.

¹⁹² *Clapp v. Hale*, 112 Mass. 368, 17 Am. R. 111.

¹⁹³ *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556, 25 S. W. 868; *Bank of Milo v. Mertz*, 96 Iowa 725, 65 N. W. 318; *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. 444; *Byerts v. Robinson*, 9 N. Mex. 427, 54 Pac. 932, as to presumption of payment from lapse of time, see note in 18 Am. St. 822.

the presumption of non-payment arising when the payee has possession of the note.¹⁹⁴ An indorsement or payment, part payment, or payment of interest made while the note was in force, is evidence of such payment.¹⁹⁵ This is held to be prima facie evidence when in the hand-writing of the holder or by some one legally authorized to receive payment.¹⁹⁶ The holder of the note being the legal custodian of it, would not be presumed to put credits, or to indorse payments, upon the note to his prejudice unless actual payment had been made; therefore the presumption of payment arises from such indorsements.¹⁹⁷ The fact that a long time has elapsed since an alleged payment is sufficient to make such evidence less certain of actual payment;¹⁹⁸ but an instrument will generally be presumed to have been paid after a period of many years unless evidence is introduced to prove that it was never paid.¹⁹⁹ Payment of interest in advance by the maker of a note has been held to raise the presumption that the time for payment is extended so far as the interest is paid.²⁰⁰ If a certain place is named in the instrument as the place of payment it will be presumed that the parties knew the law of the place named and expected to be governed by it.²⁰¹ The instrument need not be produced to prove payment, as it is often destroyed,²⁰² but any proper circumstances tending to prove payment may be shown.²⁰³

¹⁹⁴ *Coe v. Anderson*, 92 Iowa 515, 61 N. W. 177.

¹⁹⁵ *Jenne v. Burger*, 120 Cal. 444, 52 Pac. 706; *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. 444; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. 505; *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2; *Butts v. Capitol Nat. Bank*, 21 Neb. 586, 33 N. W. 250.

¹⁹⁶ *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 49 Am. St. 505; *Butts v. Capital Nat. Bank*, 21 Neb. 586, 33 N. W. 250.

¹⁹⁷ In an action where the statutes of limitation are offered as a defense, payment will not be presumed from such indorsements, as a small credit might be offered to save the note. Supporting presumption: *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 48 Am. St. 505;

Chamberlain v. Chamberlain, 116 Ill. 480, 6 N. E. 444.

¹⁹⁸ *Manning v. Meredith*, 69 Iowa 430, 29 N. W. 336.

¹⁹⁹ *Delaney v. Brunette*, 62 Wis. 615, 23 N. W. 22; *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 24 Am. St. 894; *Courtney v. Studenmayer*, 56 Kans. 392, 43 Pac. 758, 54 Am. St. 592; see note in 18 Am. St. 882.

²⁰⁰ *Skelly v. Bristol Sav. Bank*, 63 Conn. 83, 26 Atl. 474, 38 Am. St. 340, 19 L. R. A. 599.

²⁰¹ *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651; *Brownell v. Freese*, 35 N. J. L. 285, 10 Am. R. 239.

²⁰² *Minter v. Cupp*, 98 Mo. 26, 10 S. W. 862.

²⁰³ *Minter v. Cupp*, 98 Mo. 26, 10 S. W. 862; *Catterlin v. Armstrong*, 79 Ind. 514.

§ 1841. **Usury.**—The burden of proving usury is upon the party setting up this as a defense;²⁰⁴ but parol evidence may be admitted to show an agreement for usurious interest, and to prove that it was paid.²⁰⁵ Usury need not be established by direct evidence, but facts and circumstances which will tend to establish usury may be proved.²⁰⁶ And a mere preponderance of the evidence will establish usury.²⁰⁷

§ 1842. **Declarations and admissions.**—Declarations made by the owner of the note against his interest and before he has parted with title are admissible against him.²⁰⁸ But if he has parted with title and possession and is no longer interested in the instrument, then his declarations cannot be used as against a bona fide holder, who has purchased for value, before maturity and without notice.²⁰⁹

§ 1843. **Parol evidence.**—This subject has already been considered with reference to particular questions, but a further consideration in a general way may be desirable. A negotiable instrument cannot be modified, enlarged or extended by parol evidence, although such evidence may be introduced to identify a written contract, if referred to in the note. The instrument itself is prima facie evidence of the whole transaction and cannot be materially altered. This rule generally goes so far as to exclude any evidence which will contradict or even modify the instrument and extend to prior or contemporaneous agreements which seek to vary the terms, or legal effect of the instrument.²¹⁰ Parol evidence cannot be admitted generally to show

²⁰⁴ *Scott v. Lloyd*, 9 Pet. (U. S.) N. E. 106, 4 N. E. 303; *Commercial Nat. Bank v. Brill*, 37 Neb. 626, 56 25 Tex. Civ. App. 390, 61 S. W. 428; N. W. 382; *Newbery Bank v. Sinclair*, 60 N. H. 100, 49 Am. R. 307;

²⁰⁵ *Seekel v. Norman*, 71 Iowa 264, 32 N. W. 334; *Rohan v. Hanson*, 11 Cush. (Mass.) 44. *Maddox v. Atlantic &c.*, 115 N. Car. 624, 20 S. E. 190.

²⁰⁶ *Rockmore v. Davenport*, 14 Tex. 602, 65 Am. Dec. 132; *Adams v. Wilson*, 12 Metc. (Mass.) 138, 45

²⁰⁷ *Nunn v. Bird*, 36 Ore. 515, 59 Am. Dec. 240; *Allen v. Furbish*, 4 Pac. 808. *Gray (Mass.)* 504; *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361,

²⁰⁸ *Reed v. Vancleve*, 27 N. J. L. 352, 72 Am. Dec. 369; *Williams v. Judy*, 8 Ill. 282, 44 Am. Dec. 699; *Fisher v. Leland*, 4 Cush. (Mass.) 456, 50 Am. Dec. 805. *Clark v. Allen*, 132 Pa. St. 40, 18 Atl. 1071; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332; *Stiles v. Vanderwater*, 48 N. J. L. 67, 4 Atl. 658; Thom-

²⁰⁹ *Proctor v. Cole*, 104 Ind. 373, 3

that a written contract absolute on its face was a conditional note, or to annex conditions to a note.²¹¹ But parol evidence is admissible, in a proper case, to establish a second or subsequent agreement extending the time of payment where the admission of such evidence is not in violation of any statute.²¹² When the purpose is to show an extension of time, parol evidence may be used to show such agreement, or a renewal by advance payments, or the giving of a renewal note.²¹³ But the date of payment cannot be extended by parol evidence of the original agreement, where the date on the instrument is plain, except in cases of fraud, accident or mutual mistake.²¹⁴ The real intention, as a general rule, must be taken from the instrument, with the above named exceptions.²¹⁵ Parol evidence is not admissible

as *v. Nebraska Plow Co.*, 56 Neb. 333, 76 N. W. 876; *Hall v. First Nat. Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319; *Getto v. Binkert*, 55 Kans. 617, 40 Pac. 925; *Murchie v. Peck*, 160 Ill. 175, 43 N. E. 356; *Dorsey v. Armor*, 10 Colo. App. 255, 50 Pac. 726; *Weaver v. Lapsley*, 94 Am. Dec. 671, 42 Ala. 601; *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Brown v. Spofford*, 95 U. S. 474.

²¹¹ *Skinner v. Hendrick*, 1 Root. (Conn.) 253, 1 Am. Dec. 43; *Heywood v. Perrin*, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361, 35 Am. Dec. 126.

²¹² *Grafton Bank v. Woodward*, 5 N. H. 90, 20 Am. Dec. 566; 4 Starkie, 1048, says: "If an agreement be reduced to writing, parol evidence is admissible to show that the parties without writing afterwards varied the terms." See also, *Chitty Contracts* 27; *Keating v. Price*, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92; *Solomons & Co. v. Jones*, 3 Brev. (S. Car.) 54, 6 Am. Dec. 594; *Ferguson v. Hill*, 3 Stew. (Ala.) 485, 21 Am. Dec. 641; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 585; *Bank of Horton v. Brooks*, 64 Kans. 285, 67 Pac. 860;

Grace v. Lynch, 80 Wis. 166, 49 N. W. 751; where statute prohibits change by parol: *Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Foster v. Furlong*, 8 N. Dak. 282, 78 N. W. 986.

²¹³ *Abel v. Alexander*, 45 Ind. 523, 15 Am. R. 270; *Drescher v. Fulham*, 11 Colo. App. 62, 52 Pac. 685; *Eaton v. Whitmore*, 3 Kans. App. 760, 45 Pac. 450; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673; *St. Joe & Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055; *Heath v. Achey*, 96 Ga. 438, 23 S. E. 396; *Niblack v. Champeny*, 10 S. Dak. 165, 72 N. W. 402.

²¹⁴ *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Neal v. Reams*, 88 Ga. 298, 14 S. E. 617; *Hobart v. Dodge*, 10 Me. 156, 25 Am. Dec. 214; *Des Moines Co. v. Hinkley*, 62 Iowa 637, 17 N. W. 915; *Union Bank v. Meeker*, 4 La. Ann. 189, 50 Am. Dec. 559; *Campbell v. Upshaw*, 7 Humph. (Tenn.) 185, 46 Am. Dec. 75; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; *Wallace v. Richards*, 16 Utah 52, 50 Pac. 804.

²¹⁵ See, *Ward v. Perrigo*, 33 Wis. 143; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Dickerson*

to contradict, add to, or vary, a contract in writing; and the character in which parties sign is presumed to be evidenced by the instrument. But in actions for contribution and the like, parol evidence may be admissible to show the relation existing between the makers themselves. This is a collateral fact of the contract, and not part of it. Evidence of the relation between the makers themselves is simply to prove a collateral contract and rebut a presumption.²¹⁶ Parol evidence has often been admitted to prove the relation of principal and

v. Harris, 60 Iowa 727, 13 N. W. 335. But where the time of payment cannot be ascertained from the note, parol evidence has been held admissible to show the real intention of the parties. *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Neal v. Reams*, 88 Ga. 298, 14 S. E. 617; *Hobart v. Dodge*, 10 Me. 156, 25 Am. Dec. 214; contra, *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Horner v. Horner*, 145 Pa. St. 258, 23 Atl. 441; *Neal v. Reams*, 88 Ga. 298, 14 S. E. 617; *Burditt v. Howe*, 69 Vt. 563, 38 Atl. 240. It has also been held admissible that a party who has indorsed a note at the time of its execution and without any words to express the nature of his undertaking may show by parol or other evidence the real obligation intended to be assumed at the time of signing: *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Houck v. Graham*, 106 Ind. 195; *Bright v. Carpenter*, 34 Am. Dec. 432; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673; for example, the indorser may show that he signed for the purpose of creating a trust or the like: *Hight v. Taylor*, 97 Ind. 392; *Dale v. Gear*, 38 Conn. 15; *Chaddock v. Venness*, 35 N. J. L. 517; *Houck v. Graham*, 106 Ind. 195; *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kans. 412; it is also stated

in general terms that if an ambiguity is apparent upon the face of the instrument, then parol evidence may be introduced to explain it: *Cox v. Beltzhoover*, 11 Mo. 142, 47 Am. Dec. 145; *Kendrick v. Beard*, 81 Mich. 182, 45 N. W. 837; *Union Bank v. Meeker*, 4 La. Ann. 189, 50 Am. Dec. 559; *Boykin v. Mobile Bank*, 72 Ala. 262, 47 Am. R. 408; but parol evidence cannot be admitted to explain a patent ambiguity: *Flak v. McNeal*, 23 Neb. 726, 37 N. W. 616, 8 Am. St. 162; *Nichols v. Frothingham*, 45 Me. 220, 71 Am. Dec. 539; *Griffith v. Furry*, 30 Ill. 251, 83 Am. Dec. 186.

²¹⁶ *Williams v. Glenn*, 92 N. Car. 253, 53 Am. R. 416; *Robison v. Lyle*, 10 Barb. (N. Y.) 512, says: "As between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions, which are the proper subject of parol evidence." *Douglass v. Waddle*, 1 Ohio 413, 13 Am. Dec. 630; *Cook v. Brown*, 62 Mich. 473, 29 N. W. 46, 4 Am. St. 870; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. R. 1; *Preston v. Gould*, 64 Iowa 44, 19 N. W. 834; *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. R. 101; *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Ross v. Espy*, 66 Pa. St. 481, 5 Am. R. 394; *Kiel v. Choate*, 92 Wis. 517, 67 N. W. 431.

surety, and the like, as between signers of a negotiable instrument.²¹⁷ So, as already shown, although when the indorsement on a note or bill follows regularly that of the payee, the contract is definite and cannot ordinarily be modified, or contradicted²¹⁸ by parol evidence, there are many cases holding that the indorsement of a bill or note, which is not indorsed at all by the payee, is an irregular proceeding and that the contract created is not fixed and definite and therefore may be inquired into and determined by parol evidence.²¹⁹ So, there are many cases holding that a blank indorsement, at least as between original parties, may be explained by parol evidence.^{219*}

²¹⁷ *Williams v. Glenn*, 92 N. Car. 253, 53 Am. R. 416; *Barry v. Ransom*, 12 N. Y. 462; *Sisson v. Barrett*, 2 N. Y. 406; *Hecker v. Mahler*, 64 Ohio St. 398, 60 N. E. 555; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. R. 1; *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. R. 101; *Barry v. Ransom*, 12 N. Y. 462; *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Pirkle v. Chamblee*, 109 Ga. 32, 34 S. E. 276; *Howle v. Edwards*, 113 Ala. 187, 20 So. 956; *McGee v. Prouty*, 9 Metc. (Mass.) 547, 43 Am. Dec. 409; *Eastman v. Cleaver*, 72 Mich. 167, 40 N. W. 238.

²¹⁸ *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217, 66 Am. Dec. 473; *Woodward v. Foster*, 18 Gratt. (Va.) 200; *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. R. 101; *Hately v. Pike*, 162 Ill. 241, 44 N. E. 441, 53 Am. St. 304; *Geneser v. Wissner*, 69 Iowa 119, 28 N. W. 471; *Bowler v. Braun*, 63 Minn. 32, 65 N. W. 124, 56 Am. St. 449.

²¹⁹ *Stack v. Beach*, 74 Ind. 571, 39 Am. R. 113; *Dale v. Gear*, 38 Conn. 15; *Chaddock v. Venness*, 35 N. J. L. 517; *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kans. 412; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Dale v. Gear*, 38 Conn. 15, 9 Am. R. 353; *Stack v. Beach*, 74

Ind. 571, 39 Am. R. 113, says: "The cases which hold that as between the parties who execute or indorse the bill the true relationship may be shown, do not trench upon the rule that an endorsement cannot be varied by parol evidence. The right of such parties may be tried between themselves, but the rights of the holders cannot be thereby affected."

^{219*} *Baxter v. Talbot*, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; *Spencer v. Sloan*, 108 Ind. 183, 9 N. E. 150, 58 Am. R. 35; *Dale v. Gear*, 38 Conn. 15, 9 Am. R. 353; *Marshalltown Bank v. Crabtree*, 86 Iowa 731, 52 N. W. 559; *Ballard v. Burton*, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; see also as indorsers before delivery: *Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. R. 727; *Fullerton v. Hill*, 48 Kans. 558, 29 Pac. 583, 18 L. R. A. 33; *Essex Co. v. Edmands*, 12 Gray (Mass.) 273, 71 Am. Dec. 758; *Dennis v. Jackson*, 57 Minn. 286, 59 N. W. 198, 47 Am. St. 603; *Richardson v. Foster*, 73 Miss. 12, 18 So. 573, 55 Am. St. 481; *Deering v. Creighton*, 19 Ore. 118, 24 Pac. 198, 20 Am. St. 800; *Jamaica Bank v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. 100; but compare, *Temple v. Baker*, 125 Pa. St. 634, 17 Atl. 516, 11 Am.

The question as to the admissibility of parol evidence to show the capacity in which a note was signed has already been sufficiently considered elsewhere.²²⁰

St. 926, 3 L. R. A. 709; Salisbury v. Cambridge City Bank, 37 Neb. 872, 56 N. W. 727, 40 Am. St. R. 527; Gumz v. Giegling, 108 Mich. 295, 66 N. W. 48; Vore v. Hurst, 13 Ind. 551, 74 Am. Dec. 268; Dennis v. Jackson, 57 Minn. 286, 59 N. W. 198, 47 Am. St. 603; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49; Rhinehart v. Schall, 69 Md. 352, 16 Atl. 126; Preston v. Gould, 64 Iowa 44, 19 N. W. 834.

²²⁰ See Vol. I, § 616, and authorities cited in notes 324, 325.

CHAPTER XC.

BOUNDARIES.

Sec. 1843a. Generally. 1844. Burden of proof. 1845. Presumptions and rules of law. 1846. Presumptions in favor of surveys. 1847. Presumptions as to boundaries on water or highways. 1848. Other presumptions. 1849. Questions of law or fact. 1850. Parol evidence. 1851. Reputation. 1852. Opinions.	Sec. 1853. Best evidence. 1854. Intent. 1855. Establishing lost corners. 1856. Surveys, maps, reports and field notes. 1857. Agreements. 1858. Declarations and admissions. 1859. Ancient boundaries. 1860. Estoppel. 1861. Defenses and matters admitted generally. 1862. Documents referred to.
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§ 1843a. **Generally.**—A boundary is defined as “any separation natural or artificial, which marks the confines or line of two contiguous estates.”¹ Boundaries are divided into two general classes and these are subdivided many times. Natural boundaries are those placed by nature, while artificial boundaries are those erected by man and made use of for designating limits.² Describing the boundary lines of different estates is very important, as upon this depends the extent of a grant of land, and for the reason that the statutes of frauds of the different states, and of England require that all conveyances of land or any interest therein, except certain leases, shall be in

¹ *Bouv. Law Dict.* p. 259; *Tyler v. Starr*, 4 Hill (N. Y.) 369; *Halsey v. McCormick*, 13 N. Y. 296; *Babcock v. Utter*, 1 Abb. App. Dec. (N. Y.) 27; *Dunlap v. Stetson*, 4 Mason (U. S.) 349; *Daniels v. Cheshire*, 20 N. H. 85; *Martin v. Nance*, 3 Head (Tenn.) 650; *Watson v. Peters*, 26 Mich. 516; *Howard v. Ingersoll*, 54 U. S. 380; *Charlestown v. Tufts*, 111 Mass. 348; *Raymond v. Nash*, 57 Conn. 447.

writing, and the written instrument must give such a description, either by describing certain lines or reference to other instruments or matters, that the boundary line may be ascertained.³ The method most commonly adopted in the United States for describing boundary lines is by mathematical lines. An act of Congress of May 12, 1796 provided that the Northwest Territory should be divided by north and south lines, run according to the true meridian, and by others crossing these lines at right angles. This method has gradually spread over nearly all the country of the United States, largely superseding the old method of describing by measurements from certain natural objects. By an act of Congress in 1805, this method was legalized and made a permanent system of surveying.⁴

§ 1844. **Burden of proof.**—The burden of proof is ordinarily upon the plaintiff, but in actions in which boundaries are involved, much depends upon the form of the issue and manner in which the question is raised, and the burden of producing or going forward with the evidence may shift. Generally the burden is upon the party seeking to change the boundary line. The evidence need not be direct or positive, but circumstantial evidence may be used to locate the true boundary line.⁵ Where the boundary line is described in a conveyance, the written instrument is the best evidence, and its construction is usually for the court; but where the contention is over the practical construction of the writing, actual location of monuments, and the like, the question generally becomes one of fact or mixed law and fact; and the burden is usually on the party seeking possession or seeking to show that a survey or location is incorrect.⁶ When the defendant attempts to show an estoppel, as against the plaintiff, be-

³ *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131; *Allen v. Taft*, 6 Gray (Mass.) 552; *Bower v. Earl*, 18 Mich. 367; *Stevens v. Hollister*, 18 Vt. 294, 46 Am. Dec. 154; *Marr v. Hobson*, 22 Me. 321.

⁴ 2 Statutes at Large, pp. 73, 277, 313, 324, 665, 748; *Brown v. Clements*, 3 How. (U. S.) 663, says: "The settled policy of Congress has been to survey the public lands in square figures, running the lines north and south, and east and west, and to extend the subdivision au-

thorized by law, as far as practicable in square figures, to the lowest denomination." *Nolin v. Parmer*, 21 Ala. 66.

⁵ *Scott v. Pettigrew*, 72 Tex. 321, 12 S. W. 161; *Jones v. McCracken*, 13 Ky. L. R. 522, 17 S. W. 626; *Daskam v. Beemer*, 64 Wis. 13.

⁶ *Bennett v. Simon*, 152 Ind. 490, 53 N. E. 649; *Preston v. Bowmar*, 6 Wheat. (U. S.) 580; *Townsend v. Hayt*, 51 N. Y. 656; *Hill v. Weir*, 33 Fed. (U. S.) 100.

cause of his acts or declarations, or silence when he ought to have spoken, inducing the defendant to believe that a false line was the true one, the burden has been held to be upon the defendant, and the defendant must also show that he relied upon such belief when he purchased or made improvements with reference to such boundary line.⁷ Where designated monuments or corner-stones can be found, the burden is upon the party who seeks to locate the line at another place.⁸ Again the burden is upon the party who asserts that a certain monument is the object named in the written instrument, if the monument does not correspond with the present line.⁹ The report and establishment of boundaries of the surveyor generally throws the burden upon the side disputing his acts, if he acted with proper authority.¹⁰ Boundary lines are presumed to remain fixed as in the original conveyance and the burden of proving them otherwise rests upon the party disputing their correctness.¹¹ Where it is claimed that there was an oral agreement between the original owners, by which they designated a certain line as the boundary line, the burden of showing the existence of such an agreement, that the boundary line was located as claimed, that it has been accepted and treated by the original owners as the true line, has been held to be upon the party relying upon such agreement, who, in several of the cases cited, was the defendant.¹²

§ 1845. **Presumptions and rules of law.**—The presumption is that corner-stones and monuments, properly established, are correct; and the burden of proving them otherwise is generally on the party disputing their correctness.¹³ When the monuments can be positively

⁷ Greer v. Squire, 9 Wash. 359, 37 Pac. 545; McEvoy v. Loyd, 31 Wis. 142; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203.

⁸ Robinson v. Laurer, 27 Ore. 315, 40 Pac. 1012; Cadeau v. Elliott, 7 Wash. 205, 34 Pac. 916; Greer v. Squire, 9 Wash. St. 359, 37 Pac. 545; Schaeffer v. Perry, 62 Tex. 705.

⁹ Ashby v. Eastern &c., 5 Metc. (Mass.) 368, 38 Am. Dec. 426; Robinson v. Laurer, 37 Ore. 315, 40 Pac. 1012; Henry v. Huff, 143 Pa. St. 548, 22 Atl. 1046.

¹⁰ Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Downer v. Tarbell, 61 Vt.

530, 17 Atl. 482; Beach v. Fay, 46 Vt. 337; Worthington v. Baughman, 84 Tex. 480, 19 S. W. 770; Greif v. Norfolk &c. Co., (Va.) 30 S. E. 438.

¹¹ Greer v. Squire, 9 Wash. 359, 37 Pac. 545; McEvoy v. Loyd, 31 Wis. 142; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203.

¹² Jones v. Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. 589; Archer v. Helm, 70 Miss. 874, 12 So. 702; Dashiel v. Harshman, 113 Iowa 283, 85 N. W. 85.

¹³ Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Campbell v. Clark, 8 Mo. 553, goes farther and says that, al-

identified there is generally a conclusive presumption that the lines are the true boundaries. These monuments are better evidence of the boundary line, because they are the facts themselves; while field notes, plats or any evidence, indicating courses, distances and quantities are merely a description, which help in ascertaining the real facts.¹⁴ When boundary lines cannot be located or reconciled, certain presumptions are usually indulged which aid in arriving at the true intention of the parties. What are boundary lines, and the relative importance of each, is a question of law for the court, and the following rules have been laid down: First, the law has highest regard for natural boundaries and they generally control all others.¹⁵ Second, it is presumed that artificial monuments fixed by the survey are correct and mark the true line.¹⁶ Third, in the absence of natural or artificial

though such corners or boundaries may have been effaced or destroyed, yet, if the locality can be established by other testimony, it would prevail, even though the computed contents did not correspond with monuments. *McEvoy v. Loyd*, 31 Wis. 142; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203; *Haydel v. Dufresne*, 17 How. (U. S.) 23; *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916.

¹⁴ *Park v. Wilkinson*, 21 Utah 279, 60 Pac. 945; *Wharton v. Garvin*, 34 Pa. St. 340; *Chandler v. McCard*, 38 Me. 564; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Echerd v. Johnson*, 126 N. Car. 409, 35 S. E. 1036; *Wiley v. Lindley*, (Tex. Civ. App.) 56 S. W. 1001; *Whitehead v. Atchison*, 136 Mo. 485, 37 S. W. 928; *McKinney v. Doane*, 155 Mo. 287, 56 S. W. 304; *Hubbard v. Dusy*, 80 Cal. 28, 22 Pac. 214; *Clary v. McGlynn*, 46 Vt. 347; *Ulman v. Clark*, 100 Fed. (U. S.) 180; *Schaeffer v. Berry*, 62 Tex. 705; *Nichols v. Turney*, 15 Conn. 101; *Root v. Cincinnati*, 87 Iowa 202, 54 N. W. 740; *Rollins v. Davidson*, 84 Iowa 237, 50 N. W. 1061; *Johnson v. Preston*, 9 Neb. 474, 4 N.

W. 83; *Bellas v. Cleaver*, 40 Pa. St. 260.

¹⁵ *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282, 55 Am. R. 871; *Hughes v. Cawthorn*, (Cal.) 35 Fed. 248; *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64; *Cutts v. King*, 5 Me. 482; *Wilson v. Randall*, 67 N. Y. 338; *Pierce v. Faunce*, 37 Me. 63; *Chandler v. McCard*, 38 Me. 564; *Marshall v. Bompert*, 18 Mo. 84; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Dalton v. Rust*, 22 Tex. 133; *Sanders v. Godding*, 45 Iowa 463, 12 Am. Dec. 70, says: "A statement of the quantity of the land supposed to be conveyed, when inserted by way of description, will yield to description by monuments and also metes and bounds." *Johnson v. Archibald*, 78 Tex. 96, 22 Am. St. 27, holds that calls in a survey for natural objects or marked lines and corners prevail over calls for corners and distances. *Newsom v. Pryor*, 7 Wheat. (U. S.) 7; *Reed v. Spicer*, 27 Cal. 57; *Abbott v. Abbott*, 53 Me. 356; *Seaman v. Hogeboom* 21 Barb. (N. Y.) 398.

¹⁶ *Decatur v. Niedermeyer*, 168 Ill. 68, 48 N. E. 72; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *Ham-*

monuments the lines of adjacent lands will be extended and control.¹⁷ Fourth, the presumption is in favor of metes and bounds. In the case of metes and bounds, as in all others, if the description is clear and distinct according to the method used, and not so of the others, the clear one will prevail.¹⁸ Fifth, if other means that control fail, courses and distances will control.¹⁹ When it is impossible to reconcile both of these, distances will yield to courses.²⁰ The last and least important presumption is in favor of quantity.²¹ When the boundaries can be determined in any better way the number of acres called for in an instrument is not controlling. The presumptions or rules

mond v. Ridgely, 5 H. & J. (Md) 245, 9 Am. Dec. 522; *Frost v. Spaulding*, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; *Newman v. Foster*, 3 How. (Miss.) 383, 34 Am. Dec. 98; *Miller v. Cramer*, 190 Pa. St. 315, 42 Atl. 690; *Harrington v. Boehmer*, 134 Cal. 196, 66 Pac. 214. Control over calls described in adjacent: *Marsh v. Marshall*, 19 N. H. 301, 49 Am. Dec. 156; *Connor v. Johnson*, 59 S. Car. 115, 37 S. E. 240; *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. 718. Control over courses and distances: *Heaton v. Hodges*, 14 Mo. 66, 30 Am. Dec. 731; *Harry v. Graham*, 18 N. Car. 76, 27 Am. Dec. 226; *Doe v. Riley*, 23 Ala. 164, 65 Am. Dec. 334; *Gordon v. Booker*, 97 Cal. 586, 82 Pac. 593; *Watrrous v. Morrison*, 33 Fla. 261, 14 So. 805, 39 Am. St. 139; *Logan v. Evans*, 16 Ky. L. R. 745, 29 S. W. 636; *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. 1051. Control over quantity: *Beaty v. Robertson*, 120 Ind. 589, 30 N. E. 706; *Hooten v. Comerford*, 152 Mass. 591, 26 N. E. 407, 23 Am. St. 861.

¹⁷ *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. 315. Control courses and distances: *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; *Bowen v. Gaylord*, 122 N. Car. 816, 29 S. E. 340; *Alrey v. Kunkle*, 190 Pa. St. 196, 42 Atl. 533. Controls over quan-

tity: *Clark v. Munyan*, 22 Pick. (Mass.) 410, 33 Am. Dec. 752; *Gourdin v. Davis*, 2 Rich. (S. Car.) 481, 45 Am. Dec. 745; *Palmer v. Osborne*, 115 Iowa 714, 87 N. W. 712.

¹⁸ *Palmer v. Osborne*, 115 Iowa 714, 87 N. W. 712; metes and bounds control courses and distances: *Friend v. Friend*, 64 Md. 321, 1 Atl. 865; *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; also controls over quantity: *Doe v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *Moran v. Lezotte*, 54 Mich. 83, 19 N. W. 757; *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. 615.

¹⁹ *Carson v. Mills*, 18 N. Car. 546, 80 Am. Dec. 143; *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. 315; *Overton v. Davisson*, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 726; controls over quantity: *Duncan v. Madara*, 106 Pa. St. 562.

²⁰ *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. 886, 60 Am. R. 584; *Miller v. White*, 1 N. Car. 161, 1 Am. Dec. 591.

²¹ *Doe v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831; *Case v. Dexter*, 106 N. Y. 548, 13 N. E. 449; *Davis v. Hess*, 103 Mo. 31, 15 S. W. 324.

adopted by the courts in considering the weight to be given to certain methods of describing land, are not absolute and fixed. As the real intent of the parties, at the time the boundary line was made, is the object to be sought after, anything that will best bring about that result, should be adopted. Often, one method of description is vague and uncertain, while some other methods used in the same instrument will better serve and determine the true purpose. Cases might even arise where natural boundaries would give way to a description by the number of acres. It may also be laid down as a somewhat general rule, that when the description is uncertain or vague, the vague and uncertain calls will be rejected and controlled by the certain calls.²² A particular description will usually prevail over a general description, unless the particular description is uncertain, in which case the general description may carry more weight.²³ When there is a contradiction of boundaries in two deeds from the same grantor, the title of the first grantee is superior, but this may be reversed if the first deed is uncertain.²⁴ As between the grantor and grantee, when a description of a boundary is uncertain, it will generally be construed most strongly in favor of the grantee upon the ground that the grantor had it in his power to make the description clear and he must be the sufferer, if any one, because of his neglect.²⁵ Where the government is the grantee, this rule is reversed.²⁶

§ 1846. Presumptions in favor of surveys.—The law presumes that every public officer does his duty and therefore the presump-

²² *Lego v. Medley*, 79 Wis. 211, 48 N. W. 375, 24 Am. St. 706; *Clement v. Rutland Bank*, 61 Vt. 298, 17 Atl. 717, 4 L. R. A. 425; *Shipp v. Miller*, 2 Wheat. (U. S.) 316; *Besson v. Richards*, 24 Tex. Civ. App. 54, 58 S. W. 611; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491; *Benedict v. Gaylord*, 11 Conn. 382, 29 Am. Dec. 299; *Gano v. Aldridge*, 27 Ind. 294; *Friend v. Friend*, 64 Md. 321, 1 Atl. 865; *Owings v. Freeman*, 48 Minn. 483, 51 N. W. 476; *West v. Bretelle*, 115 Mo. 653, 22 S. W. 705; *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Robertson v. Mooney*, 1 Tex. Civ. App. 379, 21 S. W. 143.

²³ *Sharp v. Thompson*, 100 Ill. 497, 39 Am. R. 61; *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. R. 104.

²⁴ *Hitchcock v. Southern Iron & Co.*, (Tenn.) 38 S. W. 588; *Adams v. Powell*, 87 Ga. 138, 13 S. E. 280; *Flynn v. Sparks*, 10 Ky. L. R. 960, 11 S. W. 206; *Hale v. Akers*, 69 Cal. 160, 10 Pac. 385.

²⁵ *Dodge v. Walley*, 22 Cal. 225, 83 Am. Dec. 61; *Vose v. Handy*, 2 Me. 322, 11 Am. Dec. 101; *Klaer v. Ridgway*, 86 Pa. St. 534.

²⁶ *McManus v. Carmichael*, 8 Iowa 1.

tion is that the surveyor who located the boundary line and monuments, actually ran the lines as described in his filed notes, and that his maps, reports and notes are correct.²⁷ The highest regard is held for a government survey and while it is not deemed conclusive, yet it is presumed to be mathematically true and it is often said that there is a strong presumption, when the survey is clear and certain, that it is correct and ~~it~~ will control.²⁸ Because of this presumption it is said that private surveys can be used only to contradict the public surveyor when the reports and survey of the latter are uncertain²⁹ and the private survey is binding only on the parties to it,³⁰ and not on strangers. A survey is presumed to be better evidence than a plat made from the survey.³¹ Locations made on plats are presumed to have been put there in compliance with the instructions of the surveyor,³² and a plat certified to by the surveyor is sufficient, if from the facts given in the plat any competent surveyor may locate the boundary lines and ascertain the true dimensions of the land.³³ When the cornerstones are named or when lines are mentioned as extending from one place to another, the lines are presumed to be straight until the contrary is proved.³⁴ After twenty years a chamber survey

²⁷ Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Radford v. Johnson, 8 N. Dak. 182, 77 N. W. 601; Holland v. Thompson, 12 Tex. Civ. App. 471, 35 S. W. 19; Boon v. Hunter, 62 Tex. 582; Bell County v. Hendrickson, 24 Ky. L. R. 371, 68 S. W. 842; Knoll v. Randolph, 68 Neb. 599, 94 N. W. 964.

²⁸ Breen v. Donnelly, 74 Cal. 301, 15 Pac. 845; Webster v. White, 8 S. Dak. 479, 66 N. W. 1145; Williams v. Atkinson, 152 Ind. 98, 52 N. E. 603; Billingsley v. Bates, 30 Ala. 376, 68 Am. Dec. 126; Granby Min. &c. v. Davis, 156 Mo. 422, 57 S. W. 126; Martin v. Carlin, 19 Wis. 454, 88 Am. Dec. 696; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135; Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Neill v. Jordan, 15 Mont. 47; Rice v. McKune, 63 Cal. 124; Nollin v. Farmer, 21 Ala. 66.

²⁹ Billingsley v. Bates, 30 Ala. 376,

68 Am. Dec. 126; Johnson v. Archibald, 78 Tex. 96, 22 Am. St. 84; Tyrone &c. v. Cross, 128 Pa. St. 636.

³⁰ Thayer v. Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59; Kampmann v. Heintz, (Tex. Civ. App.) 24 S. W. 329.

³¹ McKinney v. Doane, 155 Mo. 287, 56 S. W. 304; Jones v. Martin, 35 Fed. 348; Root v. Cincinnati, 87 Iowa 202, 54 N. W. 206.

³² Gittings v. Hall, 1 H. & J. 14, 2 Am. Dec. 502; Payne v. English, 79 Cal. 540; Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Olin v. Henderson, 120 Mich. 149, 79 N. W. 178; Morrison v. Neff, 18 Neb. 133, 24 N. W. 555.

³³ Auburn v. Goodwin, 128 Ill. 58; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143.

³⁴ Johnson v. Pannel, 2 Wheat. (U. S.) 206; McCoy v. Galloway, 3 Ohio 282, 17 Am. Dec. 591; George v.

is presumed to be conclusive, while at any time before the twenty years is up the presumption is that an actual survey was made.³⁵ Parol evidence may, however, be introduced to overthrow this presumption and to show that the lines were never surveyed.³⁶ If there has been an actual survey at a former time this may be adopted by the later survey and the latter will not be considered a chamber survey.³⁷

§ 1847. Presumptions as to boundaries on water or highways.—

Where a line is described as running to low water mark, it does not include the land between low water mark and the thread of the stream.³⁸ A distinction is made by many authorities between land bordering upon non-navigable, or non-tidal, streams and land bordering upon navigable, or tidal, streams. The presumption is that the boundary line runs to the thread of the former, while in the latter the boundary is presumed to extend only to the bank or ordinary high water mark.³⁹ So, it has been held that when the bed of a stream is vested in the state, the presumption is that the boundary extends to high water mark and if the bed of a navigable stream belonged to the adjacent owners, then, in that case, the boundary line will be presumed to extend to the thread.⁴⁰ When a stream is not navigable, or when,

Thomas, 16 Tex. 74, 67 Am. Dec. 612; Hagan v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267; Hamil v. Carr, 21 Ohio St. 258; Allen v. Kingsbury, 16 Pick. (Mass.) 235.

³⁵ Madera Irr. Dist., In re, 92 Cal. 341, 27 Am. St. 106; Bellas v. Cleaver, 40 Pa. St. 260; Packer v. Schrader Min. Co., 97 Pa. St. 383; Burge v. Poindexter, (Tex. Civ. App.) 56 S. W. 81.

³⁶ Williamson v. Simpson, 16 Tex. 433; Salmon Lumber Co. v. Dusenbury, 110 Pa. St. 446, 1 Atl. 635; Stafford v. King, 30 Tex. 257, 94 Am. Dec. 304.

³⁷ Talbot v. Copeland, 38 Me. 333; the fact that actual lines were never run and marked will not invalidate a patent, if it can be identified with reasonable certainty, Dreer v. Car-skadden, 48 Pa. St. 38.

³⁸ Dunton v. Parker, 54 Atl. 1115,

97 Me. 461; Allen v. Weber, 80 Wis. 531, 27 Am. St. 51; Cary v. Daniels, 5 Metc. (Mass.) 236; Starr v. Child, 20 Wend. (N. Y.) 149; Child v. Starr, 4 Hill (N. Y.) 369; Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145; see, Murphy v. Copeland, 58 Iowa 409, 43 Am. R. 118; Halsey v. McCormick, 13 N. Y. 296; Jones v. Parker, 99 N. Car. 18; Cook v. McClure, 58 N. Y. 437, 17 Am. R. 270; Bradford v. Cressey, 45 Me. 9.

³⁹ McBride v. Whitaker, (Neb.) 90 N. W. 966; Fulmer v. Williams, 122 Pa. St. 191, 9 Am. St. 88; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Ensminger v. People, 47 Ill. 384, 95 Am. Dec. 495; Ross v. Faust, 54 Ind. 471, 23 Am. R. 655.

⁴⁰ Sleeper v. Laconia, 60 N. H. 201, 49 Am. R. 311; Lunt v. Holland, 14 Mass. 150; Williamsburg v. Smith, 84 Ky. 375; Norcross v. Griffiths, 65

though navigable the grantor owns the bed of it, the rule is that all grants of land bordering upon it, vest title to the thread of the stream, unless otherwise limited.⁴¹ Meander lines, run by government surveyors along the banks of streams, are for the purpose of designating the general course of the stream and not necessarily to define the boundary, and will not, ordinarily, prevent the boundary from extending to the thread of the stream, as it would, had no reference been made to the meander line.⁴² The thread of the stream is a line running equidistant from its two banks at the ordinary stage of its waters.⁴³ A grantor may limit his grant so as to exclude any portion of the stream he may wish to retain, but as it would usually be of no advantage to him and of great advantage to the grantee, therefore the presumption in the absence of words excluding it, is that the grantor intended to convey all he owned and to the thread of the stream.⁴⁴ When land is bounded by a highway, a road or street, the presumption is that it extends to the center of the highway, unless the description

Wis. 610; *Jones v. Soulard*, 24 How. (U. S.) 65; *Watson v. Peters*, 26 Mich. 508; *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. 139; *Browne v. Kennedy*, 5 H. & J. (Md.) 195, 9 Am. Dec. 503; *Middleton v. Pritchard*, 3 Scam. (Ill.) 510, 38 Am. Dec. 112, holds: "A grant of land upon a river extends the title of the grantee to the middle of the same, if the grantor has authority to extend it so far, unless limited to another boundary by express terms. This is a general principle of the common law applicable to private conveyances, which are construed most strongly against the grantor." *Boston v. Richardson*, 105 Mass. 351, 13 Allen 155.

"*Allen v. Weber*, as reported in 27 Am. St. on p. 58; *Warren v. Thomaston*, 75 Me. 329, 46 Am. R. 397; *Jackson v. Louw*, 12 Johns. (N. Y.) 255; *Brown v. Huger*, 21 How. (U. S.) 306; *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 671.

"*Fuller v. Dauphin*, 124 Ill. 542,

16 N. E. 917, 7 Am. St. 388; *East Omaha Land Co. v. Jeffries*, 40 Fed. 386; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Ross v. Faust*, 54 Ind. 471, 23 Am. R. 655; *Schlösser v. Cruickshank*, 96 Iowa 414, 65 N. W. 344; *Martin v. Carlin*, 19 Wis. 454, 88 Am. Dec. 696.

"*Warren v. Thomaston*, 75 Me. 329, 46 Am. R. 397; *Hopkins v. Dickinson*, 9 Cush. (Mass.) 552; *McCullough v. Wall*, 4 Rich. (S. Car.) 68, 53 Am. Dec. 715; *West v. Fox River &c.*, 82 Wis. 647, 52 N. W. 803.

"*Snow v. Mt. Desert Island &c.*, 84 Me. 14, 24 Atl. 429, 30 Am. St. 331, 17 L. R. A. 280; *Holden v. Chandler*, 61 Vt. 291; *Palmer v. Farrell*, 129 Pa. St. 162; *Allen v. Weber*, as reported in notes of 27 Am. St. 59; *Freeman v. Leighton*, 90 Me. 541, 38 Atl. 542; *People v. Jones*, 112 N. Y. 597, 20 N. E. 577; *Jones v. Janney*, 8 Watts & S. (Pa.) 436, 42 Am. Dec. 309; *Hill v. Lord*, 48 Me. 83.

limits it to the side or other designated line.⁴⁵ The intention to limit a boundary line to the side of a street must clearly appear or the presumption will prevail.⁴⁶ This presumption may be overcome, but it must usually be overcome by something which shows clearly and distinctly an intention to withhold an interest in the highway.⁴⁷ If streets are named in the description although they have never been opened, still if the grantor owns the fee, the presumption is held by some authorities to be that the line extends to the center.⁴⁸ And the

⁴⁵ *Gould v. Eastern &c.*, 142 Mass. 85, 7 N. E. 543; *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; *McQuaid v. Portland &c.*, 18 Ore. 237, 22 Pac. 899; *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; *Jacksonville v. Lockwood*, 33 Fla. 573, 15 So. 327; *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 1 N. W. 63, 32 Am. R. 719; *Ford v. Chicago R. Co.*, 14 Wis. 663; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Maynard v. Weeks*, 41 Vt. 617; *Iron Mts. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622; *Peabody v. Heights Co. v. Sadtler*, 63 Md. 533 52 Am. R. 519; *Foreman v. Presbyterian Asso.*, (Md.) 30 Atl. 1114; *Jacksonville v. Lockwood*, 33 Fla. 573, 15 So. 327; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473; *Low v. Tibbetts*, 72 Me. 92, 39 Am. R. 303; *Jacksonville v. Lockwood*, 33 Fla. 573, 15 So. 327; *Elliott Roads & Streets* (2d ed.), § 722.

⁴⁶ *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142, 24 L. R. A. 507; *Jarstadt v. Morgan*, 48 Wis. 245; *Gould v. Eastern*, 142 Mass. 85; *Bank v. Ogden*, 69 U. S. 59, 2 Wall. (U. S.) 57; *Weisbrod v. Chicago*, 18 Wis. 35, 86 Am. Dec. 743; *Cox v. Louisville &c.*,

48 Ind. 178; *Healey v. Babbitt*, 14 R. I. 533; *Robbins, In re*, 34 Minn. 99, 57 Am. R. 40; *Taylor v. Armstrong*, 24 Ark. 102; *Winthrop v. Fairbanks*, 41 Me. 307; *Barnes v. Burt* 38 Conn. 541; *Baker v. St. Louis*, 7 Mo. App. 429.

⁴⁷ *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142, 24 L. R. A. 507; *Columbus &c. v. Witherow*, 82 Ala. 193; *Tousley v. Galena &c.*, 24 Kans. 328; *Zinc & Co. v. La Salle*, 117 Ill. 411; but see, *Schurmeier v. St. Paul &c.*, 10 Minn. 82, 88 Am. Dec. 59; see generally, *Elliott Roads & Streets*, (2d ed.) §§ 723-727.

⁴⁸ *Johnson v. Arnold*, 91 Ga. 659, 18 S. E. 370; see also, *Paine v. Consumer's &c. Co.*, 71 Fed. (U. S.) 626; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636; *Southerland v. Jackson*, 30 Me. 462, 50 Am. Dec. 633; *Baltimore &c. v. Gould*, 67 Md. 60, 8 Atl. 754; but other courts say that this doctrine does not apply to mere paper highways: *Plumer v. Johnston*, 63 Mich. 165; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636; *Hopkinson v. McKnight*, 31 N. J. L. 422; *Bell v. Wright*, (Tex. Civ. App.) 59 S. W. 615; and the highway as opened and actually used rather than its record lay out has been considered to be the boundary intended in other cases; see, *Elliott Roads & Streets*, (2d ed.) § 725.

town plat or road survey may be used in evidence to locate the center line.⁴⁹ Parol evidence may be introduced to show the actual lines of the street under the same rules, in general, that other lines may be established.⁵⁰

§ 1848. **Other Presumptions.**—Ancient fences afford evidence of the location of the original line and if they have been standing for many years the presumption is that they represent the true line.⁵¹ The presumption is that the corners have been established at the places indicated by the field notes, and the burden of proving otherwise is on him who disputes their correctness.⁵² The presumption is that a course has reference to the true meridian, but such presumption may be overthrown by evidence.⁵³ The early cases took a different view and held that the courses in a deed are to be run according to the magnetic meridian. Unless something appears to show another method the courts will take judicial notice of the variations of the magnetic needle upon all grants made when the magnetic needle was used.⁵⁴ A senior survey is sometimes presumed to be better than a survey made later,⁵⁵ and it has been said that the presumption is against

* *Jacob v. Woolfolk*, 90 Ky. 426, 14 S. W. 415, 9 L. R. A. 551; *Atwood v. Conrike*, 86 Mich. 99, 48 N. W. 950; *Commonwealth v. Young Men's Christ. Asso.*, 169 Pa. St. 24, 32 Atl. 121; *Webb v. Demopolis*, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; *White v. Flannigain*, 1 Md. 525, 54 Am. Dec. 668; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157.

† *Cahill v. Layton*, 57 Wis. 600, 16 N. W. 1, 46 Am. R. 46; *Southern Iron Works v. Georgia R. Co.*, 131 Ala. 649, 31 So. 723; *Atwood v. Conrike*, 86 Mich. 99, 48 N. W. 950; *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831.

‡ *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831; *Hockmoth v. Des Grand Champs*, 71 Mich. 520, 39 N. W. 737; *Knight v. Coleman*, 10 N. H. 118, 49 Am. Dec. 147; *Smith v. Hosmer*, 7 N. H. 436, 28 Am. Dec. 354; *Beaubien v. Kellogg*, 69 Mich. 333.

§ *Greer v. Squire*, 9 Wash. 359, 37 Pac. 545; *McEvoy v. Loyd*, 31 Wis. 142; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203; *Den ex Dem. Van Blarcom v. Kip*, 26 N. J. L. 351; *Kuechler v. Wilson*, 82 Tex. 638, 18 S. W. 317.

¶ *Clark v. Tacoma &c.*, 2 Wash. 203, 26 Pac. 252, 26 Am. St. 851; *Sevier v. Wilson, Peck*, (Tenn.) 146, 14 Am. Dec. 741; *Reed v. Tacoma Bldg. &c.*, 2 Wash. 198, 26 Pac. 252, 26 Am. St. 4, 851; *Wilson v. Inloes*, 6 Gill. (Md.) 121; *Bonney v. McLeod*, 38 Miss. 393.

|| *Wells v. Jackson*, 47 N. H. 235, 90 Am. Dec. 575; *Bryan v. Beckley*, Lit. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; *Brooks v. Tyler*, 2 Vt. 348.

§ *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187; *Glass v. Gilbert*, 58 Pa. St. 266; *Grier v. Penn. Coal &c.*, 128 Pa. St. 79.

a party who neglects to have his land surveyed and that his deed should be narrowly construed.⁵⁶ When monuments or objects are mentioned in a survey, it is generally presumed that the call is for the center of such object. Thus, when a boundary is described as ascending a stream, such boundary usually extends to the thread of the stream.⁵⁷

§ 1849. **Questions of law or fact.**—Questions of disputed boundaries, where doubts exist as to monuments, corners, or lines, are usually mixed questions of law and fact or questions of fact, for the jury.⁵⁸ What the boundaries are, is generally a question for the court; where they are, is a question for the jury.⁵⁹ Where two or more descriptions conflict, the true boundary is usually, but not always, left to the jury, under proper instructions from the court as to the importance of the different descriptions, and the rules of law applicable thereto.

⁵⁶ *Jackson v. Schoonmaker*, 7 Johns. (N. Y.) 12.

⁵⁷ *Freeman v. Bellegarde*, 108 Cal. 179, 41 Pac. 289, 49 Am. St. 76, says, if a boundary line is described as running to the mouth of a creek and thence ascending such creek, the thread of the stream is the boundary, and the calls and courses distances must be disregarded if they do not follow such thread. *Middleton v. Pritchard*, 3 Scam. (Ill.) 510, 38 Am. Dec. 112; *Railroad Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Chicago v. Van Ingen*, 152 Ill. 624, 43 Am. St. 285; *Grand Rapids Ice Co. v. South Grand Rapids &c.*, 102 Mich. 227, 47 Am. St. 516.

⁵⁸ *Miller v. Cure*, 205 Pa. St. 168, 54 Atl. 721; *Comegys v. Carley*, 3 Watts (Pa.) 280, 27 Am. Dec. 356; *Hall v. Powel*, 4 S. & R. (Pa.) 456, 8 Am. Dec. 722; *Newman v. Foster*, 3 How. (Miss.) 383, 34 Am. Dec. 98; *Houser &c. v. Belton*, 10 Ired. L. (N. Car.) 359, 51 Am. Dec. 391;

Scott v. Yard, 46 N. J. Eq. 79; *Fitzgerald v. Brennan*, 57 Conn. 511; *Adams v. Crenshaw*, 74 Tex. 111; *Roberts v. Preston*, 106 N. Car. 411; *Marsh v. Richardson*, 106 N. Car. 539; *Cross v. Tyrone*, 121 Pa. St. 387; *Menasha Co. v. Lawson*, 70 Wis. 600; *Bewley v. Chapman*, 16 Ore. 402; *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. 833; *Miller v. Cure*, 205 Pa. 168, 54 Atl. 721.

⁵⁹ *Woodbury v. Venia*, 114 Mich. 251, 72 N. W. 189; *Dice v. McCauley*, 25 Ore. 469, 36 Pac. 530; *White v. Amrhien*, 14 S. Dak. 270, 85 N. W. 191; *Newman v. Foster*, 3 How. (Miss.) 383, 34 Am. Dec. 98; *Houser v. Belton*, 10 Ired. L. (N. Car.) 359, 51 Am. Dec. 391; *United States v. Jackalow*, 1 Black (U. S.) 484; *Galveston &c. v. Hartz*, (Tex. Civ. App.) 26 S. W. 782; *Royal v. Chandler* 83 Me. 150, 21 Atl. 18; *Taylor v. Fomby*, 116 Ala. 621, 22 So. 910, 67 Am. St. 149.

§ 1850. **Parol evidence.**—The subject of parol evidence with reference to deeds and similar instruments has already been considered at some length.⁸⁰ Parol evidence is not admitted to change the description in a written instrument, such as a deed, or the like, if it can be determined from the instrument itself,⁸¹ but parol evidence is often admitted to apply the description to the subject matter or object, and to identify and ascertain the locality of monuments named in the written instrument. So, in certain cases where the description is uncertain and ambiguous, parol evidence may be introduced to explain the instrument, to remove ambiguities, and to show the construction intended by the parties at the time of making the instrument,⁸² under and in accordance with the rules and limitations considered in the chapter to which reference has been made. Parol evidence may be admitted to show the location of lost corner stones or stakes, and to locate monuments when they are lost or uncertain. Anything of the kind that was in existence at the time of making the survey and that was used to locate the line may generally be shown in

⁸⁰ See Vol. I, §§ 597-605, 613.

⁸¹ *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. R. 311; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64; *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Hartz v. Owen*, (Tex. Civ. App.) 27 S. W. 42; *Wheeler v. Benjamin*, 68 Pac. 313, 136 Cal. 51; Vol. I, § 568, et seq.

⁸² *McAafferty v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *McCoy v. Gallo-way*, 3 Ohio 282, 17 Am. Dec. 591; *Blake v. Doherty*, 5 Wheat. (U. S.) 359; *Deery v. Cray*, 10 Wall. (U. S.) 263; *Emery v. Webster*, 42 Me. 204, 66 Am. Dec. 274; *Koch v. Dunkel*, 90 Pa. St. 264; *Reamer v. Nesmith*, 34 Cal. 624; *Benedict v. Gaylord*, 11 Conn. 332, 29 Am. Dec. 239; *Cleveland v. Obenchain*, 107 Ind. 591; *McNeill v. Dixon*, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740; *Talkin v. Anderson*, (Tex.) 19 S. W.

350; *Post Hill &c. v. Brandegee*, 74 Conn. 338, 50 Atl. 874; *McLawrin v. Salmons*, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563; *Emery v. Webster*, 42 Me. 204, 66 Am. Dec. 274; *Stone v. Clark*, 1 Metc. (Mass.) 378, 35 Am. Dec. 370; *Putman v. Bond*, 100 Mass. 58, 1 Am. R. 82; *Purkiss v. Benson*, 28 Mich. 538; *Beach v. Whittlesey*, 73 Conn. 530, 48 Atl. 350; *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. R. 311; *Baker v. McArthur*, 54 Mich. 139; *Newman v. Foster*, 3 How. (Miss.) 383, 34 Am. Dec. 98; *Diggs v. Kurtz*, 132 Mo. 250, 33 S. W. 815; *Gibson v. Poor*, 21 N. H. 440, 53 Am. Dec. 216; *Jackson v. McCall*, 10 Johns. (N. Y.) 377, 6 Am. Dec. 343; *Wynne v. Alexander*, 7 Ind. L. (N. Car.) 237, 47 Am. Dec. 326; *Euliss v. McAdams*, 108 N. Car. 507, 13 S. E. 162; *Schneider v. Patterson*, 38 Neb. 680, 57 N. W. 398; *Hanlon v. Union Pac. &c. R. Co.*, 40 Neb. 52, 58 N. W. 590; Vol. I, Ch. XXVI, 597, et seq.

such cases by parol.⁶³ Monuments, plats or written instruments mentioned in the deed and made material in locating the boundaries may be shown in evidence.⁶⁴ So, treaties, statutes, and the like, may be admissible.⁶⁵ But evidence of monuments not named or referred to in a deed which contains a good description in itself, will not, ordinarily at least, be allowed to control the description.⁶⁶ An oral agreement, either express or implied, between adjoining land owners establishing a certain line between their land as the boundary line, may be entered into and be binding upon them and those claiming under them. This may be true and not violate the statute of frauds;⁶⁷ but if there is no dispute as to the true boundary or if the description is definite and certain or is made so by legal rules of construction, parol evidence cannot, ordinarily, be introduced.⁶⁸ The reports, field notes and maps of the surveyor speak for themselves.⁶⁹ But where a survey

⁶³ *Wendell v. Jackson*, 8 Wend. (N. Y.) 183, 12 Am. Dec. 635; *Frost v. Spaulding*, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Clay v. Sloan*, 104 Tenn. 401, 58 S. W. 229.

⁶⁴ *Cleveland v. Choate*, 77 Cal. 73, 18 Pac. 875; *Thomas v. Patten*, 13 Me. 329; *Devine v. Wyman*, 131 Mass. 73; *Seaman v. Hogeboom*, 21 Barb. (N. Y.) 398; *Cragin v. Powell*, 125 U. S. 691; *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831; *State v. Crocker*, 49 S. Car. 242, 27 S. E. 49; *Frost v. Angler*, 127 Mass. 212.

⁶⁵ *Smith v. Shackelford*, 9 Dana (Ky.) 452; *Jackson v. Perrine*, 35 N. J. L. 137; *Mobile v. Mobile*, 128 Ala. 335, 30 So. 645; *Harris v. Doe*, 4 Blackf. (Ind.) 369.

⁶⁶ *McKinney v. Doane*, 155 Mo. 287, 56 S. W. 304; *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884; *Jackson v. Perrine*, 35 N. J. L. 137.

⁶⁷ *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Turner v. Baker*, 64 Mo. 218, 27 Am. R. 226; *Hitchcock v. Libby*, 70 N. H. 399, 47 Atl.

269; *Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. 870; *Masterson v. Bockel*, 20 Tex. Civ. App. 416, 51 S. W. 39; *Glen Mfg. Co. v. Weston Lumber Co.*, 80 Fed. (U. S.) 242; the purpose, in this case, being to agree upon something by which they might identify their estates and make certain that which they regarded as uncertain. *Boyd v. Graves*, 4 Wheat. 513; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604; *Makepeace v. Bancroft*, 12 Mass. 469; *Hopper v. Hickam*, 169 Mo. 166, 69 S. W. 297.

⁶⁸ *Harn v. Smith*, 79 Tex. 310, 15 S. W. 240, 23 Am. St. 340; *Nichol v. Lytle*, 4 Yerg. (Tenn.) 456, 26 Am. Dec. 240; *Sharp v. Blankenship*, 67 Cal. 441, 7 Pac. 848; *Clayton v. Feig*, 179 Ill. 534, 54 N. E. 149; *Boyd v. Graves*, 4 Wheat. (U. S.) 513; *Olin v. Henderson*, 120 Mich. 149, 79 N. W. 178; *Lennox v. Hendricks*, 11 Ore. 33, 4 Pac. 515; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

⁶⁹ *Hamilton v. Saunders*, (Tex. Civ. App.) 73 S. W. 1069; *Coleman v. Smith*, 55 Tex. 254.

is inconsistent or cannot be reconciled to the lay of the land, parol evidence may be introduced to explain.⁷⁰ When the maps, reports or notes of the survey are lost, or when the marks or monuments of the survey are destroyed, then parol evidence usually becomes competent to prove the true line.⁷¹ Witnesses who helped make the survey may be allowed to testify as to the location of the lines, the marking of the original monuments, or to identify the land, but in no case, it is said, will they be allowed to contradict surveys, maps or reports, or to correct mistakes in them when they are unambiguous and clear themselves.⁷² The interpretation that the parties themselves give the description in a deed may often be proved by parol, to show the real intent in locating the boundary.⁷³

§ 1851. *Reputation.*—As elsewhere shown⁷⁴ hearsay evidence is frequently admissible in cases of boundary disputes especially where there has been so great a lapse of time as to render it impossible, in any other way, to establish or prove the original boundary lines by the existence of the usual methods.⁷⁵ The declarations of a surveyor

"Beach v. Whittlesey, 73 Conn. 60 Pac. 902; Clay v. Sloan, 104 Tenn. 530, 48 Atl. 350; Wead v. St. Johnsbury &c., 64 Vt. 52; Silvey v. McCool, 86 Ga. 1, 12 S. E. 175; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Hunt v. Johnson, 19 N. Y. 279; Patch v. Keeler, 28 Vt. 332; Donehoo v. Johnson, 120 Ala. 438, 24 So. 888.

"Nixon v. Porter, 34 Miss. 697, 69 Am. Dec. 408; Watkins v. Holman, 16 Pet. (U. S.) 55; Camley v. Stanfield, 10 Tex. 546, 60 Am. Dec. 219; Lick v. O'Donnell, 58 Am. Dec. 383; Edwards v. Smith, 71 Tex. 156, 9 S. W. 77; Owen v. Bartholomew, 9 Pick. (Mass.) 520.

"Blackwell v. Coleman, 94 Tex. 216, 59 S. W. 530; State v. Crocker, 49 S. Car. 242, 27 S. E. 49; Cadeau v. Elliott, 7 Wash. 205, 34 Pac. 916; McCoy v. Galloway, 3 Ohio 282, 17 Am. Dec. 591; Ulman v. Clark, 100 Fed. (U. S.) 180; Twogood v. Hoyt, 42 Mich. 609, 4 N. W. 445; Canavan v. Dugan, 10 N. Mex. 316, 62 Pac. 971; Shaver v. Adams, 37 Ore. 282,

"Lego v. Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. 706; Frost v. Spaulding, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; Kinney v. Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. Dec. 864; Jackson v. Perrine, 35 N. J. L. 137; Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773; Morrison v. Neff, 18 Neb. 133, 24 N. W. 555; Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Radford v. Johnson, 8 N. Dak. 1882, 77 N. W. 601; Hedrick v. Hughes, 15 Wall. (U. S.) 123.

"Vol. I, §§ 398-403.

"Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Nixon v. Porter, 34 Miss. 697, 69 Am. Dec. 408; Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Spear v. Coate, 3 McCord (S. Car.) 227, 15 Am. Dec. 627; Wheeler v. State, 109 Ala. 56, 19 So. 993; Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716; Boardman v. Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415.

§ 1855. **Establishing lost corners.**—When an original monument making a corner in a survey has been lost, its relation can often only be approximately established by measurements from the other corners.¹⁰⁶ To relocate lost corners or lines run by government surveyors it has been held that the jury may consider a private survey of the same as well as the monuments and cornerstones, and field notes and plat, even if the private survey is different from the government survey.¹⁰⁷ The rule in relocating lost corners is that natural objects are preferred to calls for courses and distances.¹⁰⁸ To relocate a line, corner or monument, the original survey should be followed as closely as possible and the original reports, maps, field notes are competent; and, in certain instances, parol evidence may be used as a guide.¹⁰⁹ Variations in the manner of locating the line may be shown as that the new surveyor used the true instead of the magnetic meridian,¹¹⁰ or that monuments have been changed,¹¹¹ or their disappearance and location may be shown by parol.^{111*} Where two monuments mentioned in the instrument conflict, that one will usually be adopted which is most certain.¹¹² And where one of the monuments cor-

¹⁰⁶ *Noble v. Chrisman*, 88 Ill. 186; *Meyers*, 73 Mich. 259, 41 N. W. 422; *Hess v. Meyer*, 73 Mich. 259; *Anderson v. Peterson*, 74 Iowa 482; *Thoen v. Roche*, 57 Minn. 135, 58 N. W. 686, 47 Am. St. 600; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 764; 43 Am. Dec. 321.

¹⁰⁷ *Knoll v. Randolph*, 68 Neb. 599, 94 N. W. 964; *Billingsley v. Bates*, 30 Ala. 376, 68 Am. Dec. 126; *Lewis v. Lewis*, 4 Ore. 177; *Randolph v. Sentilles*, 110 La. Ann. 419, 34 So. 587.

¹⁰⁸ *Billingsley v. Bates*, 30 Ala. 376, 68 Am. Dec. 126; *Tognazzini v. Morganti*, 84 Cal. 159; *Walrod v. Flanigan*, 75 Iowa 365; *Bryan v. Beckley*, Litt. (Ky.) 91, 12 Am. Dec. 27; *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731; *Budd v. Brooke*, 3 Gill. (Md.) 198, 43 Am. Dec. 321; *Overton v. Davisson*, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; *Hollenbeck v. Sykes*, 17 Colo. 317.

¹⁰⁹ *Wendell v. Jackson*, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635; *Robinson v. Kime*, 70 N. Y. 154; *Hess v.*

Meyers, 73 Mich. 259, 41 N. W. 422; *Hathaway v. Evans*, 113 Mass. 264; *Thoen v. Roche*, 57 Minn. 135, 58 N. W. 686, 47 Am. St. 600; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 764; *Frost v. Spaulding*, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; *McCoy v. Galloway*, 3 Ohio 282, 17 Am. Dec. 591; *Crafts v. Hibbard*, 4 Metc. (Mass.) 453.

¹¹⁰ *Reed v. Tacoma*, 2 Wash. 198, 26 Pac. 252, 26 Am. St. 857.

¹¹¹ *Smith v. Hutchison*, 104 Tenn. 394, 58 S. W. 226; *Ulman v. Clark*, 100 Fed. (U. S.) 180; *Ballinger v. Stinnett*, (Tenn.) 59 S. W. 1044.

^{111*} *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. 833; *Wheeler v. Benjamin*, 136 Cal. 51, 68 Pac. 313; *Anderson v. Wirth*, 131 Mich. 183, 91 N. W. 157.

¹¹² *Bass v. Mitchell*, 22 Tex. 285; *Seaman v. Hogeboom*, 21 Barb. (N. Y.) 398; *Gates v. Lewis*, 7 Vt. 511.

responds with courses and distances, it will ordinarily be preferred to the one in conflict therewith.¹¹³

§ 1856. **Surveys, maps, reports and field notes.**—The surveyor's reports, maps and notes are usually material evidence of the original location of the boundaries and are presumed to be correct.¹¹⁴ Where the original field notes of a survey are competent evidence, and recorded as public documents, a copy of the notes, proved to be accurate and properly authenticated, may be admitted as evidence.¹¹⁵ Affidavits not provided for by law are not evidence to prove a copy to be true,¹¹⁶ but examined copies may be proved by testimony as to their accuracy.¹¹⁷ In case of a private survey the notes and maps when verified by proof in regard to the data from which they are made may be admitted.¹¹⁸ Even unauthorized maps, notes and reports of a survey may be admitted to aid in identifying the true boundary in a proper case, as by locating the monuments and aiding the jury to arrive at the true line, but they must in all cases be proved and cannot be used as evidence in and of themselves.¹¹⁹ So, plats which are not compe-

¹¹³ *Zeibold v. Foster*, 118 Mo. 349; *M'Adoo v. Sublett*, 1 Humph. (Tenn.) 105.

¹¹⁴ *Bell County &c. v. Hendrickson*, 24 Ky. L. R. 371; *Knoll v. Randolph*, 68 Neb. 599, 94 N. W. 964; *Cavazos v. Trevino*, 6 Wall. (U. S.) 773; *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38; *Heffington v. White*, 1 Bibb (Ky.) 115; *Canavan v. Dugan*, 10 N. Mex. 316, 62 Pac. 971; *Doe v. Hildreth*, 2 Ind. 274; *Dugger v. McKesson*, 100 N. Car. 1, 6 S. E. 746; *Morrison v. Neff*, 18 Neb. 133, 20 N. W. 254, 24 N. W. 555; *Chapman v. Polack*, 70 Cal. 487, 11 Pac. 764; *Hess v. Meyer*, 73 Mich. 259, 41 N. W. 422; *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484; *Hunter v. Eichel*, 100 Ind. 463, says: A survey by the county surveyor made as provided by statute, conclusively binds the parties thereto unless an appeal be taken.

¹¹⁵ *Bonewits v. Wygant*, 75 Ind. 41, says: A transcript of the survey and

field notes among the records in the land department of the State, properly authenticated by the auditor of State, was correctly admitted as evidence.

¹¹⁶ *Daniels v. Fitzhugh*, 13 Tex. Civ. App. 300, 35 S. W. 38.

¹¹⁷ *Stewart v. Crosby*, (Tex. Civ. App.) 56 S. W. 433.

¹¹⁸ *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848.

¹¹⁹ *Holliday v. Maddox*, 39 Kans. 359, 18 Pac. 299; *Radford v. Johnson*, 8 N. Dak. 1882, 77 N. W. 601; *Fisher v. Kaufman*, 170 Pa. St. 444, 33 Atl. 137; *McCoy v. Galloway*, 3 Ohio St. 282, 17 Am. Dec. 591; *Gunn v. Harris*, 88 Ga. 439, 14 S. E. 593; *Tillotson v. Pritchard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. 95; *Hoey v. Furman*, 1 Pa. St. 295, 44 Am. Dec. 129; *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848; *Justen v. Schaaf*, 175 Ill. 45, 51 N. E. 695; *Dailey v. Fountain*, 35 Ala. 26.

ties, when the location of the true line is in dispute or uncertain, or knowingly unascertained, from binding themselves by mutual agreement as to what shall be the true boundary line.¹³⁰ Parol evidence is admissible to show that parties agreed to the location of certain monuments.¹³¹ So, a writing showing an agreement may be used as evidence.¹³²

§ 1858. Declarations and admissions.—The subject of declarations and admissions of former owners has already been considered, but some further consideration may be desirable in this connection. For the purpose of establishing ancient boundaries, by locating the corners and lines, the declarations of the parties in interest, if against them, or those who assisted in making the old survey, are admissible, when such parties are unable to testify at the trial or by deposition, by reason of sickness or death.¹³³ It has also been held that acts and admissions of owners of adjacent land, recognizing a certain line as the true one, may be used as evidence of its location, when the line is uncertain; but not where the line is well defined.¹³⁴ Admissions of former owners against their interest are admissible against their privies identified in interest in evidence on questions of boundary.¹³⁵

cense in erroneous line not binding: Knight v. Coleman, 19 N. H. 118, 49 Am. Dec. 147; Crowell v. Maughs, 2 Gil. (Ill.) 419, 43 Am. Dec. 62; McNamara v. Seaton, 82 Ill. 500; Brewer v. Boston &c., 5 Metc. (Mass.) 39 Am. Dec. 694; see also, generally, Sawyers v. Fellows, 6 N. H. 107, 25 Am. Dec. 452; Turner v. Baker, 64 Mo. 218, 27 Am. R. 226; Hitchcock v. Libby, 70 N. H. 399, 47 Atl. 269; Lecomte v. Toudouze, 82 Tex. 208, 17 S. W. 1047; Boyd v. Groves, 4 Wheat. (U. S.) 513; Glen Mfg. Co. v. Weston Lumber Co., 80 Fed. (U. S.) 242.

¹³⁰ Tobey v. Secor, 60 Wis. 310, 19 N. W. 99; Pickett v. Nelson, 71 Wis. 542, 37 N. W. 836; Vosburgh v. Teator, 32 N. Y. 561; Farr v. Woolfolk, 45 S. E. 230, 118 Ga. 277.

¹³¹ Waterman v. Johnson, 13 Pick. (Mass.) 267; Kellum v. Smith, 65 Pa. St. 86.

¹³² Anderson v. Jackson, 69 Tex. 346, 6 S. W. 575; Knudsen v. Oman-son, 10 Utah 124, 37 Pac. 250.

¹³³ Deming v. Carrington, 12 Conn. 1, 30 Am. Dec. 591; Whitman v. Haywood, 77 Tex. 557; Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88; Reed v. Phillips, (Tex.) 33 S. W. 986; Critchlow v. Beatty, (Ky.) 23 S. W. 960; Burlingame v. Robbins, 21 Barb. (N. Y.) 327.

¹³⁴ Discussed at length in note to, Putnam v. Fisher, 52 Vt. 191, 36 Am. R. 746, 750; Davidson v. Arledge, 97 N. Car. 172; Johnson v. Archibald, 78 Tex. 96, 22 Am. St. 27-35 notes; Barrett v. Murphy, 140 Mass. 133, 2 N. E. 833.

¹³⁵ Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Moran v. Lezotte, 54 Mich. 83; McDowell v.

But admissions of a mistaken boundary line for the true one do not always affect the title of the party making such admission.¹³⁶ Declarations of deceased persons are admissible if made before the suit is brought and by a person who had means of knowing and had no interest in making them.¹³⁷ So, declarations of deceased surveyors are often used to locate a boundary line.¹³⁸

§ 1859. **Ancient boundaries.**—After many years of possession by one holding against the claimant, the lines of a survey are generally conclusive, and it is immaterial whether the cornerstones or other marks, mentioned in the survey can be found on the land or not.¹³⁹ It has also been held that ancient fences, used by a surveyor in attempting to reproduce the old survey, are good evidence of the location of the original lines and if the fences have been standing for many years, should be taken as indicating the true line, even against the evidence of a survey ignoring such fences, based upon an assumed starting point.¹⁴⁰

Goldsmith, 6 Md. 319, 61 Am. Dec. 305; Jackson v. Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Strickler v. Todd, 10 S. & R. (Pa.) 63, 13 Am. Dec. 649; Vol. I, §§ 264, 267, 268.

¹³⁶ Crowell v. Bebee, 10 Vt. 33, 33 Am. Dec. 172; Brewer v. Boston, 5 Metc. (Mass.) 478, 39 Am. Dec. 694; see also, Waugh v. Waugh, 28 N. Y. 94; Armstrong v. Risteau, 5 Md. 256, 59 Am. Dec. 115.

¹³⁷ Pike v. Hayes, 14 N. H. 19, 40 Am. Dec. 171; Jackson v. Davis, 5 Cow. (N. Y.) 129, 15 Am. Dec. 451; Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Deming v. Carington, 12 Conn. 1, 30 Am. Dec. 591; Putnam v. Fisher, 52 Vt. 191, 26 Am. R. 746, 750, notes; Vol. I, § 403. But as shown in the section just referred to, in some jurisdictions it must also appear that the declarant was at the time on the land and engaged in pointing out the boundaries.

¹³⁸ City of Racine v. Emerson, 85 Wis. 80, 55 N. W. 177, 39 Am. St.

821; Adams v. Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Putnam v. Fisher, 36 Am. R. 750; see also, Child v. Kingsbury, 46 Vt. 47; Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201; Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. 907; Fry v. Stowers, 92 Va. 13, 22 S. E. 500.

¹³⁹ Castleman v. Trustees &c., 24 Ky. L. R. 88, 68 S. W. 17; Peters v. Reichenbach, 114 Wis. 209, 90 N. W. 184; Grier v. Penn. Coal Co., 128 Pa. St. 79, 18 Atl. 480; Owen v. Bartholomew, 9 Pick. (Mass.) 519; Rockwell v. Adams, 6 Wend. (N. Y.) 467; Nys v. Biemeret, 44 Wis. 104; the different states have different rules as to the length of time required.

¹⁴⁰ Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737; Beaubien v. Kellogg, 69 Mich. 333; Carpenter v. Monks, 81 Mich. 103; Knight v. Coleman, 19 N. H. 118, 49 Am. Dec. 147; Smith v. Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

§ 1860. **Estoppel.**—An agreement by mistake upon an erroneous boundary line, supposing it to be the true one, will not, of itself, operate as an estoppel upon the parties where the true line can be well established.¹⁴¹ A party will not forfeit his estate by mere mistake; but if there has been acquiescence, adverse possession and improvements made, relying upon such erroneous line and under such circumstances that the real owner is charged with gross negligence, amounting to fraud, estoppel in pais may establish the erroneous line.¹⁴² Yet, as already intimated, although there is an agreement or acquiescence in a wrong boundary, when the true boundary can be ascertained from the deed, it is usually treated as a mistake¹⁴³ and neither party is estopped from claiming the true line.¹⁴⁴ But where the grantee wrongly locates his line inducing others to purchase or improve with reference to such erroneous line, he may be estopped from disputing the boundaries thus fixed.

§ 1861. **Defenses and matters admissible generally.**—An innocent purchaser, without notice from one in possession, will not, ordinarily, be affected by the oral agreements made by his grantor in establishing disputed boundary lines.¹⁴⁵ The defendant may also prove, in a proper case, that the representations or statements made by the other party and which induced him or his grantor to agree to the line, were

¹⁴¹ *Cheaney v. Nebraska &c.*, 41 Fed. (U. S.) 740.

¹⁴² *McAfferty v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Commonwealth v. Moltz*, 10 Pa. St. 527, 51 Am. Dec. 499; *Copeland v. Copeland*, 28 Me. 525; *Holland v. Thompson*, 12 Tex. Civ. App. 471, 35 S. W. 19; *Jackson v. Perrine*, 35 N. J. L. 137; *Helm v. Willson*, 76 Cal. 476, 18 Pac. 604; *Castleman v. Trustees &c.*, 24 Ky. L. R. 88, 68 S. W. 17; *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184; *McAfferty v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Yetzer v. Thoman*, 17 Ohio St. 133; *Bobo v. Richmond*, 25 Ohio St. 121.

¹⁴³ *Hartung v. Witte*, 59 Wis. 286, 18 N. W. 175; *Pickett v. Nelson*, 71

Wis. 542, 37 N. W. 836; *McAfferty v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Commonwealth v. Moltz*, 10 Pa. St. 527, 51 Am. Dec. 499; *Copeland v. Copeland*, 28 Me. 525; see also, *Brewer v. Boston*, 5 Metc. (Mass.) 478, 39 Am. Dec. 693.

¹⁴⁴ *Jackson v. Perrine*, 35 N. J. L. 137; *Joyce v. Williams*, 26 Mich. 332; see also, *Thompson v. Borg*, 90 Minn. 209, 95 N. W. 896; but see as to married women under disability: *Dukes v. Sprangler*, 35 Ohio St. 119; see also, as to surveys: *Clark v. Gallagher*, 74 Vt. 331, 52 Atl. 539; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. 139.

¹⁴⁵ *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77.

false and fraudulent.¹⁴⁶ It may also be shown, in a proper case, that the location was made by mistake, or not in settlement of a dispute.¹⁴⁷ In proving that there has been an agreement and that the line is correct as agreed upon, it is proper to show that the other party helped locate the line, helped build the fence or wall, and made improvements according to such line and that by his acts he has since agreed to such line as the true one.¹⁴⁸ It has also been held that the party claiming the present line or agreed line may show, by the testimony of neighbors who had resided near for years, that they had never heard of any dispute concerning the line;¹⁴⁹ but the understanding of a party or his grantor of certain matters concerning the line cannot ordinarily be shown in evidence, unless acquiesced in.¹⁵⁰ The party claiming possession to a certain line may show, in a proper case, that he paid taxes on the land.¹⁵¹ So, in a proper case, the peaceful acquiescence of the adverse party to a certain line may be shown,¹⁵² and the admission of the adverse party may be used against him.¹⁵³

§ 1862. Documents referred to.—In locating a boundary line, references may frequently be made to public documents and they are often admissible in evidence as explaining the true line. A deed may be referred to, especially the first deed which describes the division line and which marks the boundary of the two pieces of land.¹⁵⁴ Such

¹⁴⁶ *Perry v. Hardy*, 71 N. H. 151, 51 Atl. 644; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. R. 496.

¹⁴⁷ *Brewer v. Boston*, 5 Metc. (Mass.) 478, 39 Am. Dec. 694; *McAfee v. Conover*, 7 Ohio St. 99, 70 Am. Dec. 57; *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. 740.

¹⁴⁸ *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604; *Bank of Albany v. Gray*, 71 Hun (N. Y.) 295, 24 N. Y. S. 997; *Haring v. Van Houten*, 22 N. J. L. 61; *Hitchcock v. Libby*, 70 N. H. 399, 47 Atl. 269; *Castleman v. Trustees &c.*, 24 Ky. L. R. 88, 68 S. W. 17; *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184.

¹⁴⁹ *Smith v. Forrest*, 49 N. H. 230.

¹⁵⁰ *Heywood v. Wild River Lumber Co.*, 70 N. H. 24, 47 Atl. 294.

¹⁵¹ *Merwin v. Morris*, 71 Conn. 555,

42 Atl. 855; *Tillotson v. Pritchard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. 95.

¹⁵² *Sherman v. Kane*, 86 N. Y. 57; *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. 833.

¹⁵³ *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672.

¹⁵⁴ *Greer v. Squire*, 9 Wash. St. 359, 37 Pac. 545; *Miller v. Pryse*, 20 Ky. L. R. 1544, 49 S. W. 776, holds that a deed may be admitted in evidence to show the extent of the boundary of one who claims by adverse possession: *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. 833; *Hale v. Silloway*, 1 Allen (Mass.) 21; *Chase v. White*, 41 Me. 228; *Heinrich v. Terrell*, 65 Iowa 25, 21 N. W. 171; *McEvoy v. Loyd*, 31 Wis. 142; *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203.

original deed cannot, ordinarily, be attacked or disputed, except in an action to reform or where it is impossible to apply the description to the land in question because of ambiguities.¹⁵⁵ A treaty, statute, decree of the court, or will, may be used in a proper case if reference is made to them in the deed.¹⁵⁶ So official maps, or maps recognized by former owners may be used in evidence.¹⁵⁷ Surveys of boundary lines are admissible, when authority to make them is shown;¹⁵⁸ but a private survey is held inadmissible against one who was not a party or privy and did not consent to the survey.¹⁵⁹ Yet, private surveys or re-surveys, if made by agreement of parties or according to the law, may be admitted,¹⁶⁰ in a proper case.

¹⁵⁵ Koch v. Dunkel, 90 Pa. St. 264; 289; Harmer v. Morris, 1 McClean McAfferty v. Conover, 7 Ohio St. 99, (U. S.) 44; Smith v. Forest, 49 N. 70 Am. Dec. 57; Guilmartin v. H. 230; Burton v. Todd, 72 Cal. 351, Wood, 76 Ala. 204; Bond v. Fay, 12 13 Pac. 877; Lawrence v. Haynes, 5 Allen (Mass.) 86; Owen v. Bartholomew, 9 Pick. (Mass.) 250; N. H. 33, 20 Am. Dec. 554.

¹⁵⁶ Smith v. Shackelford, 9 Dana (Ky.) 452; Allen v. Taft, 6 Gray (Mass.) 552; Harrison v. Page, 16 Mo. 182; Wray v. Miller, 14 Pa. St.

¹⁵⁷ Clark v. Callagher, 74 Vt. 331, 52 Atl. 539; Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172; Morrison v. Neff, 18 Neb. 133, 24 N. W. 555; Martin v. Hughes, 98 Fed. (U. S.) 556.

¹⁵⁸ Wilson v. Stoner, 9 S. & R. (Pa.) 39, 11 Am. Dec. 664.

¹⁵⁹ Jones v. Huggins, 12 N. Car. 223, 17 Am. Dec. 567.

¹⁶⁰ Morrison v. Neff, 18 Neb. 133, 24 N. W. 555.

CHAPTER XCI.

BREACH OF PROMISE.

Sec.	Sec.
1863. Contract—Generally.	1880. Release.
1864. Express and implied contracts.	1881. Fraud.
1865. Burden of proof.	1882. Unchastity—Reputation.
1866. Presumptions.	1883. Married parties.
1867. Questions of law or fact.	1884. Immoral or illegal promises.
1868. Direct evidence.	1885. Impotency and ill-health.
1869. Circumstantial evidence.	1886. Damages.
1870. Letters.	1887. Financial condition of plaintiff.
1871. Secondary evidence of letters.	1888. Financial condition of defendant.
1872. Declarations and admissions.	1889. Exemplary damages.
1873. Opinions.	1890. Fraudulent representations.
1874. Acceptance.	1891. Seduction.
1875. Breach.	1892. Mental suffering.
1876. Request of plaintiff.	1893. Mitigation of damages.
1877. Consideration.	
1878. Statute of frauds.	
1879. Defenses—Infancy.	

§ 1863. **Contract—Generally.**—In an action to recover damages for breach of promise to marry, it is necessary to prove that there has been a mutual promise,¹ that is, an offer and acceptance, either directly or impliedly, a breach of this contract and that the complaining party has been injured. It is also generally necessary for the plaintiff to show a readiness to perform,² but no request by the plaintiff is necessary where the defendant has renounced his promise³ or

¹ *Burnham v. Cornwell*, 16 B. Cooke, 56 Me. 187; *Willard v. Stone*, Monroe (Ky.) 284, 63 Am. Dec. 529; 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Phillips v. Crutchley*, 3 Car. & P. Graham v. Martin, 64 Ind. 567.

178; *Cates v. McKinney*, 48 Ind. ² *Kurtz v. Frank*, 76 Ind. 594, 40 Am. R. 275; *Wagenseller v. Simmers*, 97 Pa. St. 465; *Holloway v. Griffiths*, 32 Iowa 409, 7 Am. R. 208; 15 Mass. 1, 8 Am. Dec. 77.

³ *Weaver v. Bachert*, 2 Pa. St. 80, Burtis v. Thompson, 42 N. Y. 246. 44 Am. Dec. 159; *Lawrence v.*

put it out of the power of plaintiff by absconding⁴ or by marrying another.⁵

§ 1864. **Express and implied contracts.**—It is not necessary that an express contract be proved. Any set of facts or circumstances which will show that both parties understood that they were to be married may be sufficient to support this action.⁶ An implied contract of marriage will be presumed if the plaintiff can show the belief, based upon certain acts and conduct of defendant, that there was a mutual promise to marry, and the defendant knowing this, continued the visits and attentions without any explanation to the contrary.⁷

§ 1865. **Burden of proof.**—The burden of proof is upon the plaintiff to show a mutual promise,⁸ that is, an offer and acceptance.⁹ The plaintiff must further show the breach,¹⁰ the readiness of the plaintiff to perform, or request of the defendant to fulfill his promise¹¹ and the damages resulting from the breach.¹² If, however, the defendant wishes to take advantage of a special matter by way of defense, the burden of producing evidence may be upon him as to such matter.¹³

⁴ Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116; 1 Am. Dec. 102; Coll v. Wallace, 24 N. J. L. 600.

⁵ Sheahan v. Barry, 27 Mich. 217; Pettingill v. McGregor, 12 N. H. 179.

⁶ Hahn v. Bettingen, 88 N. W. 10, 84 Minn. 512; Wise v. Schloesser, 111 Iowa 16, 82 N. W. 439; Homan v. Earle, 53 N. Y. 267.

⁷ Kennedy v. Rodgers, 2 Kans. App. 764, 44 Pac. 47.

⁸ Hook v. George, 108 Mass. 324; Bleiler v. Koons, 132 Pa. St. 401, 19 Atl. 140.

⁹ Ellis v. Guggenheim, 20 Pa. St. 287; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

¹⁰ Hook v. George, 108 Mass. 324; Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564.

¹¹ Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329.

¹² Glese v. Schultz, 53 Wis. 462, 10 N. W. 598; Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Glasscock v. Shell, 57 Tex. 215; Hook v. George, 108 Mass. 324; Kniffen v. McConnell, 30 N. Y. 285.

¹³ Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Gring v. Lerch, 112 Pa. St. 244, 56 Am. R. 314, 3 Atl. 841; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624.

§ 1866. **Presumptions.**—In absence of evidence to the contrary, the parties are presumed to be of proper age, of opposite sex, unmarried and competent to enter into the marriage relation.¹⁴ Where a contract is proved to have been entered into, but no time set, it is presumed that it was to have been carried out within a reasonable time.¹⁵

§ 1867. **Questions of law or fact.**—Whether there was a mutual promise to marry,¹⁶ whether it was express or conditional,¹⁷ whether a breach,¹⁸ and the assessment of damages,¹⁹ are all questions of fact and are for the determination of the jury. The admissibility of all evidence is a question of law.²⁰ The question of the justice or adequacy of the verdict rests largely in the judgment of the jury under the discretion of the trial judge;²¹ and as to the amount of damages, unless it appears that the jury was influenced by passion and prejudice, the verdict will usually stand.²²

§ 1868. **Direct evidence.**—Direct evidence of a proper character is always admissible to prove a promise of marriage; but as this contract is usually private and of a confidential nature, it cannot always be shown by direct proof.²³ Circumstantial or indirect evidence is, therefore, often resorted to.

¹⁴ *Tucker v. Hyatt*, 144 Ind. 635, 737, 42 N. W. 759; *Clark v. Pendleton*, 20 Conn. 495; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788, holds that if the jury find the defendant

¹⁵ *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442; *Clement* is sufficient.

¹⁶ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

¹⁷ *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10; *Allen v. Baker*, 86 N. Car. 91, 41 Am. R. 444.

¹⁸ *Schreckengast v. Ealy*, 16 Neb. 510, 20 N. W. 853.

¹⁹ *Burnham v. Cornwell*, 16 B.

Mon. (Ky.) 284, 63 Am. Dec. 529; *Wightman v. Coates*, 15 Mass. 1, 8

Am. Dec. 77; *Olmstead v. Hay*, 112 Iowa 349, 83 N. W. 1056; *Kennedy*

v. Rodgers, 2 Kans. App. 764, 44

Pac. 47; *Tefft v. Marsh*, 1 W. Va. 38.

²⁰ *Grant v. Willey*, 101 Mass. 356.

²¹ *Musselman v. Barker*, 26 Neb.

²² *Mon. (Ky.)* 284, 63 Am. Dec. 529; *Wightman v. Coates*, 15 Mass. 1, 8

Am. Dec. 77; *Olmstead v. Hay*, 112 Iowa 349, 83 N. W. 1056; *Kennedy*

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²³ *Mon. (Ky.)* 284, 63 Am. Dec. 529; *Wightman v. Coates*, 15 Mass. 1, 8

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v. Rodgers, 2 Kans. App. 764, 44

Pac. 47; *Tefft v. Marsh*, 1 W. Va. 38.

§ 1869. **Circumstantial evidence.**—A contract of marriage may be inferred from the conduct and relation of the parties with each other.²⁴ Any proper circumstantial evidence showing the acts and conduct of the parties may be admitted.²⁵ A definite understanding corroborated by their actions may be shown to prove the contract.²⁶ Evidence of courtship, or repeated visits by the defendant, when connected with relevant circumstances, may be shown.²⁷ Admissions to third parties are often competent, but it has been held that they can only be used as a part of a chain of circumstances tending to prove the contract.²⁸ Evidence of plaintiff's feeling after a breach cannot be used to show the feeling for defendant during engagement;²⁹ but the acts of the plaintiff may often be shown when they are intimately connected with the breach, as tending to prove a promise. Evidence to show the relation of the parties prior to the alleged breach as bearing on the question whether a promise was made, is admissible.³⁰ Such facts as will prove affectionate intercourse between marriageable persons are usually competent; and evidence is admissible to prove the promise by such acts as, exchange of presents, letters, plans for future married life, furnishing the house, rides and walks with each other, caresses, endearing epithets, fondness for each other and desire to be in each other's company and devoted attention.³¹ Evidence

²⁴ *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529, says: "To corroborate testimony of express promise all the facts and circumstances that have taken place between the parties are admissible in evidence." *Olmstead v. Hay*, 112 Iowa 349, 83 N. W. 1056; *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; *Wightman v. Coates*, 15 Mass. 1, 8 Am. Dec. 77.

²⁵ *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835; *Hubbard v. Bonesteel*, 16 Barb. (N. Y.) 360; *Tefft v. Marsh*, 1 W. Va. 38; *Von Storch v. Griffin*, 71 Pa. St. 240.

²⁶ *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529.

²⁷ *Wightman v. Coates*, 15 Mass. 1, 8 Am. Dec. 77; *Kennedy v. Rodgers*, 2 Kans. App. 764, 44 Pac. 47.

²⁸ *Weaver v. Bachert*, 2 Pa. St. 80,

44 Am. Dec. 159; *Burnham v. Cornwell*, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529.

²⁹ *Edwards v. Edwards*, 93 Iowa 127, 61 N. W. 413; *Robinson v. Craver*, 88 Iowa 381, 55 N. W. 492.

³⁰ *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386; *Ray v. Smith*, 9 Gray (Mass.) 141; *Hook v. George*, 108 Mass. 324; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726; *Chamness v. Cox*, 131 Ind. 118, 30 N. E. 901; *Wise v. Schloesser*, 111 Iowa 16, 82 N. W. 439; *Weaver v. Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159; *Hahn v. Bettingen*, 88 N. W. 10, 84 Minn. 512.

³¹ *Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. R. 338; *Button v. Hibbard*, 64 N. Y. St. 80, 31 N. Y. S. 483; *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267.

may sometimes be introduced showing acts and conduct of the parties after the promise to prove the probability of the engagement,³² and a direct or express repudiation of the contract need not always be shown. Any set of acts which show that defendant does not intend to carry out the contract is usually sufficient evidence of a breach.

§ 1870. **Letters.**—The plaintiff may prove by parol that letters have passed between the parties,³³ and this even without producing them.³⁴ Letters expressing love and affection are admissible as tending to prove the promise.³⁵ Letters in the possession of the plaintiff may be presumed to have been written to plaintiff and it is said to be the duty of the defendant, if he acknowledges the letters to prove they were intended for another, when he disputes the rightful possession of the letters by plaintiff.³⁶ Where letters are placed in evidence the replies may also be used in rebuttal.³⁷

§ 1871. **Secondary evidence of letters.**—The plaintiff may prove by parol that letters have passed between the parties and the contents of the letters may be shown where the letters themselves cannot be produced, after laying the proper foundation, even, in some instances, it has been held, if the party wishing to show the contents destroyed the letters.³⁸ But this is not always so.³⁹ And, ordinarily, of course, the letters are themselves the best evidence of their contents.

§ 1872. **Declarations and admissions.**—To establish a promise by defendant, his or her admissions or declarations are admissible as part of a chain of circumstances to prove the promise;⁴⁰ but plaintiff's

³² *Rutter v. Collins*, 96 Mich. 510, 56 N. W. 93; *McElree v. Wolfersberger*, 59 Kans. 105, 52 Pac. 69; *Kelley v. Highfield*, 15 Ore. 277, 14 Pac. 744; *Wagenseller v. Simmers*, 97 Pa. St. 465.

³³ *Conaway v. Shelton*, 3 Ind. 334; *Rutter v. Collins*, 96 Mich. 510, 56 N. W. 93, holds that plaintiff may introduce copies of letters sent in reply to defendant's, where defendant says the letters are destroyed.

³⁴ *Conaway v. Shelton*, 3 Ind. 334; *Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554; *Stone v. Sanborn*, 104 Mass. 319, 6 Am. R. 338.

³⁵ *Tefft v. Marsh*, 1 W. Va. 38; *Judy v. Sterrett*, 52 Ill. App. 265; *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936.

³⁶ *Tefft v. Marsh*, 1 W. Va. 38.

³⁷ *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936; *Richmond v. Roberts*, 98 Ill. 472.

³⁸ *Rutter v. Collins*, 96 Mich. 510, 56 N. W. 93; *Shields v. Lewis*, 20 Ky. L. R. 1601, 49 S. W. 803.

³⁹ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

⁴⁰ *Weaver v. Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159; *Chellis v. Chapman*, 7 N. Y. S. 78, 26 N. Y. St. 953,

declarations, not part of the *res gestae*, made to persons not related to or interested in plaintiff, cannot be used to prove the promise on the part of the defendant, nor it seems even on the part of the plaintiff when sought to be introduced by the plaintiff.⁴¹ Plaintiff's declarations of willingness to marry the defendant, made to third parties in the absence of the defendant cannot be used to prove the promise.⁴² But admissions and declarations of the defendant showing the promise made in the presence of the plaintiff and otherwise competent may be shown.⁴³ Ordinarily, however, it is said that declarations of intention to marry plaintiff are admissible only to corroborate other evidence, that he made the contract.⁴⁴ Declarations of the plaintiff, made before institution of suit, that there was a promise, have been held admissible.⁴⁵ So, declarations made to a relative at the time of the breach, and a part of the *res gestae* are admissible.⁴⁶ Admissions of the plaintiff tending to show that plaintiff had little affection for the defendant may be used by the defendant, in a proper case, to reduce damages.⁴⁷ It has also been held that the statements of the plaintiff may be shown, where the plaintiff has told the defendant that she was engaged to another.⁴⁸

§ 1873. Opinions.—Opinions are not admissible to prove the contract.⁴⁹ This is not a subject in regard to which expert witnesses can be used, as one person is as competent to pass an opinion as another,

26 N. E. 308, 35 N. Y. St. 17, 11 L. Tamke v. Vangsnes, 72 Minn. 236, R. A. 784; Burnham v. Cornwell, 16 75 N. W. 217.
B. Mon. (Ky.) 284, 63 Am. Dec. 529. * Wetmore v. Mell, 1 Ohio St. 26; Willcox v. Green, 23 Barb. (N. Y.) 639.

* Cates x. McKinney, 48 Ind. 562; also see, Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745. * Jones v. Layman, 123 Ind. 569, 24 N. E. 363.

* Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; * Robinson v. Craver, 88 Iowa 381, 55 N. W. 492; Healey v. O'Sullivan, 6 Allen (Mass.) 114.
Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Fidler v. McKinley, 21 Ill. 308. * Johnson v. Leggett, 28 Kans. 590.

* Leckey v. Blosser, 24 Pa. St. 401; and so generally the defendant's admissions may be shown against him in a proper case. * Brown v. Odill, 104 Tenn. 250, 56 S. W. 840; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Leckey v. Blosser, 24 Pa. St. 401; Saunders v. Railroad Co., 99 Tenn. 131, 41 S. W. 1031.

* Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591; Geiger v. Payne, 102 Iowa 581, 69 N. W. 554;

and the whole matter must be left to the jury. The facts observed by the witnesses may be shown, but not conclusions or surmises.⁵⁰ This rule, however, is somewhat modified by the doctrine that ordinary witnesses may sometimes speak as to appearances, and it has been held that one living with the plaintiff may be permitted to give an opinion or statement as to the affection shown toward defendant⁵¹ and in one jurisdiction it has been held that neighbors and intimate friends may give an opinion as to the amount of damage sustained by the plaintiff.⁵²

§ 1874. Acceptance.—Acceptance of defendant's promise, either express or implied, must be shown.⁵³ The acts of the parties and the relations assumed by them may usually be shown for this purpose. Many cases hold that the acceptance of the plaintiff may be proved by acts and declarations before the breach, and while attentions were being paid,⁵⁴ as that the plaintiff communicated to her family the fact of her engagement.⁵⁵ But there is some conflict upon this subject, and certainly acts and declarations of the plaintiff which are not part of the *res gestae*, and are unknown to the defendant, are not ordinarily admissible to prove a promise on his part nor, under all circumstances, to prove an acceptance on the part of the plaintiff.

§ 1875. Breach.—A declaration by defendant that he would not carry out the contract of marriage is admissible to prove the breach, although the time within which the contract was to have been performed has not expired.⁵⁶ Anything which will show that the defend-

⁵⁰ *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689.

⁵¹ *McKee v. Nelson*, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384.

⁵² *Jones v. Fuller*, 19 S. Car. 66, 45 Am. R. 761.

⁵³ *Wells v. Padgett*, 8 Barb. (N. Y.) 323.

⁵⁴ *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Robinson v. Craver*, 88 Iowa 381, 55 N. W. 492; *Wilcox v. Green*, 23 Barb. (N.

Y.) 639; *Wightman v. Coates*, 15 Mass. 1, 8 Am. Dec. 77; *contra*, *Cates v. McKinney*, 48 Ind. 562, 17 Am. R. 678; *Hahn v. Bettingen*, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 449; *Walmsley v. Robinson*, 63 Ill. 41, 14 Am. R. 111; *Russell v. Cowles*, 15 Gray (Mass.) 582, 77 Am. Dec. 391.

⁵⁵ *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Peppinger v. Low*, 6 N. J. L. 467.

⁵⁶ *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Burtis v. Thompson*, 42 N. Y. 246; *Johnstone v. Milling*, L. R. 16 Q. B. 460;

ant has refused or has made it impossible, as by his marriage with another, may, as a rule, be admissible to show a breach.⁵⁷ So, it has been held that a statement of the defendant denying that he ever promised, may be used as evidence to show a refusal.⁵⁸ Where defendant refuses to communicate with or maintain a suitor's relation with plaintiff, this may be shown as evidence of a breach.⁵⁹ But evidence that the defendant was ill or unable to marry at a particular time will not ordinarily show a breach, and may excuse delay.⁶⁰ The mere fact that the marriage has been postponed or that the parties were not married upon a certain date, while usually admissible, is not, ordinarily, sufficient to prove a breach. Some evidence must usually be introduced which shows that the defendant was unwilling to marry plaintiff.⁶¹ This repudiation may be shown by the acts, words or conduct of defendant breaking the contract without sufficient reason or cause.⁶²

§ 1876. **Request of plaintiff.**—Proof of a request and refusal need not be direct and positive; they may be inferred from circumstances or conduct of the defendant.⁶³ Evidence which shows that defendant has refused to marry the plaintiff,⁶⁴ or has married another,⁶⁵ or has wholly discarded the plaintiff,⁶⁶ is sufficient; and, in such cases, formal request need not be proved.

§ 1877. **Consideration.**—The consideration need not be proved as the mutual promises are sufficient, but if there happen to be other

Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441.

⁵⁷ Brown v. Odill, 104 Tenn. 250, 56 S. W. 840; Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564.

⁵⁸ Wagenseller v. Simmers, 97 Pa. St. 465.

⁵⁹ Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346.

⁶⁰ Campbell v. Arbuckle, 51 Hun (N. Y.) 641, 4 N. Y. S. 29.

⁶¹ Clark v. Corey, 24 R. I. 137, 52 Atl. 811; Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Kennedy v. Rodgers, 2 Kans. App. 764;

Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

⁶² Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Burtis v. Thompson, 42 N. Y. 246, 1 Am. R. 516; Holloway v. Griffith, 32 Iowa 409, 7 Am. R. 208.

⁶³ Prescott v. Guyler, 32 Ill. 312.

⁶⁴ Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346.

⁶⁵ Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

⁶⁶ Olson v. Solverson, 71 Wis. 663, 38 N. W. 329.

considerations, as the exchange of property, this may be shown.⁶⁷ Illicit intercourse is not a good consideration for a promise to marry.⁶⁸

§ 1878. Statute of frauds.—A promise to marry is not a promise in "consideration of marriage" so as to require it to be evidenced by writing, under the statute of frauds.⁶⁹ But, it has been held, that where a man promises to pay a woman a certain sum of money if she would marry him, the entire contract must be in writing.⁷⁰

§ 1879. Defenses—Infancy.—There are several defenses that may be successfully interposed in cases of the kind under consideration.⁷¹ Infancy of the defendant may be proved as a defense, in an action for breach of promise to marry, even in those states where an infant may enter into the marriage relation.⁷² And it has been held to be a complete defense even though seduction be also alleged.⁷³ Infancy of the plaintiff cannot, however, be taken advantage of by the defendant in such a case, either as a defense or to reduce damages.⁷⁴

§ 1880. Release.—As in the case of other contracts a release may be shown when properly pleaded, and this has been held to be so, even though the plaintiff is a minor, at least where she has power to enter into the marriage contract.⁷⁵ But, as a general rule at least, the release must be mutual, and a mere unaccepted offer to release or a re-

⁶⁷ *Shields v. Lewis*, 20 Ky. L. R. 1601, 49 S. W. 803; *Finkelstein v. Bennett*, 74 N. Y. St. 551, 38 N. Y. S. 961.

⁶⁸ *Hanks v. Naglee*, 54 Cal. 51, 35 Am. R. 67; *Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. 797.

⁶⁹ *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443; *Short v. Stotts*, 58 Ind. 29; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385, holds: A contract to marry is not within statute of frauds, requiring "any agreement not to be performed within a year to be in writing." *MacElree v. Wolfersberger*, 59 Kans. 105, 52 Pac. 69.

⁷⁰ *Cushman v. Burritt*, 14 N. Y. Wkly. Dig. 59.

⁷¹ See Notes in 63 Am. Dec. 532; 40 Am. St. 166; 44 Am. St. 381.

⁷² *McConkey v. Barnes*, 42 Ill. App. 511; *Wells v. Hardy*, 21 Tex. Civ. App. 454, 51 S. W. 503; *Frost v. Vought*, 37 Mich. 65; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. R. 523.

⁷³ *Leichtweiss v. Treskow*, 21 Hun (N. Y.) 487.

⁷⁴ *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Frost v. Vought*, 37 Mich. 65.

⁷⁵ *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14; *Krazberger v. Roiter*, 91 Mo. 404, 3 S. W. 872, 60 Am. R. 262; *Develin v. Riggabee*, 4 Ind. 464, release by infant held valid; see also, *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199.

lease by the defendant and not by the plaintiff would not constitute a defense.⁷⁶

§ 1881. **Fraud.**—Evidence of fraudulent concealment or misrepresentations of former history and character of the plaintiff is admissible for the defendant in a proper case, and may be sufficient to constitute a complete defense.⁷⁷ Generally speaking, however, it may be said that, except, perhaps, as to chastity, ability to consummate the marriage and possibly one or two other more unusual exceptions, there is no implied representation, and the parties are not bound to communicate to each other the previous history and circumstances of their lives. This is conceded in the case above referred to; but it is there held that if representations are made and all material matters are undertaken to be stated by one to the other, even though voluntarily, fraudulent representation or fraudulent concealment of material facts inducing the contract will entitle the other party to withdraw from it.

§ 1882. **Unchastity—Reputation.**—Unchastity may be shown as a defense when the defendant was ignorant of this fact at the time of the contract;⁷⁸ but it is not a good defense if he knew of these facts⁷⁹ or if he did not cancel the contract on that account.⁸⁰ The character of the plaintiff for chastity when attacked, can always be sustained by evidence of good reputation.⁸¹ If the defendant is ignorant of the unchastity of the plaintiff at the time of contract, he may prove this fact as a defense;⁸² but it has been held that mere reputation con-

⁷⁶ See, *Kellett v. Robie*, 99 Wis. 303, 74 N. W. 781, in which case, however, it was held that the release was mutual; and compare, *Kraxberger v. Roiter*, 91 Mo. 404, 3 S. W. 872, 60 Am. R. 262, in which it was held that there was not a mutual release.

⁷⁷ *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 44 Am. St. 373, and note; 26 L. R. A. 430.

⁷⁸ *Bell v. Eaton*, 28 Ind. 468, 92 Am. Dec. 329; *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; see also, notes in 40 Am. St. 172, and 63 Am. Dec. 543.

⁷⁹ *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; *Kelley v. Highfield*, 15 Ore. 277, 14 Pac. 744; see also, notes in 40 Am. St. 172, and 63 Am. Dec. 543.

⁸⁰ *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422.

⁸¹ *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386; *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698; *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363; *Hughes v. Nolte*, 7 Ind. 526, 34 N. E. 745.

⁸² *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Bell v. Eaton*, 28 Ind.

cerning these facts is not sufficient and that the fact itself must be proved.⁸³

§ 1883. **Married parties.**—The defendant may show that he was married at the time of the alleged promise and that plaintiff knew it,⁸⁴ or he may prove that the plaintiff was married.⁸⁵ But both of these contentions may be rebutted and the plaintiff may show that she had no knowledge that the defendant was a married man,⁸⁶ or she may show that she had a divorce and was unmarried.⁸⁷

§ 1884. **Immoral or illegal promises.**—A promise of marriage in consideration of illicit intercourse, or upon one of the parties procuring a divorce is not good as against public policy.⁸⁸ So, where the statute makes marriage within a certain degree of relationship illegal, this relationship may be offered as a defense.⁸⁹

§ 1885. **Impotency and ill-health.**—If the plaintiff is impotent or unable to have intercourse, this may be shown as a defense, in a proper case. In an action for breach of promise of marriage it may be proved that the woman was unable to have sexual intercourse and although she promised to submit to a surgical operation and did not, it may nevertheless be offered as a complete defense.⁹⁰ Evidence of poor health may be used as a defense unless these facts were concealed from the plaintiff and defendant knew of them at the time of making the contract.⁹¹ If the plaintiff has a venereal disease, unknown to

468, 92 Am. Dec. 329; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

⁸³ Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; see also, McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649; Butler v. Eschleman, 18 Ill. 44.

⁸⁴ Paddock v. Robinson, 63 Ill. 99, 14 Am. R. 112; Noice v. Brown, 38 N. J. L. 228, 20 Am. R. 388.

⁸⁵ Drennan v. Douglas, 102 Ill. 341, 40 Am. R. 595.

⁸⁶ Kelley v. Riley, 106 Mass. 339, 8 Am. R. 336; Kerns v. Hagenbuehle, 42 N. Y. St. 210, 17 N. Y. S. 367; Coover v. Davenport, 1 Helsk. (48 Tenn.) 368, 2 Am. R. 706.

⁸⁷ Eve v. Rogers, 12 Ind. App. 623, 40 N. E. 25; Smith v. Hall, 69 Conn. 651, 38 Atl. 386.

⁸⁸ Hanks v. Naglee, 54 Cal. 51, 35 Am. R. 67; Noice v. Brown, 38 N. J. L. 228; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Eve v. Rogers, 12 Ind. App. 623, 40 N. E. 25; Hanks v. Naglee, 54 Cal. 51, 35 Am. R. 67.

⁸⁹ Albretz v. Albretz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Reed v. Reed, 49 Ohio St. 654, 32 N. E. 750.

⁹⁰ Gring v. Lercn, 112 Pa. St. 244, 3 Atl. 841, 56 Am. R. 314; see also, Gulick v. Gulick, 41 N. J. L. 13; note in 40 Am. St. 172.

⁹¹ Trammell v. Vaughan, 158 Mo.

the defendant at the time of entering into the contract, or if such a disease reappears in the defendant, after the promise, when he had in good faith believed that he had been cured, this fact may be shown as a defense.⁹³

§ 1886. Damages.—The damages recoverable for breach of promise to marry are such as will compensate plaintiff for the benefits lost⁹⁴ by the breach, and for the mental suffering;⁹⁴ and the jury may consider all the proper circumstances in evidence attending the breach. Generally damages must be proved in a case of breach of contract; but proof of specific damages is not always necessary.⁹⁵ Bad faith or attentions for the purpose of deceiving the plaintiff can be shown in aggravation of damages but not as a defense.⁹⁶

§ 1887. Financial condition of plaintiff.—The plaintiff may show that she has no property and no means of support.⁹⁷ She may show her mental suffering caused by the breach of promise, and any sickness or suffering therefrom, which would affect her earning capacity.⁹⁸

214, 59 S. W. 79, 81 Am. St. 302, 51 L. R. A. 854; Pollock v. Sullivan, 53 Vt. 507, 38 Am. R. 702; Paddock v. Robinson, 63 Ill. 99, 14 Am. R. 112; Campbell v. Arbuckle, 51 Hun (N. Y.) 641, 44 N. Y. S. 24.

⁹³ Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 81 Am. St. 302, 51 L. R. A. 854; Shackelford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 40 Am. St. 166, 15 L. R. A. 531; see also, Allen v. Baker, 86 N. Car. 91, 40 Am. R. 444; but not if he wrongfully contracted the disease after the promise or had it before and knew that it was permanent; see note in 40 Am. St. 175; see also, Hall v. Wright, 96 Eng. Com. L. 746.

⁹⁴ Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 35 N. Y. S. 17, 11 L. R. A. 784; Mainz v. Lederer, 21 R. I. 370, 43 Atl. 876.

⁹⁵ Robinson v. Craver, 88 Iowa 381, 55 N. W. 492; Tobin v. Shaw,

45 Me. 331, 71 Am. Dec. 547; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Giese v. Schultz, 65 Wis. 487, 27 N. W. 353.

⁹⁶ Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Glasscock v. Shell, 57 Tex. 215; proof of the contract and its wrongful breach will entitle the plaintiff to nominal damages at least, and in many cases, the circumstances justify the recovery of substantial general damages, although no exact amount or specific element of damages is directly proved.

⁹⁷ Tamke v. Vanganes, 72 Minn. 236, 75 N. W. 217; Prescott v. Guyler, 32 Ill. 312; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624.

⁹⁸ Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

⁹⁹ Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282.

The length of time of the engagement is an element to be shown in fixing the damages,⁹⁹ and the plaintiff may show the expenses incurred in preparation for the marriage¹⁰⁰ and the loss of time and employment in preparing for the marriage.¹⁰¹

§ 1888. Financial condition of defendant.—In order to fix the damages, evidence may be introduced which shows the financial condition of the defendant and his social position, and what rights and privileges the plaintiff would have acquired pecuniarily and socially by such marriage.¹⁰² The earning capacity of the defendant may be shown to help in determining the damages,¹⁰³ and also his social position,¹⁰⁴ but evidence is not admissible to show the wealth of a relative from whom he may inherit an estate.¹⁰⁵ Reputation of defendant for wealth may be shown to help in fixing the damages,¹⁰⁶ and specific evidence thereof may also be used.¹⁰⁷ The defendant in rebuttal may show his real wealth at the time of the breach, for those are the con-

⁹⁹ *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936; *Olmstead v. Hay*, 112 Iowa 349, 83 N. W. 1056.

¹⁰⁰ *Yale v. Curtiss*, 151 N. Y. 598, 45 N. E. 1125.

¹⁰¹ *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

¹⁰² *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. 217; *Kennedy v. Rodgers*, 2 Kana. App. 764, 44 Pac. 47; *Allen v. Baker*, 86 N. Car. 91, 41 Am. R. 444; *Reed v. Clark*, 47 Cal. 194; *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. R. 443; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726.

¹⁰³ *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835.

¹⁰⁴ *Dent v. Pickins*, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 624.

¹⁰⁵ *Totten v. Read*, 16 Daly (N. Y.) 282, 10 N. Y. S. 318; *Miller v. Rosier*, 31 Mich. 475; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. 726, holds that "a decree settling the share of defendant in the estate of his deceased father, whose death occurred previous to the breach, was admissible as tending to show defendant's pecuniary ability at the time of the breach, although the decree was not rendered until afterward.

¹⁰⁶ *Birum v. Johnson*, 87 Minn. 362, 92 N. W. 1; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442; *Rime v. Rater*, 108 Iowa 61, 78 N. W. 835; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875.

¹⁰⁷ *Smith v. Compton*, 67 N. J. L. 548, 52 Atl. 386; *Dent v. Pickins*, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. R. 208.

§ 1893. **Mitigation of damages.**—Unchastity of the plaintiff may be shown not only as a defense but in mitigation of damages, if the defendant was ignorant of such fact at the time of the contract;¹²⁶ but, it has been held, that the defendant cannot show plaintiff's illicit intercourse with himself, either before or after the promise, for the purpose of reducing damages.¹²⁷ Loud or immoral conduct after the breach, with others, may be shown to reduce damages, as a woman guilty of such conduct could not be greatly humiliated or injured by such breach.¹²⁸ Illicit relations with another during time of engagement may not only be offered as a defense, but in mitigation of damages.¹²⁹ Coarse and immodest conduct of plaintiff may be shown for this same purpose.¹³⁰ But bad character of relatives of either plaintiff or defendant cannot for any purpose be shown.¹³¹ The defendant may show in mitigation of damages that the plaintiff did not care for him in the proper manner,¹³² and she cannot prove her declarations after the breach to dispute this fact,¹³³ although he may use her declarations after the breach to show that she did not care for him.¹³⁴ Where no undue familiarity is shown, evidence that she had other suitors is not admissible.¹³⁵ Evidence of an offer to marry plaintiff after the breach, may be shown¹³⁶ in a proper case. The poor

¹²⁶ *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783; *Kelley v. Highfield*, 15 Ore. 277, 14 Pac. 744; *Clement v. Brown*, 57 Minn. 314, 59 N. W. 198; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242.

¹²⁷ *Boynton v. Kellogg*, 3 Mass. 189.

¹²⁸ *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925; *Button v. McCauley*, 38 Barb. (N. Y.) 413, holds that drunkenness of the plaintiff may be shown in mitigation of damages.

¹²⁹ *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783; *Sheahan v. Barry*, 27 Mich. 217.

¹³⁰ *Albertz v. Albertz*, 78 Wis. 72, 74 N. W. 95, 10 L. R. A. 584; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875.

¹³¹ *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; *Spell-*

ing v. Parks, 104 Tenn. 351, 58 S. W. 126.

¹³² *Robinson v. Craver*, 88 Iowa 381, 55 N. W. 492; *Hook v. George*, 100 Mass. 331.

¹³³ *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442; *Edwards v. Edwards*, 93 Iowa 127, 61 N. W. 413.

¹³⁴ *Robinson v. Craver*, 88 Iowa 381, 55 N. W. 492; *Healey v. O'Sullivan*, 6 Allen (Mass.) 114.

¹³⁵ *Roper v. Clay*, 18 Mo. 383, 59 Am. R. 314; *Albertz v. Albertz*, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

¹³⁶ *Kelly v. Renfro*, 9 Ala. (U. S.) 325, 44 Am. Dec. 441; contra: *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442; not as a defense: *Kurtz v. Frank*, 76 Ind. 594, 40 Am. R. 275; *Southard v. Rexford*, 6 Cow. (N. Y.) 255.

health of either party, in the absence of fraud or misrepresentations, may be shown in mitigation of damages.¹³⁷ It has also been held that the defendant may show the fact, if he was ignorant of it at the time of entering the contract, that certain members of plaintiff's family are insane, in mitigation of damages.¹³⁸

¹³⁷ *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, plaintiff's ill-health; *Mabin v. Webster*, 129 Ind. 430, 23 N. E. 863, 28 Am. St. 199, defendant's ill-health; *Sanders v. Coleman*, 97 Va. 690, 24 S. E. 621, 47 L. R. A. 581.
¹³⁸ *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. 591; but see, *Baker v. Cartwright*, 10 C. B. N. S. 124, 7 Jur. N. S. 1247.

CHAPTER XCII.

CARRIERS OF PASSENGERS AND BAGGAGE.

Sec.	Sec.
1894. Meaning of term.	1900. Breach of contract—Burden of proof.
1895. Pleading and evidence—Generally.	1901. Breach of contract—Burden of proof—Contributory negligence.
1896. Burden of proof—Presumptions.	1902. <i>Res ipsa loquitur</i> —Presumptions.
1897. Burden of proof—Status as passenger.	1903. <i>Res ipsa loquitur</i> —Doctrine applied.
1898. Presumptions—Status as passenger.	1904. Breach of contract—What may be shown.
1899. What may be considered or introduced—Status as passenger.	1905. Baggage—Loss or damage.

§ 1894. **Meaning of term.**—A carrier of passengers and baggage is one who undertakes to carry passengers and their baggage from one place to another. A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to payment of fare, or that which is accepted as an equivalent therefor.¹

§ 1895. **Pleading and evidence—Generally.**—In actions for injuries to passengers, the gist of the action is, in a sense, the same as in actions against common carriers for loss or injury to freight, that is, a breach of duty owing to the plaintiff by the defendant, and, as it may arise either out of the contract or be imposed by law on account of the relation of carrier and passenger, there may be the same election to sue either in contract or in tort.^{1*} Ordinarily, however, such actions are founded on the tort or breach of duty imposed by law. In order to recover for a breach of such duty due a passenger, the

¹ *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256. See also, for exhaustive definition of who are or are not carriers of passengers, 3 Thompson Neg. (2nd ed.), §§ 2535-2539.

^{1*} See post, §§ 1906, 1907.

plaintiff must aver and prove the existence of the duty, that is, the relation of carrier and passenger, the negligence or breach of duty or contract on the part of the defendant, and the resulting injury and damages to him. In some jurisdictions he must also allege and prove that he was free from contributory negligence. A general allegation of damages may permit proof of such as are the usual and natural consequences of the wrong complained of, or, in other words, such as naturally and proximately result therefrom; but in order to recover special damages he must allege and prove them.² He can only recover *secundum allegata et probata*, and, while in most jurisdictions negligence may be averred somewhat generally,³ he cannot charge negligence in one respect and recover for negligence in another and entirely different respect.⁴ Unless the complaint shows that the passenger agreed to assume the risk, or that the liability of the company is limited by special contract, it is held that the carrier, if it relies upon

²*Laing v. Colder*, 8 Pa. St. 479; *Hunter v. Stewart*, 47 Me. 419; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Kinney v. Crocker*, 18 Wis. 74; *Baldwin v. Western R. Co.*, 4 Gray (Mass.) 338; *Smith v. St. Paul & C. R. Co.*, 30 Minn. 169, 14 N. W. 797, 9 Am. & Eng. R. Cas. 262, and note; 1 *Sutherland Dam.* §§ 419, 421; *Gulf & C. R. Co. v. Warlick*, 1 Indian Ter. 10, 35 S. W. 235, it was held that evidence of permanent injuries was not admissible when not alleged.

³See, for examples of general averments held sufficient in actions by passengers, *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Carmanty v. Mexican & C. R. Co.*, 5 La. Ann. 703; *Gulf & C. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Pittsburg & C. R. Co. v. Theobald*, 51 Ind. 246; *Chattanooga & C. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 484; *Coudy v. St. Louis & C. R. Co.*, 85 Mo. 79, 27 Am. & Eng. R. Cas. 282; *Winter v. Central Iowa R. Co.*, 80 Iowa 443, 45 N. W. 737; *San Antonio*

Traction Co. v. Williams, (Tex. Civ. App.) 78 S. W. 977.

⁴*Mayor v. Humphries*, 1 Car. & P. 251; *Price v. St. Louis & C. R. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Breese v. Trenton R. Co.*, 52 N. J. L. 250; *Cincinnati & C. R. Co. v. McClain*, 148 Ind. 188, 44 N. E. 306; *Waldhier v. Hannibal & C. R. Co.*, 71 Mo. 514; *Toledo & C. R. Co. v. Beggs*, 85 Ill. 80; see also, *Birmingham & C. R. Co. v. Clay*, 108 Ala. 233, 19 So. R. 309; *Memphis & C. R. Co. v. Chastine*, 54 Miss. 503; *South & N. Ala. R. Co. v. Schaufier*, 75 Ala. 136; *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 2 Am. Neg. Cas. 43; *Gulf & C. R. Co. v. Scott*, (Tex. Civ. App.) 27 S. W. 827; *McManamee v. Missouri Pac. R. Co.*, 135 Mo. 440, 37 S. W. 119; *Aaron v. Southern R. Co.*, 68 S. Car. 98, 46 S. E. 556; but compare, *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *Hannon v. St. Louis Transit Co.*, 102 Mo. App. 216, 77 S. W. 158; *Penny v. Atlantic Coast Line R. Co.*, 133 N. Car. 221, 45 S. E. 563, 63 L. R. A. 497.

such an agreement, must specially plead it.⁵ So, if it relies upon a release by the plaintiff.⁶ It has also been held that if the plaintiff has violated the rules of the carrier this is a matter of defense to be asserted by it.⁷ As carriers of passengers are not insurers, like common carriers of goods, the plaintiff must show some negligence, or willfulness in a proper case, on the part of the carrier or its employés, which proximately caused his injury;⁸ but, as elsewhere shown, a presumption of negligence on its part frequently arises against it in favor of a passenger sufficient to make a prima facie case, so far as the negligence of the defendant is concerned, upon proof of the happening of an accident (so called) under certain circumstances; and, owing to the high duty which a carrier owes to its passengers, slight evidence of negligence, may often be sufficient. But a mere scintilla of evidence, conjecture or surmise that it may have been negligent will not justify a verdict against it.⁹ In many jurisdictions, as we have said, the bur-

⁵ *Citizens' R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; *Louisville & R. Co. v. Orr*, 84 Ind. 50.

⁶ *Horton v. Horton*, 83 Hun (N. Y.) 213, 31 N. Y. S. 588; *Johnson v. Kerr*, 1 S. & R. (Pa.) 25; *Corbett v. Lucas*, 4 McCord (S. Car.) 323.

⁷ *Whitehead v. St. Louis & C. R. Co.*, 99 Mo. 263, 11 S. W. 751; *Hicks v. Hannibal & C. R. Co.*, 68 Mo. 329.

⁸ *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462, 17 Atl. 14, passenger struck by missile; *Wabash & C. R. Co. v. Koenigsam*, 13 Ill. App. 505, bridge down owing to unusual rain, and no evidence of negligence; *Henry v. St. Louis & C. R. Co.*, 76 Mo. 288, not proximate cause; *Sawyer v. Hannibal & C. R. Co.*, 37 Mo. 240, bridge destroyed by public enemy; *Sickles v. Missouri & C. Co.*, 13 Tex. Civ. App. 434, 35 S. W. 493, failure to heat car; *Chicago & C. R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765; *Moore v. Edison & C. Co.*, 43 La. Ann. 792, 9 So. 433; *St. Louis & C. R. Co. v. Moore*, 14 Ill. App. 510, hidden defect in material; *Pershing v. Chicago & C. R. Co.*, 71 Iowa 561,

32 N. W. 488; *Libby v. Maine & C. R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, extraordinary flood; *Sullivan v. Jefferson & C. R. Co.*, (Mo.) 34 S. W. 566, passenger injured by match lighted by another passenger; *Morris v. New York & C. R. Co.*, 106 N. Y. 678, 13 N. E. 455, fall of parcel in car; *Gulf & C. R. Co. v. Warlick*, 1 Indian Ter. 10, 35 S. W. 235, platform; *Ohio & C. R. Co. v. Allender*, 59 Ill. App. 620, ice on platform; *Davis v. Chicago & C. R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132; *Galveston & C. R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485, injury of one passenger by another; note to *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; note in 2 L. R. A. 252.

⁹ *Toomey v. London & C. R. Co.*, 3 C. B. N. S. 146; *Cotton v. Wood*, 8 C. B. N. S. 568; *Stern v. Michigan R. Co.*, 76 Mich. 591; *Curtis v. Rochester & C. R. Co.*, 18 N. Y. 534; *Edgerton v. New York & C. R. Co.*, 39 N. Y. 227; *LeBarron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312; *Joy v. Winnisimmet Co.*, 114 Mass.

den is upon the plaintiff to prove his own freedom from contributory negligence, as well as the negligence of the defendant, and in all he will be defeated, where his negligence proximately contributed to his injury. It has also been held that his own fraud may defeat a recovery, as, for instance, where he rides upon another's non-transferable ticket, or induces the conductor to carry him without paying any fare, in known violation of the rules of the company.⁹

§ 1896. Burden of proof—Presumptions.—As to carriers of passengers and baggage it may be generally stated that the burden of proof is upon the passenger or plaintiff to establish the relation, the wrongful act or breach on the part of the carrier, and the resulting injury and damages to the plaintiff. The duty of going forward with evidence may shift from the passenger to the carrier; but the burden of proof or duty of ultimately establishing the case, as a general rule, rests upon the plaintiff.¹⁰ This shifting of the burden, in the sense indicated, is caused mainly by certain presumptions which make a *prima facie* case for the party in whose favor they operate. Actions against common carriers are, perhaps, more influenced by presumptions than almost any other class of cases, and are peculiarly or particularly subject to the doctrine or rule of presumption expressed in the maxim, *res ipsa loquitur*.

§ 1897. Burden of proof—Status as passenger.—The burden of proof is on the passenger to establish that he was a passenger in case he attempts to recover as a passenger for breach of the duty or contract to carry him safely.¹¹ So, where he endeavors to recover for an

63; *Stager v. Ridge &c. Co.*, 119 Pa. St. 70, 12 Atl. 821; *Sherman v. Menominee &c. Co.*, 77 Wis. 14, 45 N. W. 1079; *Babcock v. Fitchburg R. Co.*, 140 N. Y. 308, 35 N. E. 596; see also, *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *Toledo &c. R. Co. v. Brannagan*, 75 Ind. 490, it is not liable for a pure accident; *Hardwick v. Georgia &c. R. Co.*, 85 Ga. 507, 11 S. E. 332; *Lewis v. Flint &c. R. Co.*, 54 Mich. 55, 19 N. W. 744.

⁹ *Way v. Chicago &c. R. Co.*, 64 Iowa 48, 19 N. W. 828, 52 Am. R. 431; *Toledo &c. R. Co. v. Brooks*, 81

Ill. 245, 292; *Toledo &c. R. Co. v. Beggs*, 85 Ill. 80; *Brevig v. Chicago &c. R. Co.*, 64 Minn. 168, 66 N. W. 401; *Janny v. Great Northern R. Co.*, 63 Minn. 380, 65 N. W. 450. This section is taken in the main from 4 *Elliott Railroads*, § 1696.

¹⁰ See discussion of this question in *Cleveland &c. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, quoted ante, Vol. I, § 140; see also, Vol. I, §§ 91, 139.

¹¹ *Creed v. Pa. R. Co.*, 86 Pa. St. 139, 27 Am. R. 693; *Chicago & E. I. R. Co. v. Huston*, 95 Ill. App. 350;

alleged wrongful expulsion,¹² and to recover as a passenger he must prove that he has been received and accepted as a passenger either expressly or impliedly.¹³ It has been held, however, that where a carrier seeks to relieve itself from liability because of special conditions in a ticket, the burden is on the carrier to establish the conditions.¹⁴

§ 1898. Presumptions—Status as passenger.—One riding in the proper place in a passenger vehicle has been held to have the presumption in his favor that he is there lawfully as a passenger.¹⁵ And, as a general rule, every one on the passenger train of a railroad company for the purpose of carriage, with the consent of the company, express or implied, is presumptively a passenger.¹⁶ The same rule has been held to apply to persons riding on a freight train if such train has a custom of carrying passengers.¹⁷ But it does not ordinarily apply in favor of one who is on a train that is not such as passengers are usually carried on.¹⁸ And the presumption that one is a passenger may be rebutted.¹⁹

§ 1899. What may be considered or introduced—Status as passenger.—Many cases have arisen indicating what may be introduced in evidence to determine whether or not one is a passenger. Among those facts which have been introduced and held admissible in certain cases are the following: That one bought a ticket,²⁰ that it was the custom

Texas &c. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118.

¹² *Central of Georgia R. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874.

¹³ *McLarin v. Atlanta &c. R. Co.*, 85 Ga. 504, 11 S. E. 840; *Illinois Cent. R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, citing 4 *Elliott Railroads*, §§ 1578, 1581; *Janny v. Great Northern R. Co.*, 63 Minn. 380, 65 N. W. 450; *Arkansas &c. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Southern R. Co. v. Smith*, 86 Fed. 292.

¹⁴ *Daniels v. Florida &c. R. Co.*, 62 S. Car. 1, 39 S. E. 762.

¹⁵ *Louisville &c. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 57 Am.

R. 120; *Creed v. Pa. R. Co.*, 86 Pa. St. 139, 27 Am. R. 693; *People v. Douglass*, 87 Cal. 281, 25 Pac. R. 417.

¹⁶ *Pennsylvania T. Co. v. Books*, 57 Pa. St. 339; *Moore v. St. Louis &c. R. Co.*, 67 Ark. 389, 55 S. W. 161, 163, citing 4 *Elliott Railroads*, § 1578.

¹⁷ *Buffit v. Troy &c. R. Co.*, 36 Barb. (N. Y.) 420; see also, *Woolery v. Louisville &c. R. Co.*, 107 Ind. 381.

¹⁸ *Atchison &c. R. Co. v. Headland*, 18 Colo. 477, 33 Pac. 185; *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 332.

¹⁹ *People v. Douglass*, 87 Cal. 281, 25 Pac. 417.

²⁰ *Central R. Co. v. Wolff*, 74 Ga. 664.

and usage of a railroad to carry passengers on a freight train,²¹ and, that it was the custom to carry at times without a ticket.²² So, also the relationship of the passenger and carrier may be established or contradicted by circumstantial evidence.²³ And it has been held that it may be shown orally, independent of any ticket, that one traveled from one point to another as a passenger.²⁴ A ticket has been considered documentary evidence of a right to be transported.²⁵ And it has been held that the contents of a ticket cannot be proved by oral evidence unless there is an accounting for the non-production of the ticket.²⁶ But the prevailing rule is that an ordinary ticket, at least where the contract is not fully expressed therein, is in the nature of a voucher, token, or receipt, or is evidence of the contract rather than the contract itself, and that parol evidence is admissible, in a proper case, to prove the true contract.²⁷ The holder or purchaser of a ticket, however, is not always a passenger;²⁸ nor, on the other hand, is it always necessary that one should have a ticket, or even be in the vehicle, to be considered a passenger.²⁹

²¹ *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. 706.

²² *Louisville &c. R. Co. v. Guinan*, 11 Lea (Tenn.) 98, 47 Am. R. 279.

²³ *Chicago &c. R. Co. v. Huston*, 95 Ill. App. 350.

²⁴ *Central R. Co. v. Wolff*, 74 Ga. 664.

²⁵ *International &c. R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722; see also, 4 *Elliott Railroads*, § 1594; *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392.

²⁶ *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5.

²⁷ *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Peterson v. Chicago &c. R. Co.*, 80 Iowa 92, 45 N. W. 573; *Baltimore &c. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. R. 617; *Kent v. Baltimore &c. R. Co.*, 45 Ohio St. 284, 4 Am. St. 539; *Johnson v. Concord &c. R. Co.*, 46 N. H. 213, 88 Am. Dec. 199; *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433;

Burnham v. Grand Trunk R. Co., 63 Me. 298, 18 Am. R. 220; *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663; *Mauritz v. New York &c. R. Co.*, 23 Fed. 765; *New York &c. R. Co. v. Winter's Adm.*, 143 U. S. 60, 12 Sup. Ct. 356; *Ames v. Southern Pac. R. Co.*, 141 Cal. 728, 75 Pac. 310, citing 4 *Elliott Railroads*, § 1593.

²⁸ *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Webster v. Fitchbury R. Co.*, 161 Mass. 298, 37 N. E. 165.

²⁹ *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069; *Louisville &c. R. Co. v. Treadway*, 142 Ind. 475, 40 N. E. 807; *Hannibal &c. R. Co. v. Martin*, 111 Ill. 219; *Caswell v. Boston &c. R. Co.*, 98 Mass. 194; *Haselton v. Portsmouth &c. R. Co.*, 71 N. H. 589, 53 Atl. 1016, 1017, citing 4 *Elliott Railroads*, § 1579; *Phillips v. Southern R. Co.*, 124 N. Car. 123, 32 S. E. 388, 389, citing same text book; but see, *Radley v. Columbia Southern R. Co.*, (Ore.) 75 Pac. 212.

§ 1900. **Breach of contract—Burden of proof.**—The burden of proof to establish a breach of contract or tort is on the passenger. The burden of proof, indeed, is on him to prove all the essential elements of his cause of action by a fair preponderance of the evidence.³⁰ Thus in an action for personal injuries he must establish negligence on the part of the carrier.³¹ "It is a perfectly well settled principle that, to entitle a plaintiff to recover in an action of this kind, he must show, not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that injury. The negligence alleged, and the injury sued for, must bear the relation of cause and effect. The concurrence of both, and the nexus between them, must exist to constitute a cause of action."³² But it has been held that in an action for wrongful expulsion, after the plaintiff has established the fact that he was rightfully in a vehicle as a passenger, the duty of going forward with the evidence shifts to the carrier to establish the fact that an expulsion was lawful.³³

§ 1901. **Breach of contract—Burden of proof—Contributory negligence.**—There is a conflict of authority as to whether the carrier or passenger has the burden as to contributory negligence. In some jurisdictions it is held that the passenger has the burden of showing absence of contributory negligence.³⁴ The weight of authority, however, is probably to the effect that the contributory negligence is a matter of defense which the carrier has the burden of establishing.³⁵

§ 1902. **Res ipsa loquitur—Presumptions.**—It is often laid down in general terms that in an action against a carrier for injuries to a passenger, proof that the plaintiff was a passenger, the occurrence of the accident, and injury, establish a prima facie case of the defendant's

³⁰ *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Chicago & C. R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244, 25 Atl. 104; *Hardwick v. Georgia & C. R. Co.*, 85 Ga. 507, 11 S. E. 832; *Terre Haute & C. R. Co. v. Sheeks*, 155 Ind. 74, 95, 56 N. E. 434, citing 4 *Elliott Railroads*, § 1644.

³¹ *Palmer v. Winona & C. Co.*, 78 Minn. 138, 80 N. W. 869; *Central R. Co. v. Freeman*, 75 Ga. 331; *Norfolk & C. R. Co. v. Ferguson*, 79 Va. 241.

³² *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

³³ *Central of Ga. R. Co. v. Cannon*, 106 Ga. 828, 32 S. E. 874.

³⁴ *Galena & C. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 5 N. W. 177, 36 Am. R. 221; see also, *Fuller v. Boston & C. R. Co.*, 133 Mass. 491; *Lucas v. New Bedford & C. R. Co.*, 6 Gray (Mass.) 64, 66 Am. Dec. 406; *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21.

³⁵ *MacDougall v. Central R. Co.*, 63

negligence.³² But this is too broadly stated, or, if literally true, as so stated, it is apt to be misleading. Thus, in a recent case it is said: "As an injury may occur from causes other than the negligence of the party sued, it is obvious that, before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. . . . There are instances in which the circumstances surrounding an occurrence, and giving a character to it, are held, if unexplained, to indicate the antecedent or co-existent existence of negligence as to the efficient cause of an injury complained of. These are the instances where the doctrine *res ipsa loquitur* is applied. This phrase, which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz.: first, when the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is, in its very nature, so obviously de-

Cal. 431; *Baltimore &c. R. Co. v. 383, 26 Pac. 866; Holmes v. Oregon State*, 60 Md. 449; *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360, 18 Am. St. 105; *St. Joseph &c. R. Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 55 Am. R. 544; *Gulf &c. R. Co. v. Williams*, 70 Tex. 159, 8 S. W. 78; *Northern &c. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866; *Holmes v. Oregon &c. R. Co.*, 5 Fed. 523.

³² *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591; *Zemp v. Wilmington & M. R. Co.*, 9 Rich. L. (S. Car.) 84, 64 Am. Dec. 763; *Laing v. Colder*, 8 Pa. St. 479; *Louisville &c. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902; *Galena &c. R. Co. v. Yarwood*, 17 Ill. 509.

structive of the safety of the person or property, and is so tortious in its quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of injurious agency. . . . The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact."⁸⁷ The same doctrine has also been stated and explained as follows: "The carrier is not an insurer against injuries to the passenger, and there is no implied contract that the passenger shall be transported safely. His right of action for injuries is based on negligence, and the burden of proof of negligence is on the plaintiff. Therefore the mere proof of an injury to the passenger in course of transportation, which, so far as it is shown, might have occurred by reason of other cause than the carrier's negligence, such as the act of the passenger himself, or without fault of any one, will not make out a *prima facie* case. So also if it appears that the accident might have been the result of the wrongful acts or negligence of third persons, or of causes not due to human agency, a *prima facie* case is not made out. It is very generally said, however, that proof of the happening of an accident which appears to have been due to defective roadbed, track, machinery, or appliances, or fault of the operation of the conveyance, makes out a *prima facie* case in an action by the passenger to recover for injuries resulting therefrom; and throws on the carrier the burden of proof to show his freedom from negligence, that is, from any want of the exercise of the high degree of care, skill, and foresight required of carriers of passengers in the prosecution of their business with respect to the defect or fault which caused the accident. And this rule is particularly applicable where some defect in the track, machinery, or appliances is shown."⁸⁸ Much the same view as to the proper limitations of the doctrine is taken in a recent text book, and numerous illustrative cases are cited, showing that the doctrine is not applicable without proper limitations.⁸⁹

§ 1903. *Res ipsa loquitur*—Doctrine applied.—It has been held that proof of injuries caused in the following ways is sufficient to raise

⁸⁷ *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478.

⁸⁸ 6 Cyc. 628.

⁸⁹ 4 *Elliott-Railroads*, § 1644, citing, *McClary v. Sioux City &c. R. Co.*, 3 Neb. 44; *Smith v. St. Paul &c.*

a presumption of negligence under the *res ipsa loquitur* doctrine: by the breaking of machinery,⁴⁰ by defect in carrier's railway track,⁴¹ by derailment,⁴² by the train running past station to a place unsafe for alighting,⁴³ by being struck by an object over which the carrier had control,⁴⁴ by explosion,⁴⁵ by sudden and extraordinary jerks or lurches of the car or train,⁴⁶ by the breaking of a bridge or trestle,⁴⁷ by the upsetting or overturning of the car in which plaintiff was a

R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. R. 550; Norfolk &c. R. Co. v. Marshall, 90 Va. 836, 20 S. E. 823; Pennsylvania R. Co. v. MacKinney, 124 Pa. St. 462, 17 Atl. 14, 2 L. R. A. 820; Fleming v. Pittsburgh &c. R. Co., 158 Pa. St. 180, 27 Atl. 858, 38 Am. St. 835; Long v. Pennsylvania R. Co., 147 Pa. St. 343, 30 Am. St. 732 and note; Holbrook v. Utica &c. R. Co., 12 N. Y. 236; Curtis v. Rochester &c. R. Co., 18 N. Y. 534; Stimson v. Milwaukee &c. R. Co., 75 Wis. 381, 44 N. W. 748; Stern v. Michigan Cent. R. Co., 76 Mich. 591, 43 N. W. 587; Mitchell v. Chicago &c. R. Co., 57 Mich. 236, and other authorities; see also the following recent cases: Allen v. Northern Pac. R. Co., (Wash.) 77 Pac. 204, 206, quoting text book above referred to; St. Louis &c. R. Co. v. Burrows, 62 Kans. 39, 61 Pac. 439; Chicago City R. Co. v. Rood, 163 Ill. 477, 45 N. E. 238, 54 Am. St. 478; Ogelsby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 633, 272; in the last case the court refused to apply the doctrine in favor of one of the train crew; see also generally upon the subject, Cassidy v. Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10; Kefauver v. Philadelphia &c. R. Co., 122 Fed. 966.

⁴⁰Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. R. 613; Sharp v. Kansas City &c. R. Co., 114 Mo. 94, 20 S.

W. 93; Meier v. Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. R. 581.

⁴¹Cleveland &c. R. Co. v. Newall, 104 Ind. 264, 3 N. E. 836, 54 Am. R. 312.

⁴²Bergen Co. T. Co. v. Demarest, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. 683; Louisville &c. R. Co. v. Jones, 108 Ind. 551; Illinois Cent. R. Co. v. Kuhn, (Tenn.) 64 S. W. 202.

⁴³Memphis &c. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. R. 699; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346.

⁴⁴Texas M. R. Co. v. Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797; Baltimore Y. T. Co. v. Leonhardt, 66 Md. 70, 5 Atl. 346, 59 Am. R. 156; Walker v. Erie R. R. Co., 63 Barb. (N. Y.) 260.

⁴⁵Spear v. Philadelphia &c. R. Co., 119 Pa. St. 61, 12 Atl. 824.

⁴⁶Murphy v. St. Louis &c. R. Co., 43 Mo. App. 342; Birmingham Union R. Co. v. Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. 748; Lavis v. Wisconsin Cent. R. Co., 54 Ill. App. 636; but see, Saunders v. Chicago &c. R. Co., 6 S. Dak. 40, 60 N. W. 148; Herstine v. Lehigh &c. R. Co., 151 Pa. St. 244, 25 Atl. 104.

⁴⁷Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Louisville &c. R. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. 60, 3 L. R. A. 434; Louisville &c. R. Co. v. Thompson, 107 Ind. 442.

passenger,⁴⁸ and by collision between trains upon the same track.⁴⁹ Other cases in which the doctrine has been applied are cited below.⁵⁰

§ 1904. **Breach of contract—What may be shown.**—A few of the many matters which have been admitted in evidence to prove or disprove the relation of carrier and passenger and the breach of a contract on the part of the carrier, are briefly considered in this section. Upon an issue as to whether the plaintiff entered the car intending to become a passenger, evidence that he tried to procure a ticket before entering has been held admissible,⁵¹ and so, on the other hand, has been evidence that he had no money with him.⁵² Evidence, however, should be responsive or relevant to the issues; and it has been held that in an action against a steamboat company for negligence of the defendant's servant in allowing a bale of cotton to fall on the plaintiff, evidence of defects in the construction of the boat was not admissible.⁵³ The carrier may introduce proper evidence to rebut the presumption applied under the doctrine *res ipsa loquitur*, or to meet evidence on the part of the plaintiff to show negligence on its part. This may be done by showing, among other things, contributory negligence on the part of the plaintiff or that the cause of the injury was one for which the carrier was not responsible; and it has been held that it is sufficient to overcome the presumption, if the carrier shows that there

⁴⁸ *Illinois Cent. R. Co. v. Kuhn*, Mich. 420, 83 N. W. 26; *White v. 107 Tenn. 106*, 64 S. W. 202; *Ohio &c. R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774.

⁴⁹ *Rouse v. Hornsby*, 67 Fed. (U. S.) 219; *Iron R. Co. v. Mbwery*, 36 Ohio St. 418; *Skinner v. London &c. R. Co.*, 5 Ex. 787; *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747; see also, *Chattanooga &c. Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861; *Flaherty v. Northern Pac. R. Co.*, 39 Minn. 328, 40 N. W. 160, 4 L. R. A. 681, and note; *Louisville &c. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899.

⁵⁰ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859; *Stoody v. Detroit &c. R. Co.*, 124

Mich. 420, 83 N. W. 26; *White v. Boston &c. R. Co.*, 144 Mass. 404, 11 N. E. 552; *Railroad Co. v. Walrath*, 38 Ohio St. 461, 43 Am. R. 433; *Louisville &c. R. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58; *Kentucky &c. R. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753; see also, notes in, 20 Am. St. 490; 15 L. R. A. 33; 62 Am. Dec. 682.

⁵¹ *Perkins v. Missouri Pac. R. Co.*, 55 Mo. 201; see also, *Central R. Co. v. Wolff*, 74 Ga. 664.

⁵² *Atchison &c. R. Co. v. Cuniffe*, (Tex. Civ. App.) 57 S. W. 692.

⁵³ *Memphis &c. Co. v. McCool*, 83 Ind. 392.

was no negligence on its part even though no satisfactory explanation is given of the real cause of the injury.⁵⁴ Evidence of other accidents at the same place, or about the same time, causing injuries to passengers, has been received in some cases.⁵⁵ But such evidence is not always admissible, nor for all purposes; and evidence of similar accidents, must usually be accompanied by proof that the conditions were similar,⁵⁶ or that there had been no change in the conditions.⁵⁷ Declarations of the carrier's servants⁵⁸ and declarations of fellow passengers⁵⁹ have been held admissible in many cases as part of the *res gestae*, or, in some instances, the former have been received under the doctrine of agency. Such declarations, however, have been fully treated elsewhere.⁶⁰

§ 1905. **Baggage—Loss or damage.**—In an action by a passenger to recover for a loss of baggage the burden of showing a delivery of it to the carrier is on the passenger;⁶¹ and the plaintiff has the burden of proof to make out a *prima facie* case of loss⁶² or damage⁶³ to baggage. Custom may often exert an important influence upon the question of delivery, and evidence thereof is admissible in a proper case.⁶⁴

⁵⁴ *Louisville &c. R. Co. v. Jones*, Ind. 183; *Twomley v. Central &c. R. Co.*, 69 N. Y. 158.

⁵⁵ *Chicago &c. R. Co.*, 43 Iowa 236; *Hammack v. White*, 11 C. B. N. S. 538, 31 L. J. C. P. 129, 103 E. C. L. 538. ⁵⁶ Vol. I, §§ 550, 557, 564, 565; and as to admissions of agents, see, Vol. I, § 252.

⁵⁷ *Clapp v. Minneapolis R. Co.*, 33 Minn. 22, 21 N. W. 844, 24 N. W. 340; *Bullard v. Boston &c. R. Co.*, 64 N. H. 27, 5 Atl. 838. ⁵⁸ *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, 64 N. W. 219; *Matteson v. New York Cent. &c. R. Co.*, 76 N. Y. 381, there must be a delivery and acceptance, although acceptance may often be implied; *Merriam v. Hartford &c. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; see also, 4 Elliott Railroads, § 1652; as to baggage transfer companies, see, 34 L. R. A. 137, and note.

⁵⁹ *Hipsley v. Kansas City &c. R. Co.*, 38 Mo. 348. ⁶⁰ *McCormick v. Pennsylvania Cent. R. Co.*, 99 N. Y. 65, 52 Am. R. 6.

⁶¹ *Wilder v. Metropolitan St. R. Co.*, 41 N. Y. S. 931, affirmed in 161 N. Y. 665, 57 N. E. 1128. ⁶² *Montgomery &c. R. Co. v. Culver*, 75 Ala. 587.

⁶³ *Maury v. Talmadge*, 2 McLean (U. S.) 157, 16 Fed. Cas. No. 9315. ⁶⁴ *Green v. Milwaukee &c. R. Co.*, 38 Iowa 100; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246.

⁶⁴ *Mobile &c. R. Co. v. Ashcraft*, 48 Ala. 15; *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946; *St. Louis &c. R. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 29 Am. St. 32; see also, *Indianapolis R. Co. v. Anthony*, 43

The possession of the baggage check is *prima facie* evidence of the receipt of the baggage by the carrier,⁶⁵ but it is not conclusive and may be explained;⁶⁶ and, according to the weight of authority, the baggage check is in the nature of a receipt taken for identification rather than a contract.⁶⁷ Where baggage is checked by an owner who intends making a journey over lines of different railroads and at the end of one line he surrenders the baggage check first received and receives the baggage check of the second line the latter check is evidence that the line issuing it had received the baggage represented by such check.⁶⁸ But a through check over several different lines will not of itself, without a contract for through transportation, make the carrier responsible for loss of the baggage by one of the other connecting carriers.⁶⁹ It has been held that proof of the presentation of the check with a demand for the baggage at a proper time at the place of destination, and an unconditional refusal on the part of the carrier to deliver it, raises a presumption of negligence on the carrier's part and makes a *prima facie* case against it.⁷⁰ So, proof of the delivery to the carrier and the failure to account for the property, without explanation, has been held sufficient to take the case to the jury.⁷¹

⁶⁵ *Davis v. Michigan &c. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Denver &c. R. Co. v. Roberts*, 6 Colo. 333; *Dill v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 158, 62 Am. Dec. 407; *Atchison &c. R. Co. v. Brewer*, 20 Kans. 669; *Louisville &c. R. Co. v. Weaver*, 9 Lea (Tenn.) 38, it is held judicial notice will be taken of the general custom or system of checking baggage; *Isaacson v. New York &c. R. Co.*, 94 N. Y. 278.

⁶⁶ *Chicago &c. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. Michigan &c. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151.

⁶⁷ See, 4 Elliott Railroads, § 1655, and authorities cited and reviewed on both sides.

⁶⁸ *Ahlbeck v. St. Paul &c. R. Co.*, 39 Minn. 424, 40 N. W. 364; *St. Louis &c. R. Co. v. Hawkins*, 39 Ill. App. 406; *Kansas Pac. R. Co. v. Montelle*, 10 Kans. 119.

⁶⁹ *Green v. New York &c. R. Co.*, 4

Daly (N. Y.) 553; *Stimson v. Connecticut &c. R. Co.*, 98 Mass. 83; *Talcott v. Wabash R. Co.*, 89 Hun (N. Y.) 492, 35 N. Y. S. 574; see, *Louisville &c. R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 16 Am. & Eng. R. Cas. 218; and compare, *Fox v. Wabash &c. R. Co.*, 16 Misc. (N. Y.) 370, 38 N. Y. S. 88.

⁷⁰ *Atchison &c. R. Co. v. Brewer*, 20 Kans. 669; *Schouler Bailm. & Car.*, § 694; *Cleveland &c. R. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523.

⁷¹ *Wheeler v. Oceanic &c. Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. 729; see also, *McCormick v. Pennsylvania R. Co.*, 99 N. Y. 65, 1 N. E. 99, 52 Am. R. 6; but see, *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, 64 N. W. 219, where baggage, from which articles were found to have been stolen at the destination, was first in the hands of an expressman.

CHAPTER XCIII.

CARRIERS OF GOODS AND LIVE STOCK.

Sec.	Sec.
1906. Meaning of term.	1913. The contract—What may be shown—Generally.
1907. Actions against common carriers—Pleading and evidence.	1914. The contract—What may be considered or introduced.
1908. Evidence for defense—Generally.	1915. Breach of contract—Burden of proof.
1909. Whether a common carrier—Burden of proof and presumption.	1916. Burden of proof—Liability limited by special contract.
1910. Whether a common carrier—How shown.	1917. Breach of contract—Presumptions.
1911. The contract—Burden of proof.	1918. Breach of contract—What evidence is admissible.
1912. The contract—Presumptions.	1919. Live stock—Burden of proof.
	1920. Rule where owner accompanies stock.

§ 1906. **Meaning of term.**—A carrier of goods is defined as one who undertakes to transfer goods from one place to another; one who carries or agrees to carry the goods of another, from one place to another, for hire, or without hire. Carriers are either common or private. Private carriers are persons who undertake the transportation in a particular instance only, not making it their vocation, nor holding themselves out to the public as ready to act for all who desire their services. To bring the person within the description of a common carrier of goods he must exercise the business of carrying goods for hire as a public employment; he must undertake to carry goods for persons generally; and he must hold himself as ready to transport goods for hire, as a business, not as a casual occupation, *pro hac vice*.¹ A carrier of live stock has been defined as a carrier who undertakes the transportation of live stock for hire, and who holds himself out

¹ Black Law Dict.; as to who are common carriers, see generally, this definition, 5 Thompson Neg. notes in 6 L. R. A. 619, 10 L. R. A. (2nd ed.), Ch. CLVI, § 6415, et seq.

damage caused thereby to himself. The evidence must be responsive to the issues¹³ and the recovery limited to the issues, so that when the declaration or complaint counts entirely upon a non-delivery of the goods there can be no recovery thereunder for injury to the goods when the proof shows that they were delivered by the carrier.¹⁴ The general rules governing the admissibility of the evidence are substantially the same as in other cases.¹⁵

§ 1908. Evidence for defense—Generally.—The carrier may defend by showing that the loss or injury was caused by the act of God, the public enemy, public authority, the fault of the plaintiff, or the inherent nature of the goods. So, it may show, where there is a special contract exempting it from liability for loss or injury from certain causes, that the injury or loss was the result of the causes for which it is not responsible under its contract. Evidence that the conductor in charge of a train at the time goods were lost was skillful and competent,¹⁶ or that goods lost from the carrier's depot were taken care of just as other goods of the same kind had always been taken care of by it, and that none had ever before been lost,¹⁷ is inadmissible. But evidence that there was not room in the company's warehouse to store the plaintiff's goods at the particular time, that the warehouse was sufficient for the company's ordinary business, and that the defendant immediately notified the plaintiff to that effect, was held admissible in a recent case, in an action against the carrier for negligence in failing to store the goods safely.¹⁸ At common law, whether the action was in assumpsit or in tort, it was generally sufficient for the carrier to plead the general issue.¹⁹ A general denial will often be

¹³ *Chicago &c. R. Co. v. Hoeffner*, 6 Pac. 160; *Mayhew v. Nelson*, 64 Ill. App. 137; *Kyle v. Buffalo &c. R. Co.*, 16 U. C. C. P. 76.

¹⁴ *South &c. R. Co. v. Wilson*, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41; *Alabama &c. R. Co. v. Grabfelder*, 83 Ala. 200, 3 So. 432; *Nudd v. Wells*, 11 Wis. 426.

¹⁵ As to declarations and admissions of agents and employes, see, Vol. 1, §§ 252, 564, 565; *Union R. &c. Co. v. Riegel*, 73 Pa. St. 72; *Green v. Boston &c. R. Co.*, 128 Mass. 221, 35 Am. R. 370; *Bennett v. Northern Pac. R. Co.*, 12 Ore. 49,

6 Pac. 160; *Mayhew v. Nelson*, 6 Car. & P. 58.

¹⁶ *Montgomery &c. R. Co. v. Edmunds*, 41 Ala. 667.

¹⁷ *Lane v. Boston &c. R. Co.*, 112 Mass. 455.

¹⁸ *Stowe v. New York &c. R. Co.*, 113 Mass. 521.

¹⁹ *Hutchinson Carriers*, (2d ed.) § 758; *Illinois Cent. R. Co. v. Johnson*, 34 Ill. 389; *Ortt v. Minneapolis &c. R. Co.*, 36 Minn. 396, 31 N. W. 519; *Brown v. Dunlap*, 3 S. Car. 101; *St. Louis &c. R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. 1132, a mere

sufficient in the code states, but as "new matter" must be specially pleaded under the codes it will sometimes be necessary, or at least advisable, to answer specially, as, for instance, in some cases where there is a contract limiting the liability of the carrier.²⁰

§ 1909. Whether a common carrier—Burden of proof and presumption.—The burden of proof to establish the fact that one is a common carrier is on the one who endeavors to recover against another as a common carrier.²¹ When, however, it is shown that one is and acts as a common carrier, and the carrier desires to show that his liability as common carrier had terminated at the time of the loss, the burden is on him to produce evidence to establish that fact.²² Thus, it has been held that where, in a suit against a carrier for the loss of property received for transportation, it is shown that the defendant was a common carrier of the property, the presumption is that such relation continues, and the burden is on it to show that its liability as common carrier had ceased before the loss occurred.²³

§ 1910. Whether a common carrier—How shown.—The fact that one is a common carrier may be established by the introduction of evidence proving that the person held himself out as a common carrier.²⁴ Proof that he exercised or carried on the business of carrying goods for hire as a public employment, that he undertook to carry goods for persons generally, and that he held himself out as ready to transport goods for hire, as a business, not as a casual occupation, *pro hac vice*, sufficiently established the fact that one was a common carrier.²⁵

denial by the carrier that it ever received the goods has been held insufficient to require the plaintiff to show a non-delivery to the consignee. *Hot Springs &c. R. Co. v. Hudgins*, 42 Ark. 485, 18 Am. & Eng. R. Cas. 643.

²⁰ See, *Missouri Pac. R. Co. v. Wichita &c. Co.*, 55 Kans. 525, 40 Pac. 899; *Atchison &c. R. Co. v. Bryan*, (Tex. Civ. App.) 28 S. W. 98; *Atchison &c. R. Co. v. Ditmars*, (Kans.) 43 Pac. 833; *Elliott Railroads*, §§ 1438, 1694.

²¹ *Ringgold v. Haven*, 1 Cal. 108; see also, *Bristol v. Rensselaer &c.*

R. Co., 9 Barb. (N. Y.) 158; *Pozzi v. Shipton*, 8 Ad. & El. 963; *Marshall v. York &c. R. Co.*, 11 C. B. 655.

²² *Peoria &c. R. Co. v. United States Rol. Stk. Co.*, 136 Ill. 643, 27 N. E. 59.

²³ *Peoria &c. R. Co. v. United States Rol. Stk. Co.*, 136 Ill. 643, 27 N. E. 59.

²⁴ *Southern Ex. Co. v. Ashford*, 126 Ala. 591, 28 So. 732.

²⁵ See cases in note, *supra*; also, *Fuller v. Bradley*, 25 Pa. St. 120; *Levi v. Lynn &c. R. Co.*, 11 Allen (Mass.) 300; *Russell v. Livingston*, 19 Barb. (N. Y.) 346, but a railroad

The fact also may be established by proof that one was in the habit of doing business as a carrier for all that called on him.²⁸ It has also been held that it may be established by introducing the carrier's advertisements or handbills issued before the transaction.²⁷

§ 1911. **The contract—Burden of proof.**—The burden of proof to establish the contract is on the plaintiff in an action against a carrier to recover damages for breach of contract of carriage.²⁸ So the delivery of the property being a part of the agreement, the burden of proof is on the plaintiff to prove the delivery of the property to the carrier.²⁹ But the burden of proof has been held to be on the carrier to show that the condition of the goods as received by him was not such as recited in the bill of lading.³⁰ When required by the contract that a claim be presented in a certain way and within a certain required time, the burden has been held to be on the shipper to show performance.³¹ But if the carrier seeks thereby to relieve himself from liability the burden has been held to be on him to show that such a requirement is a just and reasonable stipulation.³²

§ 1912. **The contract—Presumptions.**—The presumptions which arise mostly under this head are mainly presumptions as to the authority to make the contract or as to the parties to the contract. Thus, it has been held that a station agent will be presumed to have authority to make a contract and receive freight without proof of that fact by the plaintiff in the first instance.³³ But, in most jurisdictions, it

company has been held to be a private carrier as to an express company with which it has a special contract; *Louisville & C. R. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348.

²⁷ *Haslam v. Adams Ex. Co.*, 6 Bosw. (N. Y.) 235.

²⁸ *Farmers' & Bank v. Champlain Trans. Co.*, 23 Vt. 186.

²⁹ *Tarbox v. Eastern S. B. Co.*, 50 Me. 339.

³⁰ *Stout v. Coffin*, 28 Cal. 65; *Southern R. Co. v. Allison*, 115 Ga. 635, 42 S. E. 15; *St. Louis I. M. & S. R. R. Co. v. Knight*, 122 U. S. 79; *Louisville & C. R. Co. v. Echols*, 97

Ala. 556, 12 So. 304; as to evidence of delivery, see, 4 *Elliot Railroad*, § 1413.

³¹ *Bissel v. Price*, 16 Ill. 408.

³² *Osterhoudt v. Southern Pac. R. Co.*, 47 N. Y. App. Div. 146, 62 N. Y. S. 134; see, *St. Louis & C. R. Co. v. Hays*, 13 Tex. Civ. App. 577, 35 S. W. 476.

³³ *Cox v. Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; but see, *United States Ex. Co. v. Joyce*, (Ind. App.) 69 N. E. 1015.

³⁴ *Gulf & C. R. Co. v. Short*, (Tex. Civ. App.) 51 S. W. 261; *Lake Erie & C. R. Co. v. Rosenberg*, 31 Ill. App. 47; *Pruitt v. Hannibal & C. R. Co.*, 62

is held that this presumption does not extend, ordinarily, to making contracts binding upon the carrier to carry freight beyond its own line;³⁴ and there is said to be a presumption that a vendor of property contracts on his own behalf and not for the consignee;³⁵ but, ordinarily, in most jurisdictions, the presumption in the absence of anything to the contrary is that the consignee is the owner or real party in interest, and that he is therefore the proper party to sue for their loss, injury or delay.³⁶ Some other presumptions that arise are the shipper's assent to a limited contract, when it is shown that a writing containing the restrictions was accepted by him;³⁷ and a presumption of a contract to carry to a point beyond its own line when a carrier receives goods marked to such a point.³⁸

§ 1913. The contract—What may be shown—Generally.—In general all facts tending to establish or rebut the alleged contract may be introduced in evidence. The question as to whether or not there has been a delivery is one which frequently arises. Thus it has been held that delivery to a carrier may be proved by circumstantial evidence.³⁹ And it is proper to show that the carrier's custom was to receive freight at a certain place⁴⁰ or to make contracts to carry goods to a point beyond its own line.⁴¹ The bill of lading and the way bill are

Mo. 527; *Deming v. Grand Trunk &c. R. Co.*, 48 N. H. 455; *Harrell v. Wilmington &c. R. Co.*, 106 N. Car. 258, 11 S. E. 286; 4 *Elliott Railroads*, § 1406.

³⁴ *Minter v. Southern Kans. R. Co.*, 56 Mo. App. 282; *Gulf &c. R. Co. v. Hodge*, (Tex.) 30 S. W. 829; *Burroughs v. Norwick &c. R. Co.*, 100 Mass. 26, 1 Am. R. 78; 1 *Elliott Railroads*, § 303; 4 *Elliott Railroads*, §§ 1406, 1437.

³⁵ *Union F. R. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. 398.

³⁶ *Pennsylvania R. Co. v. Poor*, 103 Ind. 553, 3 N. E. 253; *Southern Ex. Co. v. Caperton*, 44 Ala. 101; *Kruller v. Ellison*, 47 N. Y. 36; *Dyer v. Great Northern R. Co.*, 51 Minn. 345, 53 N. W. 714; *Bacharach v. Chester*

Freight Line, 133 Pa. St. 414, 19 Atl. 409; 4 *Elliott Railroads*, §§ 1426, 1559, 1692.

³⁷ *Cox v. Central V. R. Co.*, 170 Mass. 129, 49 N. E. 97; *Evansville &c. R. Co. v. Kevekordes*, (Ind. App.) 69 N. E. 1022; *Schaller v. Chicago & Northwestern R. Co.*, 97 Wis. 31, 71 N. W. 1042; *contra*, *Chicago & Northwestern R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095.

³⁸ *Chicago & Northwestern R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596.

³⁹ *Missouri Pac. R. Co. v. Riggs*, 10 Kans. App. 578, 62 Pac. 712.

⁴⁰ *Bowie v. Baltimore &c. R. Co.*, 1 McArthur (D. C.) 609.

⁴¹ *Gulf &c. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. 119.

care and skill. And, generally, the burden is on the carrier to exculpate itself by showing that the loss was caused by the act of God, or the like, after proof of loss.⁶⁴ So, where the plaintiff, in an action against a carrier for injuries to goods delivered to him for transportation has shown such delivery and the injury, the burden has been held to be upon the defendant to prove that his liability had terminated before the injury occurred.⁶⁵ But in an action for damages against a railroad company for loss of part of a shipment consigned to a point where there was no depot or agent, it being shown that the car reached the destination, and was left there on a side track, the burden was held to be on the plaintiff to show that the loss occurred before arrival.⁶⁶ And although the carrier may be liable where its negligence concurs with the act of God, in causing the loss, yet it has been held that when it is shown that the loss was due to such an overpowering cause, the burden is upon the plaintiff to show negligence on the part of the carrier.⁶⁷ It has been held that in an action against a railroad company for the loss of oil while in its custody, the plaintiff must sustain the burden of furnishing satisfactory proof of the loss; but he is not required to prove it to a mathematical certainty, but simply to such degree as would be sufficient to satisfy the mind of the jury of the fact.⁶⁸ Where a carrier received goods improperly packed or in a bad condition and the same were damaged to a greater extent the burden was held to be on the carrier to show that the injury was caused on account of the improper condition in which they were when received.⁶⁹ The owner of property damaged or lost by a carrier has the burden of proving the amount of his damages,⁷⁰ and he must generally show the value of the goods lost.⁷¹

⁶⁴ *Grieve v. Illinois Cent. R. Co.*, (Minn.) 97 N. W. 893; *Railroad Co. v. Reeves*, 10 Wall. (U. S.) 176; but see, *Brown v. Adams & Co.*, 15 W. Va. 812; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49, and 4 *Elliott Railroads*, § 1457, where additional authorities are cited pro and con.

⁶⁵ *Baltimore & R. Co. v. Schumacher*, 29 Md. 168, 96 Am. Dec. 510.

⁶⁶ *South & N. A. R. Co. v. Wood*, 66 Ala. 167, 41 Am. 749.

⁶⁷ *Union Ex. Co. v. Graham*, 26 Ohio St. 595.

⁶⁸ *South & N. A. R. Co. v. Wood*, 71 Ala. 215, 46 Am. R. 309.

⁶⁹ *Atlanta & R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600.

⁷⁰ *Seller v. The Pacific, Deady* (U. S.) 17, 1 Ore. 409.

⁷¹ *Jones v. Minneapolis & R. Co.*, (S.) 17, 1 Ore. 409.

§ 1916. Burden of proof—Liability limited by special contract.—

It frequently becomes of the utmost importance where the carrier claims that its liability is limited by special contract, to determine upon whom rests the burden of proof. Upon some phases of this subject there is sharp conflict among the authorities. Two propositions, however, seem to be fairly well settled. Proof of loss or non-delivery or injury to freight while in the possession of the carrier usually raises a presumption of negligence or fault on its part and casts the burden upon the carrier to explain or account for the same in some way which will exonerate it;⁷² and, if the carrier claims that the loss or damage occurred from some cause excepted in the special contract the burden is upon the carrier to show that fact.⁷³ The car-

⁷² *Canfield v. Baltimore &c. R. Co.*, 93 N. Y. 532; *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523, 7 Atl. 134; *Merchants' Dispatch &c. Co. v. Bloch*, 28 Tenn. 392, 6 S. W. 881; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Maun v. Birchard*, 40 Vt. 326; *Chapman v. New Orleans &c. R. Co.*, 21 La. Ann. 224, 99 Am. Dec. 722; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Bintoul v. New York &c. R. Co.*, 17 Fed. (U. S.) 905; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129; *Chesapeake &c. R. Co. v. Radbourne*, 52 Ill. App. 203; *Georgia R. &c. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; *St. Louis &c. R. Co. v. Farmer*, (Tex. Civ. App.) 30 S. W. 1109; *George v. Chicago &c. R. Co.*, 57 Mo. App. 358; *Witting v. St. Louis &c. R. Co.*, 101 Mo. 631; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 37 Am. & Eng. R. Cas. 663, 669; *Pennsylvania R. Co. v. Liveright*, (Ind. App.) 41 N. E. 350, 43 N. E. 162; *Little v. Boston &c. R. Co.*, 66 Me. 239; *Tygert Co. v. The Charles P. Sinnickson*, 24 Fed. 304; *Browning v. Goodrich Trans. Co.*, 78 Wis. 391, 10 L. R. A. 415.

⁷³ *Jaines v. Union &c. Co.*, 28 Ohio St. 418; *Merchants' Dispatch &c. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. 847; *Verner v. Sweitzer*, 32 Pa. St. 208; *St. Louis &c. R. Co. v. Lesser*, 46 Ark. 236; *Bennett v. Filyaw*, 1 Fla. 403; *Alden v. Pearson*, 3 Gray (Mass.) 342; *South &c. R. Co. v. Henlein*, 52 Ala. 606; *Kallman v. United States Ex. Co.*, 3 Kans. 205; *Baltimore &c. R. Co. v. Brady*, 32 Md. 333; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Lindsley v. Chicago &c. R. Co.*, 86 Minn. 539, 1 Am. St. 692; *Cumming v. The Baracouta*, 40 Fed. (U. S.) 498; *Wallingford v. Columbia &c. R. Co.*, 26 S. Car. 258, 2 S. E. 19; *Witting v. St. Louis &c. R. Co.*, 28 Mo. App. 103; *Terre Haute &c. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781; *Chapman v. New Orleans &c. R. Co.*, 21 La. Ann. 224, 31 N. E. 781; *Chapman v. New Orleans &c. R. Co.*, 21 La. Ann. 224, 99 Am. Dec. 722; *Wheeler Carriers*, 252; *Lawson Contracts of Carriers*, §§ 246, 247. Many of the above cases hold that the burden is upon the carrier to plead and prove the special contract limiting its liability; to this effect are also, *Schaeffer v. Philadelphia &c. R. Co.*, 168 Pa. St. 209, 31 Atl. 1088; *Missouri Pac. R. Co. v. Wichita &c. Co.*, 55 Kans. 525, 40 Pac. 899; *Atchison &c. R. Co. v. Bryan*, (Tex. Civ. App.)

rier, however, is generally liable for its own negligence even though the loss was from some excepted cause, such as fire, or the like, proximately resulting from its failure to exercise due care. In many of the states the burden is upon the carrier to show not only that the cause of the loss was within the terms of exception, but also that there was, on its part, no negligence or want of due care,⁷⁴ or, at least, none which was a proximate cause of loss. But the weight of authority supports the rule that, after the loss is once shown to be within the exception, the burden is upon the plaintiff to show negligence upon the part of the carrier.⁷⁵ Proof by a common carrier that a loss was by

28 S. W. 98; *Western Trans. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *McMillan v. Michigan &c. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606, but we do not believe that this rule can prevail in all cases in all jurisdictions.

"*Shea v. Minneapolis &c. R. Co.*, 63 Minn. 228, 65 N. W. 458; *Shriver v. Sioux City &c. R. Co.*, 24 Minn. 506; *Ryan v. Missouri &c. R. Co.*, 65 Tex. 13; *Chicago &c. R. Co. v. Moss*, 60 Miss. 1003; *Johnson v. Alabama &c. R. Co.*, 69 Miss. 191, 11 So. 104; *Berry v. Cooper*, 28 Ga. 543; *Columbus &c. R. Co. v. Kennedy*, 78 Ga. 646, under a statute; *Graham v. Davis*, 4 Ohio St. 362; *Gaines v. Union &c. Co.*, 28 Ohio St. 418; *Wallingford v. Columbia &c. R. Co.*, 26 S. Car. 258; *Slater v. South Carolina R. Co.*, 29 S. Car. 96; *Louisville &c. R. Co. v. Touart*, 97 Ala. 514, 11 So. 756; see also, *Boies v. Hartford &c. R. Co.*, 37 Conn. 272; *Adams Ex. Co. v. Stettiners*, 61 Ill. 184; *Dunseth v. Wade*, 3 Ill. 285; *Chicago &c. R. Co. v. Manning*, 23 Neb. 552.

"*Little Rock &c. R. Co. v. Talbot*, 39 Ark. 523; *Little Rock &c. R. Co. v. Harper*, 44 Ark. 208; *Mitchell v. United States Ex. Co.*, 46 Iowa 214; *New Orleans &c. Co. v. New*

Orleans &c. R. Co., 20 La. Ann. 302; *Kallman v. United States Ex. Co.*, 3 Kans. 205; *Kansas Pac. R. Co. v. Reynolds*, 8 Kans. 623; *Sager v. Portsmouth &c. Co.*, 31 Me. 228; *Jordan v. American Ex. Co.*, 86 Me. 225, 29 Atl. 980; *Read v. St. Louis &c. R. Co.*, 60 Mo. 199; *Davis v. Wabash &c. R. Co.*, 89 Mo. 340, 1 S. W. 327; *Witting v. St. Louis &c. R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602; *Smith v. American Ex. Co.*, 108 Mich. 572, 66 N. W. 479; *French v. Buffalo &c. R. Co.*, 4 Keyes (N. Y.) 108; *Whitworth v. Erie &c. R. Co.*, 87 N. Y. 413; *Smith v. North Carolina R. Co.*, 64 N. Car. 235; *Farnham v. Camden &c. R. Co.*, 55 Pa. St. 53; *Hubbard v. Harnden Ex. Co.*, 10 R. I. 244; *Railway Co. v. Manchester Mills*, 88 Tenn. 653; *Washburn-Crosby Co. v. William Johnston Co.*, 125 Fed. (U. S.) 273, 60 C. C. A. 187; *Clark v. Barnwell*, 12 How. (U. S.) 272; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129; *Werthelmer v. Pennsylvania R. Co.*, 17 Blatch. (U. S.) 421; *Marsh v. Horne*, 5 B. & C. 322; *Ohrloff v. Briscall*, L. R. 1 P. C. App. 231; see also, *Terre Haute &c. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781; *Indianapolis &c. R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138, where there is no evidence

some vis major, as by flood, will excuse him, without affirmative proof that he was guilty of no negligence. The proof of such negligence, if any is asserted to exist, rests on the other party.⁷⁶ The former rule has been approved by eminent text writers and judges, and much may be said in its favor;⁷⁷ but we are inclined to think that the latter is supported by the better reason as well as by the weight of authority.⁷⁸ It has also been held by some of the courts that where the property consists of live stock or perishable fruit, or the like, which is peculiarly liable to injury or deterioration because of its inherent nature or vice, it is not enough for the shipper to show that it was delivered by the carrier in a damaged condition.⁷⁹ And it has been held that where the shipper goes with the stock and agrees to take care of it he must show negligence on the part of the carrier and freedom from negligence on his part.⁸⁰ It cannot be said, however, that either of these propositions is settled in all jurisdictions.⁸¹ But

as to how the loss occurred the presumption may be against the carrier, but where it is shown to be within the exception and the circumstances do not import negligence on the part of the carrier, the burden is upon the plaintiff to prove negligence, which is generally a question of fact for the jury; *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 24 Atl. 678.

⁷⁶*Memphis &c. R. Co. v. Reeves*, 77 U. S. 176.

⁷⁷See 2 *Greenleaf Ev.*, § 219; *Hutchinson Carriers*, § 766; *Lawson Contracts of Carriers*, §§ 249, 250, the reasons for this rule are that the facts are best known to the carrier and that it is required by public policy. It may also be urged with plausibility that when the plaintiff makes out a prima facie case by showing the delivery and loss, it cannot be justly said that this is rebutted by showing that it occurred by reason of a cause which was within the exception, where the exception does not cover negligence and such cause does not

exclude negligence, but is compatible therewith.

⁷⁸See reasoning in, *Patterson v. Clyde*, 67 Pa. St. 500.

⁷⁹*Pennsylvania R. Co. v. Raiford*, 119 Pa. St. 577, 13 Atl. 324; *Hussey v. The Saragossa*, 3 Wood (U. S.) 380; see also, *Pittsburg &c. R. Co. v. Hollowell*, 65 Ind. 188; *Bartlett v. Pittsburg &c. R. Co.*, 94 Ind. 281; *Pittsburg &c. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. R. 422; *Michigan &c. R. Co. v. McDonough*, 21 Mich. 165; *Clarke v. Rochester &c. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *The Hindoustan*, 67 Fed. (U. S.) 794.

⁸⁰*Terre Haute &c. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781; *St. Louis &c. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. 104, 117; *Louisville &c. R. Co. v. Hedger*, 9 Bush (Ky.) 645; *McBeath v. Wabash &c. R. Co.*, 20 Mo. App. 445; see also, *Harvey v. Rose*, 26 Ark. 3; *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440, 448.

⁸¹*Central R. &c. Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 8 *Lewis Am. Ry. & Corp. R.* 395; *Phoenix &c.*

the rule that affirms that the burden is on the shipper in such cases rests, we think, on solid foundation. It has been sometimes overlooked, or the distinction has been ignored, but there are few, if any, well considered cases in which it has been expressly denied.

§ 1917. **Breach of contract—Presumptions.**—Under the doctrine elsewhere considered,⁸² where there are connecting carriers and goods are shown to have been delivered to the first carrier in good condition and are found damaged on arrival at their destination, the presumption, in the absence of anything to the contrary, is that they were injured by, or in the hands of, the last carrier.⁸³ It has also been held that the connecting carrier in whose hands the property is found injured is presumed to have caused the injury. This presumption, however, may be rebutted by the carrier showing that the property was in good condition while in its possession.⁸⁴ Other presumptions that have been indulged in certain cases and under certain circumstances are that goods were *prima facie* received by a carrier in good order for shipment;⁸⁵ that goods were damaged en route where it appeared that they arrived in a damaged condition, and it appeared from the bill of lading, that they were in good order when loaded;⁸⁶ that the carrier was negligent when a loss of the door to a car containing freight was shown and unexplained.⁸⁷ And where it is shown that the breakage of goods delivered by a carrier was such as, considering the manner in which they were packed, would not ordinarily

Works v. Pittsburg &c. R. Co., 139 Pa. St. 284, 20 Atl. 1058.

⁸² Vol. I, § 109.

⁸³ *Cote v. New York &c. R. Co.*, 182 Mass. 290, 65 N. E. 400; *Texas &c. R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801; *Texas &c. R. Co. v. Adams*, 78 Tex. 372, 22 Am. St. 56, and note; *Beard & Sons v. Illinois Cent. R. Co.*, 79 Iowa 518, 44 N. W. 800, 18 Am. St. 381, 7 L. R. A. 280; *Falson v. Alabama &c. R. Co.*, 69 Miss. 569, 13 So. 37; *Savannah &c. R. Co. v. Harris*, 26 Fla. 148, 7 So. 544, 23 Am. St. 551; Vol. I, § 109, n. 124; 4 *Elliott Railroads*, § 1450; but see, *Georgia &c. R. Co. v. Hughart*, 90 Ala. 36, 8 So. 62,

where goods were lost and not delivered at all, and compare, *Louisville &c. R. Co. v. Jones*, 100 Ala. 263, 14 So. 114.

⁸⁴ *Louisville &c. R. Co. v. Tennessee Brewing Co.*, 96 Tenn. 677, 36 S. W. 392; *Flynn v. St. Louis &c. R. Co.*, 43 Mo. App. 424; *Laughlin v. Chicago &c. R. Co.*, 28 Wis. 204, 9 Am. R. 493; *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225; *Shriver v. Sioux City &c. R. Co.*, 24 Minn. 506, 31 Am. R. 353.

⁸⁵ *Breed v. Mitchell*, 48 Ga. 533.

⁸⁶ *Kerr v. Norman*, Fed. Cas. No. 7732; 1 Newb. Adm. R. 525.

⁸⁷ *Little v. Boston & Maine R. Co.*, 66 Me. 239.

occur, if transported with care, negligence may be presumed.⁸⁸ And where goods are stolen, while in the possession of a carrier after arriving at their destination, in the absence of evidence to the contrary, it has been presumed that the loss resulted from the carrier's negligence.⁸⁹ A presumption arises against a common carrier in an action against him when the plaintiff proves that the goods were received by the carrier and that he has failed to deliver them according to his undertaking.⁹⁰ And it has been held that where grain shipped on defendant's cars is found on delivery to be damaged by water, the presumption that the cars were in good order, raised by evidence that the cars of defendant were universally inspected as provided by the rules of the company, and would have been condemned if in bad order, is not conclusive; but the question of their condition is for the jury.⁹¹ So, it has been held that the fact that a consignee has received, of a common carrier, the goods without objection, and receipted for them as in good order, is only presumptive evidence that they have not been damaged in the carrier's hands.⁹² But where the shipper forwarded goods to a customer for inspection, and the goods were subsequently returned in a damaged condition, it was held that there is no presumption that, while in the hands of the customer, they remained in the same condition as when originally shipped.⁹³

§ 1918. Breach of contract—What evidence is admissible.—Expert testimony is admissible in a proper case to determine whether or not the condition of certain property was due to the fact that it had been handled roughly.⁹⁴ But in an action for burning cotton by sparks from the defendant's engine, where it appeared that the cotton was loaded by the plaintiff on the flat cars, without covering, the opinion of a witness as to whether it would have burned if it had been

⁸⁸ *Flynn v. St. Louis &c. R. Co.*, 43 Mo. App. 424. *Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239.

⁸⁹ *Georgia Railroad & Banking Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. 197. ⁹¹ *Searles v. Alabama &c. R. Co.*, 69 Miss. 186, 13 So. 815.

⁹⁰ *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523, 7 Atl. R. 134, 60 Am. R. 360; *Pennsylvania R. Co. v. Live-* ⁹² *Bloomington v. Durell*, 1 Idaho, 33.

right, 14 Ind. App. 518, 43 N. E. 162; *Norton, The E. M.*, 15 Fed. (U. S.) 686; see also, *Missouri Pac. R.* ⁹³ *Brooks v. Dinsmore*, 6 N. Y. St. 281.

⁹⁴ *Southern Pac. R. Co. v. Arnett*, 111 Fed. (U. S.) 849.

covered or loaded in box cars was held inadmissible.⁹⁵ Evidence of custom is frequently admissible and important upon the question of the place and manner of delivery both to the carrier,⁹⁶ and by the carrier.⁹⁷ And there are many other matters in regard to which such evidence is admissible.⁹⁸ The following has also been laid down⁹⁹ as the rule as to proof of custom or usage on the issue of negligence in actions against carriers: "On an issue as to the negligence of a carrier in transportation of property, proof of the general custom of other carriers under similar circumstances is competent as tending to show that the defendant was not negligent under the circumstances,¹⁰⁰ but if the method of shipment used by the carrier was an unsafe one, the fact that it was the carrier's custom to so ship cannot exonerate it from its contract to transport safely, and hence its own usage would have no tendency to show that it had adopted a safe method."¹⁰¹ The market value is usually the basis for estimating the measure of plaintiff's recovery; and evidence is generally admissible to show such value, but there are cases in which this is inapplicable. Thus, it has been held that if the parties have agreed upon a valuation, where the shipper in compliance with a regulation requiring the value to be stated as the basis for estimating the compensation to be paid, has placed a valuation upon the goods, such valuation will control in an action against the carrier for loss.¹⁰² So, goods which have no market value, may nevertheless have a real value for which there

⁹⁵ *Louisville &c. R. Co. v. Natchez &c. Co.*, 67 Miss. 399, 7 So. 350.

⁹⁶ *Merriam v. Hartford &c. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344 and note; *Evansville &c. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296; *Pacific Ex. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830; *Constable v. National &c. Co.*, 154 U. S. 51, 14 Sup. Ct. 1062; *Bowie v. Baltimore &c. R. Co.*, 1 McArthur (D. C.) 609; 4 *Elliott Railroads*, § 1403.

⁹⁷ *Pittsburgh &c. R. Co. v. Nash*, 43 Ind. 423; *Arthur v. St. Paul &c. R. Co.*, 38 Minn. 95, 35 N. W. 718; *Farmers' &c. Bank v. Champlain*, 16 Vt. 52, 42 Am. Dec. 491, and note; *Black v. Ashley*, 80 Mich. 90, 44 N.

W. 1120; *Shelton v. Merchant's Desp. &c. Co.*, 59 N. Y. 258; *Richardson v. Goddard*, 23 How. (U. S.) 28; 4 *Elliott Railroads*, §§ 1522, 1527.

⁹⁸ See, 4 *Elliott Railroads*, §§ 1405, 1410, 1412, 1502 n., 1522, 1528, 1559, 1560; also, ante, Vol. I, §§ 172, 607, 608.

⁹⁹ *Ency. of Ev.* Vol. II, p. 897.

¹⁰⁰ *Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373; *Hendricks v. Boston &c. R. Co.*, 170 Mass. 44, 48 N. E. 835.

¹⁰¹ *Leonard v. Fitchbury R. Co.*, 143 Mass. 307, 9 N. E. 667; see also, *Hibler v. McCartney*, 31 Ala. 501.

¹⁰² *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350.

may be a recovery.¹⁰³ As to property having a special value, owing to particular circumstances, the carrier may be held liable for such special value, so far, at least, as reasonable and known to him.¹⁰⁴ So, there are other cases, in which the damage resulting from failure of the carrier to perform his obligation can only be approximately estimated, and in such cases the best evidence obtainable will usually be received.¹⁰⁵

§ 1919. Live stock—Burden of proof.—It is said that “the rules relating to the burden of proof in case of transportation of live stock are in principle the same as those with reference to goods, but some particular questions arise in their application. Thus, inasmuch as the carrier is not liable for death of animals during transportation due to natural causes, or to their inherent vice or natural disposition, mere proof that the animals died after delivery to the carrier and before the end of the transportation, is not sufficient to establish liability, but the evidence must further show that the loss was due to human agency. But if the loss or bad condition appears to have been due to human agency, then the carrier must show that it did not result from his negligence in order to escape liability on the ground that it was due only to delay or from causes within the common law exemption or within a valid particular limitation. But this he may do by general evidence of care and diligence in the transportation.”¹⁰⁶ There is some conflict among the authorities as to the burden of proof in cases of loss or injury to live stock; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof rests upon the carrier to show that the loss or injury was not caused by its own negligence.¹⁰⁷ There is much, however, that might

¹⁰³ *International &c. R. Co. v. Nicholson*, 61 Tex. 550.

¹⁰⁴ *Cushing v. Wells*, 98 Mass. 550; *Winchell v. National Ex. Co.*, 64 Vt. 15, 23 Atl. 728; *Missouri Pac. R. Co. v. Nevin*, 31 Kans. 385, 2 Pac. 795.

¹⁰⁵ *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; *Clements v. Burling-*

ton &c. R. Co., 74 Iowa 442, 38 N. W. 144.

¹⁰⁶ 6 Cyc. 524; see also, *Boehl v. Chicago &c. R. Co.*, 44 Minn. 191, 46 N. W. 333; *Hayman v. Philadelphia &c. R. Co.*, 8 N. Y. St. 86; *Missouri Pac. R. Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. 239.

¹⁰⁷ *Louisville &c. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, 3 Lewis

be said in favor of the opposite rule, where animals are injured and the plaintiff introduces no evidence to show how the injuries were inflicted or that any accident occurred to the train, or the like, and there is nothing to show that the injuries might not have been caused solely because of the inherent nature and propensities of the animals. This view is not entirely without the support of authority.¹⁰⁸

§ 1920. Rule where owner accompanies stock.—The fact that the owner, or his agent, is furnished transportation by the carrier and goes with his cattle or horses to look after and care for them, especially if he has agreed to do so in the contract of carriage, often exerts an important influence in determining the duties and liabilities of the carrier in the particular case, and is sometimes controlling upon the question as to the burden of proof or of producing evidence. It may relieve the carrier from the duty to feed and water and otherwise give particular attention to the stock;¹⁰⁹ although it will not relieve the carrier from the duty to afford the owner reasonable oppor-

Am. Ry. & Corp. R. 13; Missouri Pac. R. Co. v. Texas &c. R. Co., 41 Fed. (U. S.) 913; Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333; Lindsley v. Chicago &c. R. Co., 36 Minn. 539, 33 N. W. 7; Doan v. St. Louis &c. R. Co., 38 Mo. App. 408; Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649; Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834, 49 Am. & Eng. R. Cas. 157; Dow v. Portland &c. Co., 84 Me. 490, 24 Atl. 945; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; Wallingford v. Columbia &c. R. Co., 26 S. Car. 258; McCoy v. Keokuk &c. R. Co., 44 Iowa 424; Chapin v. Chicago &c. R. Co., 79 Iowa 582, 44 N. W. 820.

¹⁰⁸ Pennsylvania R. Co. v. Raiford, 119 Pa. St. 577, 13 Atl. 324; International &c. R. Co. v. Smith, 1 Tex. App. 484; Smith v. Midland R. Co., 57 L. T. R. 813; Hussey v. The Saragossa, 3 Woods (U. S.) 380; Harris v. Midland R. Co., 25 W. R. 63; Kendall v. London &c. R.

Co., L. R. 7 Exch. 373; see also, St. Louis &c. R. Co. v. Piper, 13 Kans. 505; Bankard v. Baltimore &c. R. Co., 34 Md. 197; Lewis v. Pennsylvania R. Co., (N. J.) 56 Atl. 128.

¹⁰⁹ "Of course the carrier is relieved from special care and oversight of the animals, where the owner or his agent accompanies them for that purpose." Boehl v. Chicago &c. R. Co., 44 Minn. 191, 46 N. W. 333, 334, citing Angell Carr., § 214, et seq.; Hutchinson Carr., § 217; Clarke v. Rochester &c. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Evans v. Fitchburg R. Co., 111 Mass. 142; 3 Am. & Eng. Ency. of Law 6; Moulton v. Railroad Co., 31 Minn. 85, 16 N. W. 497; this statement is, perhaps, a little too sweeping, as the mere fact that the shipper accompanied the stock will not necessarily relieve the shipper from liability for failing to feed and water or the like, unless there is a special contract to that effect.

tunities for so doing. It may also be important upon the question of contributory negligence. So, where the owner accompanies the stock, under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts in regard to their loss or injury as the carrier, and as they may have been injured because of his own negligence, or because of their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the loss, and if the carrier is liable only for negligence the burden is upon the plaintiff to show such negligence.¹¹⁰ So, it is said in several recent cases that the burden, under such circumstances, is on the shipper to establish that the damage or loss was not caused by his negligence.¹¹¹ It has also been held that a railroad company is not liable as an insurer where the car in which animals are shipped is in the possession and control of their owner under a contract that he should take care of them; and that if they are injured by the act of the owner, the carrier is not liable, no matter whether such act was negligent or not.¹¹² The court further held, in the case just referred to, that even if the special contract was prohibited by statute, and therefore invalid, there could be no recovery.¹¹³

¹¹⁰ *Terre Haute &c. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 55 Am. & Eng. R. Cas. 326, 17 L. R. A. 339; *Clark v. St. Louis &c. R. Co.*, 64 Mo. 440; *McBeath v. Wabash &c. R. Co.*, 20 Mo. App. 445; *St. Louis &c. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. 104, 117, 8 S. W. 134; *Louisville &c. R. Co. v. Hedger*, 9 Bush. (Ky.) 645; *Boehl v. Chicago &c. R. Co.*, 44 Minn. 191, 46 N. W. 333.

¹¹¹ *Chicago &c. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832; *Louis-*

ville & N. R. Co. v. Harned, 23 Ky. L. R. 1651, 66 S. W. 25; *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829.

¹¹² *Hart v. Chicago &c. R. Co.*, 69 Iowa 485, 29 N. W. 597; but compare, *McDaniel v. Chicago &c. R. Co.*, 24 Iowa 412; *Peters v. New Orleans &c. R. Co.*, 16 La. Ann. 222; *Moulton v. St. Paul &c. R. Co.*, 31 Minn. 85, 47 Am. R. 781.

¹¹³ See also, *Roderick v. Railroad Co.*, 7 W. Va. 54.

CHAPTER XCIV.

CASE.

Sec.	Sec.
1921. Generally.	1924. Several plaintiffs or defendants.
1922. Distinguished from other actions—Election.	1925. Negligence of agent.
1923. Burden of proof—Plaintiff's case.	1926. Evidence for the defendant.
	1927. Evidence generally.

§ 1921. **Generally.**—"Case" is really a generic term embracing different species of actions adopted or framed under the statute of Westminster 2,¹ but in its narrower sense it is usually taken as meaning a particular form of action *ex delicto* known as the action of case or trespass on the case, which lies to recover damages for a tort. It lies, in general, to recover damages. "An action on the case lies to recover damages for torts not committed by force, actual or implied, for torts committed by force, actual or implied, where the matter affected was not tangible or the injury was not immediate, but consequential, or the interest in the property injured was only in reversion. Torts of this nature are to the absolute rights of persons, to the relative rights of persons, to personal property in possession or reversion, to real property, corporeal or incorporeal, in possession or reversion. The injuries may be caused either by nonfeasance, or the omission of some act which the defendant ought to perform, by misfeasance, or the improper performance of some act which might be lawfully done, by malfeasance, or the doing of something that ought not to be done at all."^{1*} Case is the usual remedy for injuries caused by negligence, especially to recover damages from the master for injuries caused by the wrong of his servant which are not the immediate and natural consequences of an act ordered by the master.² It is also the ordinary

¹ 13 Edw. I, c. 24.

^{*} Shipman Com. L. Pl., pp. 86, 88.

² Schuer v. Veeder, 7 Blackf. (Ind.) 342; Andrew, Stephen Pl. 136; Shipman Com. L. Pl. (2d ed.)

91. As a general, but not an invariable rule, case lies where the injury was negligently inflicted by the defendant and trespass where it was wilfully inflicted. This, however, is not a sure test.

form of action to recover damages or a penalty for an injury as provided by statute where the statute is silent as to the form of action.³ So, it is the usual form of action for libel or slander,⁴ for injury to health or comfort by a nuisance,⁵ for special damages to an individual by the obstruction of a watercourse or highway,⁶ and the like. As shown, in the chapter on assumpsit, there is often both a breach of contract and a violation of a duty constituting a tort, and there may be an election to sue on either the one theory or the other. There may also be an election, in some instances, between different forms of action *ex delicto*, as between case and trover or replevin, but here, too, the theory adopted will determine the form of action, and the distinction between these different forms is obvious. The most difficult distinction to draw is between case and trespass where it depends upon the question of force. As a general rule trespass lies where the injury is the immediate result of unlawful force, which may be either actual, or, in some instances, implied, while case will usually lie even where there has been unlawful force, if the injury is consequential and not immediate. A familiar illustration is that of a log being thrown into a street. If, in being thrown it strikes a traveler the injury is the direct result of the force, and trespass is the proper remedy; but if one afterwards comes along and falls over it, while it is lying in the highway in the dark, the injury is regarded as consequential, and his proper remedy is case.⁷ "As regards the directness of the injury which will distinguish a case in trespass from one in which the remedy must be sought in an action on the case," says Judge Cooley, "there seems to be no better test than this: That if the unlawful force caused the injury before it was spent, this injury must be deemed direct, but if, after the unlawful force was spent, the injury occurred as a collateral or secondary consequence, it must be considered as indirect."⁸ But even as between case and trespass

³ *County of Chester v. Brower*, 117 Pa. St. 647, 2 Am. St. 713; *Friend v. Dunks*, 37 Mich. 25; *Scidmore v. Smith*, 13 Johns. (N. Y.) 322; *Marshalsea, The*, 10 Coke, 75 b.; *President &c. v. Salmon*, 2 Salk. 451.

⁴ *Pollard v. Lyon*, 91 U. S. 226.

⁵ *Nevins v. Peoria*, 41 Ill. 502.

⁶ *Martin v. Bliss*, 5 Blackf. (Ind.) 35; *Pekin v. Brereton*, 67 Ill. 477; *Wilson v. Wilson*, 2 Vt. 68; *Greas-*

ley v. Codling, 9 Moore 489; see also, *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326; *Hamilton v. Plainwell Water &c. Co.*, 81 Mich. 21, 45 N. W. 648; *Williams v. Morland*, 2 B. & C. 910; *Rose v. Miles*, 4 M. & S. 101.

⁷ *Leame v. Bray*, 3 East 602; *Reynolds v. Clarke*, 1 Str. 636; *Green v. Belitz*, 34 Mich. 512.

⁸ *Cooley Torts*, 439. See the fam-

there may be an election in some instances.⁹ In the code states the one civil action has taken the place of the various forms of common law actions, but many of the distinctions are still important in determining the rights of the parties and the theory of the case. So, in some jurisdictions, even where trespass on the case is still maintained as a form of action the distinction between it and trespass has been abolished so far as the use of the different forms is concerned, yet it has been held that the rights and liabilities of the parties remain the same.¹⁰

§ 1922. Distinguished from other actions—Election.—The action of case in its narrowest sense is distinguished from assumpsit in that the former is for the tort while the latter is an action ex contractu. The same distinction exists between case and covenant. It follows, that even where one of these forms of action ex contractu is in a sense concurrent with case, the theory upon which recovery is sought is very different, and the proof must sustain the remedy adopted.

§ 1923. Burden of proof—Plaintiff's case.—In general, in an action on the case, all the material allegations upon the record are put in issue by the plea of not guilty, and the plaintiff is bound to prove so much of the case, as stated on the record, as will entitle him in point of law to compensation in damages. But a variance in the degree and extent of the injury proved from that alleged, will not preclude the plaintiff from recovering, provided he proves a legal cause of action, corresponding with averments on the record, although differing in extent; for although the jury would not be warranted in finding that to be proved which is not proved at all, they may justly find that which is alleged, to have been proved in part, and award damages accordingly. As a general proposition, the plaintiff is entitled to a verdict, in the absence of anything to the contrary, if he

ous squib case of, *Scott v. Shepherd*, 2 W. Bl. 892, 1 Smith Lead. Cas. (8th Am. ed.) 797, where it was held that trespass was the proper remedy as the force was not spent.

⁹ See, *Blin v. Campbell*, 14 Johns. (N. Y.) 432; *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Wilson v. Smith*, 10 Wend. (N. Y.) 324; *Bald-*

ridge v. Allen, 2 Ired. L. (N. Car.) 206; *Simpson v. Hand*, 6 Whart. (Pa.) 311; *Clafin v. Wilcox*, 18 Vt. 605; *Howard v. Tyler*, 46 Vt. 687.

¹⁰ *Blalock v. Randall*, 76 Ill. 224. the statutes do not abrogate the rule that the proof must correspond with the issue; *Gay v. De Werff*, 17 Ill. App. 417; *Chrisman v. Carney*, 33 Ark. 316.

proves such averments as constitute the ground of action alleged, although no proof be given of other averments which show that an injury has been done to a greater degree and extent, or which are immaterial to the cause of action.¹¹ Thus, in an action for slander he is entitled to recover if he proves some of the words as said which are actionable, although he fails in proving others which are also actionable.¹² So, although he does not succeed in proving circumstances in aggravation, or the extent of damages as laid in the declaration.¹³ In an action for damages on account of the negligence of the defendant, for instance, the burden of proof is upon the plaintiff to show the negligence charged, and he cannot recover upon an entirely different theory or for entirely different negligence.¹⁴ In some jurisdictions the burden is also upon the plaintiff to show freedom from contributory negligence. The allegation of the particular day on which an injury was committed is not usually material, and it is generally sufficient if it is proved to have been before the commencement of the action,¹⁵ and within the time prescribed by the statute of limitations. "But if the injury be continuous in its nature, or has been repeated, it seems that the plaintiff, if there be but one count alleging a continuance, or repeated acts within a time specified, may either give in evidence upon that count one act anterior to the first day specified in the declaration, or any number within the limits assigned; and if the declaration contains several counts, he may give in evidence so many acts, each anterior to the first day specified in each respective count."¹⁶ But the pleadings and the proof must substantially correspond in all particulars essential to constitute a cause of action on the theory adopted.¹⁷

¹¹ *Jones v. Givin*, 185 Gil. L. E. 229. *Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; see also,

¹² *Compagnon v. Martin*, 2 W. Bl. 790. *Hardr.* 470. *Bachelder v. Heagan*, 18 Me. 32; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460.

¹³ *Gardiner v. Crossdale*, 2 Burr. 904, 1 W. Bl. 198. ¹⁴ *Manchester v. Vale*, 1 Will. Saund. 24 n.; *Brook v. Bishop*, 7

Mod. 152, *Ld. Raym.* 823, 974, 976, 2 Salk. 639; *Hume v. Oldavre*, 1 Starkie 351.

¹⁵ 2 Starkie Ev. § 357.

¹⁶ *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688; *Wilkinson v. Moseley*, 18 Ala. 288; *Putnam v. Kingsbury*, 16 Pick. (Mass.)

Co. v. Wynant, 100 Ind. 160; *Terre*

§ 1924. **Several plaintiffs or defendants.**—As a general rule a cause of action must be shown in all the plaintiffs, and they must recover, if at all, in respect of a general joint damage, for the courts will not take cognizance of separate and distinct injuries in one and the same action.¹⁸ The plaintiffs must therefore prove a joint cause of action, such as damage done to joint property,¹⁹ joint slander of the plaintiffs in their trade or business.²⁰ But it has been held that two persons may join, although their interests be several, if the injury complained of was a joint damage to both.²¹ Where the damage is laid as a joint damage to several plaintiffs, and appears in evidence to be a separate damage to some of them only, it has been held that they must be non-suited; as, where the declaration alleged a slander of the plaintiffs in their joint trade, and it appeared in evidence that the words were addressed personally to one only.²² It is a general rule, however, as to the defendants, that in action of tort one defendant may be acquitted and another found guilty, torts being several in their nature.²³ Yet where the action is virtually founded upon a breach of contract, doubts have been entertained upon this point.²⁴

371; *Gay v. De Werff*, 17 Ill. App. 417; *Terre Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Weall v. King*, 12 East 452, 11 Rev. R. 455.

¹⁸ *Cabell v. Vaughan*, 1 Saund. 291; *Coryton v. Lithbye*, 2 Saund. 116, n. 2; *Weller v. Baker*, 2 Wils. 423; *Ward v. Bampton*, 3 Lev. 362; but see, *Fairbanks v. San Francisco &c. R. Co.*, 115 Cal. 579, 47 Pac. 450.

¹⁹ If one tenant in common only be sued in trespass, trover or case, for anything concerning the land in common, the defendant may plead the tenancy in common in abatement, *Cabell v. Vaughan*, 1 Saund. 291, e.

²⁰ *Cook v. Batchelor*, 3 B. & P. 150.

²¹ *Coryton v. Lithbye*, 2 Saund. 116, a.; *Ward v. Bampton*, 3 Lev. 362; *McClurg v. Ingleheart*, (Ky.) 33 S. W. 80; *Perkins v. Tilton*, 53 Neb. 440, 73 N. W. 930; *Hays v. Farwell*, 53 Kana. 78, 35 Pac. 794.

²² *Solomons v. Medex*, 1 Starkie's C. 191; and see, *Barnes v. Holloway*, 8 Term R. 150; *Hawkes v. Hawkey*, 8 East 427; *Helly v. Hender*, 3 Bulst. 83; *Rex v. Berry*, 4 Term R. 217.

²³ *Cabell v. Vaughan*, 1 Will. Saund. 291, d., where the cases on the subject are collected. As to whether the duty, the breach of which causes the injury, must be joint there is some difference of opinion, and different views are taken in different jurisdictions, but the better rule seems to be that it need not reasonably be so. *Charman v. Lake Erie &c. R. Co.*, 105 Fed. (U. S.) 449; *Lake Erie &c. R. Co. v. Charman*, 161 Ind. 95, 99.

²⁴ *Wood v. Bretherton*, 3 B. & B. 54; *Cabell v. Vaughan*, 1 Will. Saund. 291, d., and the cases there referred to; *Ireland v. Johnson*, 1 Bing. Cas. 162; *Max v. Roberts*, 13 East 89.

§ 1925. **Negligence of agent.**—In an action for negligence of an agent, it is a general rule that an allegation of negligence of the defendant is supported by proof of negligence in his agent.²⁵ Thus a declaration alleging that the defendant so negligently drove his cart that the plaintiff's horse was killed, is supported by proof that the defendant's servant in the scope of his employment and duty, drove the cart and occasioned the injury.²⁶ But it does not follow that it is sufficient to allege that the act complained of was that of an employee of the defendant, nor that it is sufficient to prove that it was, unless it is also shown that the employé was acting in the line or scope of his duty, or that for some good reason the defendant is liable for the negligence complained of.²⁷

§ 1926. **Evidence for the defendant.**—As this action is founded on the plaintiff's title in justice and equity to receive a compensation in damages, the defendant may, under the general issue of common law, except in some instances depending on peculiar circumstances, give in evidence any facts or circumstances which in some instances are sufficient to bar the plaintiff's claim.²⁸ The defenses are: that of a justification, in an action for slander, of the truth of the words; the statute of limitations, in an action for the taking of a prisoner on fresh pursuit.²⁹ A few of the cases will illustrate the rule and show the extent to which evidence is admissible for the defendant at common law. In an action for beating the plaintiff's horse, per quod, he was admitted to prove that the plaintiff's horse was before the defendant's door at the time he came from coming to load, wherefore he whipped the horse.

²⁵ Michael v. Allestree, 2 Lev. 172; 445, 22 E. 111; Indianapolis &c. R. Co. v. Houlihan, Koch, 187 157 Ind. 494, 60 N. E. 943; Hoosac Greenway v. Donat, 10 Colo. 529; (Pa.) Min. &c. Co. v. Donat, 10 Colo. 529; Weide v. Porter, 22 Minn. 429. Stephens v. Hill, 117

²⁶ Brucker v. Fromont, 6 Term R. 659; and see, Tubervil v. Stamp, 1 Ld. Raym. 264, Skinn. 681, Carth. 425, 1 Salk. 13. P. 171

²⁷ Cincinnati &c. R. Co. v. Voght, 26 Ind. App. 665, 60 N. E. 797.

²⁸ Bird v. Randall, 3 Burr. 1352 (Yelv. 174, b. note); Ridgeley v. Town of West Fairmont, 46 W. Va.

So, in an action for obstructing the plaintiff's lights, it was held that the defendant might, under the general issue, prove that the building was built upon an ancient foundation according to the custom of London.³¹ So a release is evidence.³² In many cases, however, the rule is more stringent and more logical, and the defenses that were admissible under the general issue law must now be specially pleaded.

§ 1927. Evidence generally.—Questions as to the admissibility of particular evidence are not materially different in such similar questions in other cases, and they are so numerous that no attempt will be made to consider them here, but, so far as they have already sufficiently treated they will be considered under appropriate headings, such as negligence, slander and libel and other torts, of which case is a common remedy. It may be well, however, to call attention to some recent and somewhat peculiar cases. In one case the declaration alleged a number of wrongful acts on the part of the defendant, and that by reason of defendant's conduct the business was interrupted and injured, and evidence was held admissible not only to show such acts, but also to show that by reason of the postmaster had refused to deliver the plaintiff's mail, and the railroad companies had refused to deliver freight. In another, which was for damages for unlawful and violent dispossession of a tenant by his landlord, evidence of the temper and position of the defendant and his wife, who committed the violence, was held admissible to sustain the allegation that the plaintiff was kept out of possession by threats and violence, but it was held that such evidence must be confined to acts and words connected with the subject matter of the action.³⁴

³¹ Anonymous, Com. R. 273.

³² Baumier v. Antiau, 65

³³ Bird v. Randall, 3 Burr. 1353, 31 N. W. 888. Two judges, from 2 Stark Ev. § 361.

dissented from so much of the decision as held the evidence admissible.

³⁴ Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609.

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§ 1929. **Judicial notice.**—As elsewhere shown, the courts take judicial notice of the general corporation laws.¹ So, they take such notice of public laws, or laws declared to be public, or required by statute to be so noticed, granting special charters to domestic corporations.² But, unless the name of a corporation is stated in a public law, the courts will not, ordinarily, take judicial notice of its name,³ nor will they, unless required by statute, take judicial notice of the foreign laws for the incorporation of a foreign company.⁴ The method of doing business is also judicially noticed, in some instances, in a general way.⁵ So, is the ordinary authority or customary duty of certain officers;⁶ but this is true only within limits, and the exact duties of a particular officer or agent cannot be judicially noticed.⁷ The courts also take judicial notice of public laws authorizing the adoption of by-laws, but not, ordinarily, of any particular by-law or ordinance adopted, or claimed, or alleged to have been adopted, by the corporation.⁸

¹ Vol. I, §§ 44, 71, 72; *Methodist &c. Church v. Pickett*, 19 N. Y. 482; *Yakima Nat. Bank v. Knipe*; 6 Wash. 348, 33 Pac. 834.

² *State v. Baltimore &c. R. Co.*, 15 W. Va. 362, 36 Am. R. 803; *Parker v. Carolina Sav. Bank*, 53 S. Car. 583, 31 S. E. 673, 69 Am. St. 888; *White Water &c. Co. v. Boden*, 8 Blackf. (Ind.) 130; *Central Bank v. Tayloe*, 2 Cranch. (U. S.) 427, the courts generally judicially notice the charters of municipal corporations but not, outside of the municipal courts, their by-laws or ordinances, nor ordinarily, particular streets and the like; Vol. I, § 71.

³ *Holloway v. Memphis &c. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68; *Kelly v. Alabama &c. R. Co.*, 58 Ala. 489; *Ohio &c. R. Co. v. Ridge*, 5 Blackf. (Ind.) 78; *Mobile v. Louisville &c. R. Co.*, 124 Ala. 132, 26 So. 902. Where named in public act, see, *Jackson v. State*, 72 Ga. 28. Notice not taken of particular corporation organized under a general law merely permitting companies of

that class to incorporate: Vol. I, § 45, n. 46.

⁴ *Nashville &c. Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Gaines v. Bank*, 12 Ark. 769; *Lewis v. Bank*, 12 Ohio 132, 40 Am. Dec. 469; *Hahnemannian &c. Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519; *Holloway v. Memphis &c. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 232.

⁵ Vol. I, §§ 64, 72.

⁶ Vol. I, § 72.

⁷ *Brown v. Missouri &c. R. Co.*, 67 Mo. 122, certain powers, however, are implied as incident to certain offices, and it may be said that as to these the courts take judicial knowledge of the power or authority of an officer, such as the cashier of a bank, for instance, at least where it appears that he has or should be deemed to have the usual powers.

⁸ *Green v. City of Indianapolis*, 22 Ind. 192; *Schwab v. City of Madison*, 49 Ind. 329; *Clevenger v. Town*

§ 1930. **Burden of proof as to corporate existence.**—As a general rule, where the fact of corporate existence is properly put in issue the burden of proving it is upon the party who asserts it.⁹ But, in many jurisdictions, a general denial, not under oath, does not require a corporation plaintiff to prove its corporate existence,¹⁰ and, in many instances, it is sufficient even where some proof is required to show existence as a corporation de facto; for the existence and powers of a corporation de facto cannot, ordinarily, be collaterally inquired into.¹¹ Under a proper plea of nul tiel corporation, however, where the defendant is not estopped, the burden is upon the plaintiff to prove its corporate existence.¹² But at common law the burden of showing the right to a franchise usurped, is held to be upon the respondent when a direct attack is made by the state by quo warranto;¹³ although it has

of Rushville, 90 Ind. 258; Vol. I, § 71.

* *Rikhoff v. Brown's & Co.*, 68 Ind. 388; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 So. 496, 49 Am. St. 394; *Hudson v. Carman*, 41 Me. 84; *Lord v. Bigelow*, 8 Vt. 445; *Anderson v. Kanawha & Co.*, 12 W. Va. 526; *Bill v. Fourth Gt. W. Tpk. Co.*, 14 Johns. (N. Y.) 416.

" *Brady v. Nat. Supp. Co.*, 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. 753; *Rockland & Co. v. Sewall*, 78 Me. 167, 3 Atl. 181; *Farmers' & Drovers Bank v. Williamson*, 61 Mo. 259; *Johnson Harvester Co. v. Clark*, 30 Minn. 308; see also, *International B. & L. Asso. v. Wall*, 153 Ind. 554, 55 N. E. 431; *Concordia Sav. & Co. Asso. v. Reed*, 93 N. Y. 474; *California S. Nav. Co. v. Wright*, 6 Cal. 258; *Southern Ex. Co. v. Western & Co. R. Co.*, 99 U. S. 191; but see, *Wert v. Crawfordsville & Co. Tpk. Co.*, 19 Ind. 242; *Shick v. Citizen's Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48; *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Jackson v. Plumbe*, 8 Johns. (N. Y.) 378.

" *Williamson v. Kokomo & Co. Asso.*, 89 Ind. 389; *Williams v. Citizens*

St. R. Co., 130 Ind. 71, 29 N. E. 408; *Snider's Sons Co. v. Troy*, 91 Ala. 224, 8 So. 658, 24 Am. St. 887, 890; see also, *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. 552, 18 L. R. A. 778; *Gibb's Est., In re*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; *Chases Patent Elevator v. Boston & Co.*, 155 Mass. 211, 29 N. E. 470, 9 L. R. A. 839; *Wyandotte El. L. Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821; *Cutchogue Cong. Ch., Matter of*, 131 N. Y. 1, 30 N. E. 43.

" *Hubbard v. Chappel*, 14 Ind. 601; *Indianapolis & Co. v. Herkimer*, 46 Ind. 142; *Johnson v. Hanover Nat. Bank*, 88 Ala. 271, 6 So. 909; *Bailey v. Valley Nat. Bank*, 127 Ill. 332, 19 N. E. 695, but even under such a plea it is held sufficient to show a corporation de facto. *Cozzens v. Chicago & Co. Brick Co.*, 166 Ill. 213, 46 N. E. 788.

" *Rex v. Leigh*, 4 Burr. 2143; *Lyons & Co. Toll Road Co. v. People*, 29 Colo. 434, 68 Pac. 275; *People v. Volcano Canyon Toll Road Co.*, 100 Cal. 87, 34 Pac. 522; *High Extr. Rem.* (3d ed.) § 712; see also, *People v. Perley*, 80 N. Y. 624; *People v. River & Co. R. Co.*, 12 Mich. 389,

been held that where the original right is conceded the burden of showing a forfeiture is upon the plaintiff;¹⁴ and that the burden of showing facts in avoidance of the forfeiture is upon the respondent.¹⁵

§ 1931. **Burden of proof as to other matters.**—In an action to charge a person with a liability as a member of a corporation, the burden is upon the plaintiff to prove the fact of membership;¹⁶ but it has been held that a person once shown to have been a member will be presumed to have continued a member in the absence of anything to the contrary;¹⁷ and one may so conduct himself as to be estopped, under certain circumstances, from denying his membership. So, a plaintiff who sues for a dividend,¹⁸ or an inspection of the corporate books,¹⁹ as a stockholder, has the burden of showing his right, as that he was the owner of the stock at the proper time or a stockholder entitled to an inspection. It has also been held that one who attacks a prima facie transfer of stock as invalid has the burden of proof;²⁰ and that the burden of proving the dissolution of a corporation is upon the party who seeks to take advantage thereof.²¹ In actions on stock subscriptions, while the burden is usually upon the plaintiff to show the performance of valid conditions precedent, or a waiver thereof by the defendant,²² as well as the subscription, the

86 Am. Dec. 64; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460.

¹⁴ *North &c. Rolling Stock Co. v. People*, 147 Ill. 246, 35 N. E. 608.

¹⁵ *People v. Hillsdale &c. Tpk. Road*, 23 Wend. (N. Y.) 254.

¹⁶ *Fouche v. Merchant's Nat. Bank*, 110 Ga. 827, 36 S. E. 256; *Diven v. Lee*, 36 N. Y. 302, and to creditors seeking to charge stockholders individually have the burden of proving all necessary facts; *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580, so, under a statute making directors liable under certain circumstances the burden is upon the plaintiff to make a case within the statute; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. R. 504.

¹⁷ *Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Montgomery &c. Co. v. Webb*, 27 Ala. 618.

¹⁸ *Dow v. Gould &c. Co.*, 31 Cal. 629.

¹⁹ *People v. Northern Pac. R. Co.*, 18 J. & S. (N. Y.) 456; see, Vol. II, § 1407.

²⁰ *Walker v. Detroit &c. R. Co.*, 47 Mich. 338, 11 N. W. 187; but see, *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

²¹ *United States El. &c. Co. v. Leiter*, 19 D. C. 575; *Regents of Univ. v. Williams*, 9 Gill. & J. (Md.) 365.

²² *Junction R. Co. v. Reeve*, 15 Ind. 236; *Martin v. Pensacola R. Co.*, 8 Fla. 370, 73 Am. Dec. 713; *Southern Penn. Iron Co. v. Stevens*, 97 Pa. St. 190; *Hanover Junction &c. R. Co. v. Grubb*, 82 Pa. St. 36; *Chase v. Sycamore &c. R. Co.*, 38 Ill. 215; *Wyman v. Bowman*, 127 Fed. (U. S.) 257, it is held that one

burden is, ordinarily, upon the defendant to show payment or its equivalent where such defense is set up and relied on;²³ and it is likewise held that where the defense is a material change in the character and purpose of the corporation the defendant must show that such alteration was made without his consent.²⁴ It has also been held that in an action by an assignee to compel a corporation to issue stock to him which he claims his assignor was entitled to under a resolution of the corporation, the burden is on him to make out his case by the same weight of evidence as would have been required of the assignor; and that where the books of the corporation showed that he had already received as much or more stock than he was entitled to, the burden is upon him to show that he had not received it.²⁵

§ 1932. Presumptions as to corporate existence and acts.—Where an association of individuals assumes to be and to act as a corporation, and there is a law under which they might have been incorporated, the presumption arises as between them and others than the state, that all formal requisites to their existence as a corporation have been complied with.²⁶ So, corporate existence and the regularity or rightfulness of corporate acts have often been presumed from long continued existence of the body and its long continued exercise of such powers as a corporation.²⁷ Among the presumptions that have been

who executed the subscription and accepts, uses and sells the stock without requiring the condition to be fulfilled is estopped from asserting the condition.

²³ *Denny v. Northwestern Christian Univ.*, 16 Ind. 220.

²⁴ *North Carolina R. Co. v. Leach*, 49 N. Car. 340.

²⁵ *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 68 N. E. 1070.

²⁶ *Selma &c. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Elizabeth City Academy v. Lindsey*, 28 N. Car. 476, 45 Am. Dec. 500; *Naragansett Bank v. Atlantic S. Co.*, 3 Metc. (Mass.) 282; *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433; *Dunning v. New Albany &c. R. Co.*, 2 Ind. 437; *Sampson v. Bowdoinham &c. Corp.*, 36 Me. 78;

Busey v. Hooper, 35 Md. 15, 6 Am. R. 350; *Ricketson v. Galligan*, 89 Wis. 394, 62 N. W. 87.

²⁷ *Selma &c. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *White v. State*, 69 Ind. 273; *West Manayunk Gas. L. Co. v. New Gas L. Co.*, 21 Pa. Co. Ct. 369; *Hagerstown Tpk. Co. v. Creeger*, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495; *Rose Hill &c. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725; *United States Bank v. Dandridge*, 12 Wheat. (U. S.) 64. As to presumption of power to perform the particular act, see, *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *New York Fire Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Ohio &c. R. Co. v. McCarthy*, 96 U. S. 258; *Union Trust Co. v. Kendall*, 20

indulged, are: that the necessary amount of stock was subscribed and paid for,²⁸ that the articles of incorporation were duly published and recorded,²⁹ and that the directors and officers were stockholders, and citizens of the state, when so required by law.³⁰ But where there has never been any law under which there could be any such corporation the presumption of corporate existence cannot arise,³¹ and, the acts relied on must be such as to indicate the existence of a corporation, rather than a voluntary unincorporated association of individuals.³² The acceptance of a legislative grant or charter naming the corporators will be presumed from their acts in seeking to obtain it,³³ as well as from organizing and exercising powers thereunder.³⁴ So, as

Kans. 515; *Rochester &c. R. Co. v. Babcock*, 110 N. Y. 119, 17 N. E. 678; *Scottish &c. Co. v. Stewart*, 3 Macq. H. L. 382.

²⁸ *Sweeney v. Talcott*, 85 Iowa 103, 52 N. W. 106; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; see also, *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

²⁹ *Wood v. Wiley Const. Co.*, 56 Conn. 87, 13 Atl. 137; *Bank of Monroe v. Gifford*, 72 Iowa 750, 32 N. W. 669; *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1074; *Evans v. Lee*, 11 Nev. 194; see also, *Bank of United States v. Lyman*, 1 Blatchf. (U. S.) 297, 2 Fed. Cas. No. 924.

³⁰ *Welch v. Importers &c. Nat. Bank*, 122 N. Y. 177, 25 N. E. 269; *Sword v. Wickersham*, 29 Kans. 746.

³¹ *Douthitt v. Stinson*, 63 Mo. 268; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. 232, 31 L. R. A. 484; *Guthrie v. Territory*, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

³² *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Cunyus v. Guenther*, 96 Ala. 564, 11 So. 649; *Kirkpatrick v. Keota &c. Church*, 63 Iowa 372, 19 N. W. 272; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Fredenburg v. Lyon &c. Church*, 37 Mich. 476; *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E.

771, in many jurisdictions a corporation is also presumed, at least so far as the pleadings are concerned, or in a contract from the use of a name importing corporate existence; *Norton v. State*, 74 Ind. 337; *Adams Ex. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 16 Am. St. 315, 7 L. R. A. 214; *Stoutimore v. Clark*, 70 Mo. 471; *Platte Valley Bank v. Harding*, 1 Neb. 461; *Slaughter v. First Nat. Bank*, 109 Ala. 157, 19 So. 430; *Halcombe v. Cable Co.*, 119 Ga. 466, 46 S. E. 671; but see, *Cunyus v. Guenther*, 96 Ala. 564, 11 So. 649; *Briggs v. McCullough*, 36 Cal. 542.

³³ *St. Joseph &c. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Logan v. McAllister*, 2 Del. Ch. 176; *Atlanta v. Gate City Gas L. Co.*, 71 Ga. 106; *Perkins v. Sanders*, 56 Miss. 733.

³⁴ *Glymont Imp. &c. Co. v. Toler*, 80 Md. 278, 30 Atl. 651; *Gleaves v. Brick Church*, 1 Sneed (Tenn.) 491; *Benbow v. Cook*, 115 N. Car. 324, 20 S. E. 453, 44 Am. St. 454; *Quinlan v. Houston &c. R. Co.*, 89 Tex. 356, 34 S. W. 738; *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 Fed. 433; *Rex v. Amery*, 1 Term R. 575, 2 Term R. 515; but see, *Mississippi &c. Co. v. Prince*, 34 Minn. 79, 24 N.

a general rule, the acceptance of a beneficial charter is presumed.³⁵ The acceptance of an amendment to the charter will also be presumed or implied from acts indicating such acceptance, such as the exercise of rights and powers thereby granted and the like,³⁶ but not, ordinarily, from acts equally consistent with an intention not to accept it.³⁷ A presumption of the dissolution of a corporation may likewise arise, on the other hand, from long continued non-user of corporate franchise;³⁸ but this presumption may be rebutted in a proper case.³⁹ So, the mere fact that a corporation is insolvent does not necessarily raise a presumption of its dissolution.⁴⁰ In an action by a corporation for an injury to its property, as for instance, by a steamboat company for damages to its boat, it was held not to be necessary for the plaintiff, under the general issue, to prove that it possessed, under its charter, the power to hold the property in question; and that such power, being incidental to a corporation of that character, would be presumed, especially as against a mere wrongdoer claiming no title in himself, and setting up none in any one else.⁴¹

W. 361; *Atty.-Gen. v. Chicago & C. R. Co.*, 35 Wis. 425; *Lyons v. Orange & C. R. Co.*, 32 Md. 18.

³⁵ *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *Bangor & C. R. Co. v. Smith*, 47 Me. 34; ante, Vol. I, § 106.

³⁶ *Cincinnati & C. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. R. 729; *State v. Montgomery & C. Co.*, 102 Ala. 594, 15 So. 347; *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657; *Johnson v. Welsh*, 75 Md. 304, 23 Atl. 778; *Gibbs v. Baltimore & C. Co.*, 130 U. S. 396, 9 Sup. Ct. 553.

³⁷ *Mississippi & C. Co. v. Prince*, 34 Minn. 79, 24 N. W. 361.

³⁸ *Combes v. Keyes Co.*, 89 Wis. 297, 62 N. W. 89, 46 Am. St. 825; *Farmer's Bank v. Gallagher*, 43 Mo. App. 482.

³⁹ *State v. Vincennes Univ.*, 2 Ind. 293.

⁴⁰ *Butcher's & C. Bank v. Pulitzer*, 11 Mo. App. 594, the continued existence of a corporation has been

presumed; *People v. President & C.*, 9 Wend. (N. Y.) 351.

⁴¹ *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420. As to the presumption of the power of a corporation to take and convey land when the question arises in de-raigning a chain of title, see, *Stoker v. Schwab*, 56 N. Y. Super. 122, 16 N. Y. St. R. 885, 1 N. Y. S. 425; where the plaintiff brought an action against a railroad company for an injury received by her foot being caught between one of its rails and a plank at a highway crossing, so that she was struck by a passing train, and her complaint alleged that the crossing belonged to the defendant, and the answer did not deny the fact of ownership,—it was held that there was no presumption that the highway authorities and not the railroad company maintained the crossing, see, *Spooner v. Delaware & C. R. Co.*, 115 N. Y. 22, 21 N. E. 696, 23 N. Y. St. 554; under

And from the foregoing one writer has deduced and stated the proposition, that in an action by a corporation, the burden of proof of the defendant's averment that an act of the plaintiff was *ultra vires*, is upon the defendant.⁴²

§ 1933. **Presumptions as to authority and acts of agents.**—The authority of an officer or agent of a corporation is frequently presumed or implied from certain circumstances.⁴³ So, as elsewhere shown,⁴⁴ the authority and regularity of the acts of officers of private as well as of public corporations may often be presumed. Regularity in the acts of directors has frequently been presumed;⁴⁵ and the same

a statute (New York Laws 1864, ch. 582, par. 3), providing that any railroad company, whose main route does not exceed fifteen miles, may elect seven of its stockholders as a board of directors, where there was no proof of the length of the road except, although the articles of association which stated that the total length of the road and its branches was thirty-five miles, it was presumed, where the original number of directors was reduced to seven, that the length of the main route was not greater than fifteen miles: *Beardsley v. Johnson*, 30 N. Y. St. 691. For circumstances under which there was said to be a *prima facie* presumption that a corporation, purchasing a railroad property at a foreclosure sale, becomes liable for the performance of all covenants running with the land, including that of paying rent under prior lease: see, *Frank v. New York & C. R. Co.*, 122 N. Y. 197; *Frank v. New York & C. R. Co.*, 8 R. & Corp. L. J. 470, 25 N. E. 332.

⁴² *6 Thompson Corp.*, § 7746; *Star Brick Co. v. Ridsdale*, 36 N. J. L. 229.

⁴³ *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Carrigan v. Port Crescent & C. Co.*, 6 Wash. 590, 34 Pac. 148;

Puget Sound & C. R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929; *Louisville & C. R. Co. v. McVay*, 98 Ind. 391; *Smith v. Wells Mfg. Co.*, 148 Ind. 333; 46 N. E. 1000; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *White v. Elgin & C. Co.*, 108 Iowa 522, 79 N. W. 283; *Nat. Bank of Commerce v. Atkinson*, 8 Kans. App. 30, 54 Pac. 8; *New Eng. & C. Co. v. Farmington & C. Co.*, 84 Me. 284, 24 Atl. 848; *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433, but such authority is not always presumed when properly challenged; *City Elec. & C. Co. v. First Nat. Bank*, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. 282; *Alexander v. Cauldwell*, 83 N. Y. 480; *Shavaller v. Grand Rapids & C. Co.*, 128 Mich. 230, 87 N. W. 212; *Savannah & C. R. Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711; *Mobile & C. R. Co. v. Cogsbill*, 85 Ala. 456, 5 So. 188.

⁴⁴ Vol. I, § 106; see also, §§ 103, 104.

⁴⁵ *Stockton Harv. & C. Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Hardin v. Iowa & C. Co.*, 78 Iowa 726, 43 N. W. 543; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64; *Puget Sound & C. Co. v. Ouellette*, 7 Wash. 265, 34 Pac. 929; *Fletcher v. Chicago & C. R. Co.*, 67 Minn. 339.

has been held as to the action of stockholders in removing an officer under the by-laws or charter.⁴⁶ So, it has often been decided that it will be presumed, in the absence of anything to the contrary, that due notice of stockholders' meetings was given and that they were properly called and held.⁴⁷ And the presumption is in favor of the validity of certificates of stock bearing the genuine signatures of the proper officers and the corporate seal.⁴⁸

§ 1934. Proof of corporate existence.—As to corporations created by special charters, the ordinary mode of proving the existence of a corporation is to prove a charter, and user thereunder.⁴⁹ But, unless the rule is changed, by statute or otherwise, the charters of private corporations, when granted in form of private acts, are not noticed judicially, but must be proved.⁵⁰ In many cases, however, special charters of incorporation themselves declare that the act shall be noticed judicially by the courts, and, in such a case it has been held that a denial of the incorporation of the plaintiff does not require the plaintiff to prove it at the trial.⁵¹ So, the courts take

69 N. W. 1085; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

* *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

* *Cushman v. Illinois Starch Co.*, 79 Ill. 281; *Forest Glen &c. Co. v. Gade*, 55 Ill. App. 181; *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. 671; *Dunn v. New Orleans Bldg. Co.*, 8 La. 483; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Blanchard v. Dow*, 32 Me. 557; *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433; *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

* *Hall v. Rose Hill &c. R. Co.*, 70 Ill. 673.

* *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Searsburgh Tpk. Co. v. Cutler*, 6 Vt. 315; *Gaines v. Bank*, 12 Ark. 769; *Heaston v. Cincinnati &c. R. Co.*, 16 Ind. 275; *Buncombe Tpk. Co. v. M'Carson*, 1 Dev. & B. (N. Car.)

306; *Marsh v. Astoria Lodge*, 27 Ill. 421; *Cochran v. Arnold*, 58 Pa. St. 399, 405; *Came v. Brigham*, 39 Me. 35; *State v. Louisiana State Bank*, 20 La. Ann. 468; *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494; *Barrett v. Mead*, 10 Allen (Mass.) 337; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *Merchant's Bank v. Harrison*, 39 Mo. 433; *Bank of Toledo v. International Bank*, 21 N. Y. 542; *Henderson v. Mississippi Union Bank*, 6 Smedes & M. (Miss.) 314, legislative recognition by changing its name may be sufficient; *Green's Bricis Ultra Vires*, 21 n., but not always as against the state; *Bank of Commerce, In re*, 153 Ind. 460, 53 N. E. 950.

* *Ante*, § 1929.

* *Anderson v. Kerns' Draining Co.*, 19 Ind. 199, 77 Am. Dec. 63; *Eel River &c. Asso. v. Topp*, 16 Ind. 242; *Agnew v. Bank of Gettysburg*, 2 Har. & G. (Md.) 478.

judicial notice of any statute, although of a private nature, which contains a clause declaring it to be a public act.⁵² But where courts do not take judicial notice of the act, then it is, in strictness, necessary to prove it by producing, from the office of the Secretary of State, a copy, duly authenticated by that officer, with the seal of State thereto affixed. Statutes, or rules of evidence, however, in many states make the books of legislative acts, printed by authority of the State, evidence of the private, as well as the public, acts contained therein. If the charter is the act of the legislature of another state of the Union, then the act of Congress, which provides for the manner in which the official acts of one state shall be authenticated in order to have full faith and credit in another state, governs; and this provides that "the acts of the legislatures of the several states, shall be authenticated by having the seals of their respective states affixed thereto."⁵³ It is therefore not necessary that there should be a certificate of the Secretary of State or other official authentication; the seal of the state affixed thereto is a sufficient authentication in such cases.⁵⁴ Where judicial notice is not taken of a charter, proof of it is generally made by the production of the statute book, printed by public authority, or by an exemplified copy of the particular statute, as found in such book.⁵⁵ Yet, although there is a statute making the printed statute books issued by public authority evidence of the statutes therein contained, it has been held that this does not dispense with the necessity of formally producing the statute book containing the private statute and offering it in evidence.⁵⁶

§ 1935. Evidence of user.—Proof that a corporation has used or exercised the franchises granted by its charter may be made in many ways. Thus, it may be made by producing the books of the corporation, or by producing instruments of writing executed by it as a corporation,⁵⁷ or, in many instances, at least, even by parol.

⁵² *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170; *Whitewater Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130; ante, § 1929.

⁵³ U. S. R. S. § 905; 2 *Dest's Fed. Proc.* § 425; ante, Vol. II, § 1279, et seq.

⁵⁴ *State v. Carr*, 5 N. H. 367; *United States v. Johns*, 4 Dall. (U. S.) 412, 1 Wash. (U. S.) 363; see, Vol. II, § 7691.

⁵⁵ *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194, 504; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *United States v. Johns*, 4 Dall. (U. S.) 412, 415; *Ewbank Ind. Tr. Ev.* § 327.

⁵⁶ *Bailey v. Lincoln Academy*, 12 Mo. 174; 6 *Thompson Corp.*, § 7690.

⁵⁷ *Ramsey v. Peoria &c. Ins. Co.*, 55 Ill. 311; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Provident*

Evidence that the corporation commenced business, coupled with the production of a duly authenticated copy of its charter, is sufficient, ordinarily at least, to show *prima facie* that the conditions on which the charter was to become operative have been performed. A common way of proving user by the corporation of its powers is by evidence that the party suing the corporation, or being sued by it, has admitted the fact of its existence, by executing to it, or taking from it, the instrument sued on, the same being executed in its corporate name, or by otherwise clearly recognizing the fact of its existence as such a corporation.⁵⁸ Proof of user may consist of evidence of the acts of the corporation, showing that it is doing business under its charter, such, for instance, as keeping an office, having officers acting in the name, and as the agents of the company,⁵⁹ and transacting business as such corporation. It is not necessary that such proof should be made by the introduction of matters of record. It may be made, in a proper case, by showing acts in pais. Thus, in an action by a mutual insurance company upon a premium note, evidence in proof of user was held competent to show that the company had received, under its charter, applications for policies, and that policies had been issued by it, in the regular course of business, for years.⁶⁰ As elsewhere shown, it is generally sufficient when the corporate existence is not directly in issue by a proper proceeding for that purpose to prove the existence of a corporation *de facto*; and this may be done by proving the existence in fact of a corporation which might have lawfully existed under the charter or governing statute. "Slight evidence is generally held sufficient to establish the user necessary to show the existence of a *de facto* corporation. In some jurisdictions it is only necessary to show that the corporation assumed to act as such; or, in other words, to show a continued user of the franchises of an incorporated and organized company by persons assuming to act as its directors,—this being not only competent evidence of its continued corporate existence, but also that such persons were its legal directors."⁶¹ So, generally, where a corporation purports to de-

Institution for Savings v. Burnham, Dougl. (Mich.) 124, 135, 43 Am. 128 Mass. 458. Dec. 457.

⁵⁸ *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *Gaines v. Bank of Miss.*, 12 Ark. 769; see post, § 1940.

⁵⁹ *Cahill v. Kalamazoo Ins. Co.*, 2

⁵⁹ *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88.

⁶⁰ *St. Paul Fire & Ins. Co. v. Allis*, 24 Minn. 75; *Farmers' and Drovers' Bank v. Williamson*, 61 Mo. 259;

rive its franchise from a general law, proof of its existence, for the purpose of ordinary litigation, is sufficiently made, by showing the existence of the general law under which it might exist, and the exercise, on its part, of the franchises which it might properly have acquired and exercised by a due organization under such general law.⁶² But it is usually held that there must be a law authorizing the members to file articles of association, or to become incorporated.⁶³ In the case of corporations organized under general enabling statutes, the usual course is for the incorporators to file articles of association, or articles of incorporation, in certain public offices, generally with the Secretary of State and, frequently, also in the office of the recorder of deeds of the county within which the chief office of the corporation is to be established. Some of these statutes provide, in addition, that when these things are done in conformity with law, the Secretary of State shall issue a certificate of incorporation. A copy of the articles of association, duly certified by the Secretary of State, is the usual evidence, and in many cases it is prescribed by statute that it shall be the evidence. Statutes exist making articles of association, or articles of incorporation, when duly certified by the public officer in whose office it is filed in pursuance of the statute, prima facie evidence of their existence as a corporation. "Under general statutes, framed on the model of those of New York, where it is necessary to prove the corporate existence, it may ordinarily be proved by introducing in evidence copies of its articles of association, filed in the office of the Secretary of State, where that mode of organizing a corporation is prescribed by the governing statute; and also by a record of the articles of association in the office of the register of deeds of the county where the principal place of business of the corporation was established, where the governing statute requires the articles of association to be so recorded."⁶⁴

Buffalo &c. R. Co. v. Cary, 26 N. Y. 75; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778; *Derrenbacher v. Lehigh Valley R. Co.*, 21 Hun (N. Y.) 612, 59 How. Pr. (N. Y.) 283; 6 *Thompson Corp.*, § 7697.

⁶² *Smelser v. Wayne &c. Tpk. Co.*, 82 Ind. 417; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Finnegan v. Noerenberg*, 52 Minn. 239, 18 L. R.

A. 778, 53 N. W. 1150; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077.

⁶³ *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 54 N. E. 407; *Williamson v. Kokomo &c. Asso.*, 89 Ind. 389; *Bank of Commerce, In re*, 153 Ind. 460, 53 N. E. 950; *Douthitt v. Stinson*, 63 Mo. 268.

⁶⁴ As was done with approval in

§ 1936. Evidence of acceptance and of corporate organization.

It is necessary to the existence of a private corporation that the charter, or other enabling statute, shall have been accepted. But it is not necessary that the fact of such an acceptance should be proved by the records of the corporation; as, for instance, by an express vote to that effect entered in the corporate books or records. In the case of a special charter, as elsewhere shown, an acceptance will be presumed in many cases, where it is manifestly beneficial to the grantees; and it may also be inferred from acts in procuring it, or the like.⁶⁴ After lapse of considerable time, and a continued exercise of the powers granted to the corporation, the presumption may become irresistible that the charter has been accepted.⁶⁵ The primary evidence of the organization of a corporation is usually to be sought for in its records.⁶⁶ "Its book of entries containing the articles of association signed by the associates, and other records of its proceedings, is properly admitted in evidence to prove the fact of organization; and an organization may be shown by the minutes of the corporation without producing its lists of subscribers. So, the books of the commissioners, appointed under a charter to receive subscriptions to the stock of a projected line of railway, are competent evidence to establish the facts recorded therein, relating to the performance of their duties."⁶⁷ If the corporation, after due notice to produce its books containing the records of the organization, fails to do so, it has been held that the plaintiff may prove the de facto existence of the corporation by witnesses, and the fact that the certificate of incorporation, as required by law, was filed with the

Brown v. Corbin, 40 Minn. 508, 42 N. W. 481; *6 Thompson Corp.*, § 7699; *Porter v. State*, 141 Ind. 488, 40 N. E. 1061; *Indianapolis & Co. v. Herkimer*, 46 Ind. 142.

⁶⁴ See post § 1943.

⁶⁵ *Middlesex Husbandmen v. Davis*, 3 Metc. (Mass.) 133; *Narragansett Bank v. Atlanta Silk Co.*, 3 Metc. (Mass.) 282; *Whitmore v. Fourth Cong. Soc.*, 2 Gray (Mass.) 306; *Stone v. Congregational Soc.*, 14 Vt. 86; *Bank v. Allen*, 11 Vt. 302.

⁶⁶ *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282; *Buncombe Tpk. Co. v. M'Carson*, 1 Dev.

& B. (N. Car.) 306; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.) 392; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Vawter v. Franklin College*, 53 Ind. 88; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352, 56 Am. Dec. 116; *Highland Tpk. Co. v. M'Kean*, 10 Johns. (N. Y.) 154, 156, 6 Am. Dec. 324; *Bill v. Fourth Great Western Tpk. Co.*, 14 Johns. (N. Y.) 416; *Reynolds v. Myers*, 51 Vt. 444; *Lucas v. Bank*, 2 Stew. (Ala.) 147.

⁶⁷ *6 Thompson Corp.*, § 7702.

fore necessary to do something more than prove the papers and proceedings of incorporation;⁷⁹ it is also necessary to make proof of the statute authorizing the incorporation.⁸⁰ An authentication in the manner provided by the local statute for the authentication of foreign charters or the like, or in the manner provided by the Act of Congress is in general a sufficient authentication.⁸¹ A certificate of incorporation of another state, duly acknowledged before a notary public, and authenticated by the certificate of the Secretary of State and by a certificate of a commissioner of the state of the forum is a good authentication.⁸² It seems, also, that the examined copy of the corporate charter, as found in the office where such charters are usually kept in the foreign country, is sufficient.⁸³ But if evidence of user under a charter in the case of domestic corporation is required, the same proof will be required of foreign corporations.⁸⁴ Where a foreign corporation entered a state to do business there, and, under and in pursuance of the statute of such state, filed a certified copy of its charter, or articles of association in the office of the Secretary of State, a copy of such instrument and of the instrument appointing its local agent, certified by the Secretary of State of such state as being on record in his office, was held to be prima facie evidence of the existence of such corporation, and of its right to transact business in the state.⁸⁵ It has also been held that neither a corporation, nor the persons claiming under it, will be heard to assert that a copy of the certificate filed by its incorporators, pursuant to the governing statute, to procure the incorporation, is not sufficient in form and contents.⁸⁶

⁷⁹ *Law Guarantee &c. Soc. v. Hogue*, 37 Ore. 544, 62 Pac. 380, 63 Pac. 690.

⁸⁰ *Savage v. Russell*, 84 Ala. 103, 4 So. 325; *Savage v. Russell & Co.*, 20 Am. & Eng. Corp. Cas. 523; *Eagle Works v. Churchill*, 2 Bosw. (N. Y.) 166, it is held that it cannot be proved by parol evidence; *Comparet v. Jernegan*, 5 Blackf. (Ind.) 375; *Line v. Mack*, 14 Ind. 330.

⁸¹ Vol. II, Ch. LXV; *Paine v. Lake Erie &c. R. Co.*, 31 Ind. 233; *Ansley v. Meikle*, 81 Ind. 260.

⁸² *Hammer v. Garfield Min. &c. Co.*, 130 U. S. 291, 9 Sup. Ct. 548.

⁸³ *National Bank v. De Bernales*, 1 Car. & P. 569; see also, *Society v. Young*, 2 N. H. 310; *Agnew v. Bank of Gettysburg*, 2 Har. & G. (Md.) 478.

⁸⁴ *Gaines v. Bank*, 12 Ark. 769.

⁸⁵ *Knapp &c. Co. v. Strand*, 4 Wash. 686, 3 Pac. 1063.

⁸⁶ *Evans v. Lee*, 11 Nev. 194; *Naragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 232.

§ 1940. **Estoppel to question or to deny corporate existence.**—An association or organized body of persons who have entered into a contract as a corporation, where it is not forbidden by statute or against public policy, will not be permitted, in most states, while retaining the benefits of the contract, or after performance by the other party, to deny their corporate existence and power.⁸⁷ So, generally, where such persons hold themselves out as a corporation, at least where there is a law under which they might have incorporated, and they have attempted in good faith to do so, and acted as a corporation, there is at least a corporation de facto, and they are estopped from setting up irregularities and denying their corporate existence to the injury of those with whom they have so dealt.⁸⁸ So, on the other hand, those who have dealt with such a de facto corporation are estopped from denying the corporate existence and holding its members liable as partners.⁸⁹

§ 1941. **Best and secondary evidence.**—In civil actions, as a general rule, the best evidence of corporate existence and powers is

⁸⁷ *State Board v. Citizens' St. R. Co.*, 47 Ind. 407; *Louisville & Co.* *R. Min. Co.*, 21 Utah 1, 59 Pac. 238, 81 Am. St. 651; *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1074.

⁸⁸ *Shirk v. Thomas*, 121 Ind. 147, 22 N. E. 976; *Kiefer v. Troy School Board*, 102 Ind. 279, 1 N. E. 560; *Southern Bank v. Williams*, 25 Ga. 534; *Ten Eyck v. Pontiac & Co.*, 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. 633; *Schenfler v. Grand Lodge &c.*, 45 Minn. 256, 47 N. W. 799; *Callender v. Painesville &c. R. Co.*, 11 Ohio St. 516; *Rush v. Halcyon &c. Co.*, 84 N. Car. 702; *Johnson v. Mercantile &c. Co.*, 94 Ga. 324, 21 S. E. 576. As to estoppel of stockholder when sued on subscription, or the like, see: *Schloss v. Montgomery &c. Co.*, 87 Ala. 411, 6 So. 360, 13 Am. St. 51; *Weinman v. Wilkensburg &c. Co.*, 118 Pa. St. 192, 12 Atl. 288; *Bates v. Wilson*, 14 Colo. 140, 24

⁸⁹ *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Baker v. Neff*, 73 Ind. 68; *Williams v. Kekomo &c. Asso.*, 89 Ind. 389; *Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708; *Heaston v. Cincinnati &c. R. Co.*, 16 Ind. 275; *Lincoln Park &c. v. Swatek*, 204 Ill. 228, 68 N. E. 429; *Greenville v. Greenville Water Works Co.*, 125 Ala. 625, 27 So. 764; *Butchers' &c. Bank v. McDonald*, 130 Mass. 264; *Kalamazoo v. Kalamazoo &c. Co.*, 124 Mich. 74, 82 N. W. 811; *Studebaker's Mfg. Co. v. Montgomery*, 74 Mo. 101; *School Dist. v. Alderson*, 6 Dak. 145, 41 N. W. 466; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *Fresno Canal &c. Co. v. Warner*, 72 Cal. 379; note in 81 Am. Dec. 419.

furnished by the original articles of incorporation or certificate of association, or, when so provided by law, a duly authenticated copy thereof.⁹⁰ So, the books and records of the corporation have been held to be the best evidence of the acceptance of a charter.⁹¹ But, as elsewhere shown, corporate existence, at least where not directly attacked by the state, may often be sufficiently proved in other ways. A written subscription is the best evidence of its terms.⁹² So, generally, written contracts of, or with, corporations are the best evidence of their contents, as in other cases. It has also been held that parol evidence cannot be given of the written rules and by-laws of a corporation,⁹³ nor of transfer of stock on the corporate books.⁹⁴ So, as elsewhere shown, the records of a corporation, especially when required by law to be kept, constitute, in many instances, the best evidence;⁹⁵ but where no record is kept, or the proper foundation is otherwise laid, parol evidence is often admissible as secondary evidence.⁹⁶ Even where certified copies of articles of incorporation are not considered as the best evidence, they are nevertheless admissible

⁹⁰*Gauthier &c. Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484; *Hallett v. Harrower*, 33 Barb. (N. Y.) 537; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377; *Equitable Bldg. &c. Asso. v. Bidwell*, 60 Neb. 169, 82 N. W. 384; *Chamberlain v. Huguenot Mfg. Co.*, 118 Mass. 532; *Jones v. Hopkins*, 32 Iowa 503; *Union Tel. Co. v. Kendall*, 20 Kans. 515; *Owen v. Shepard*, 59 Fed. (U. S.) 746; but see, *Culver v. Third Nat. Bank*, 64 Ill. 528; *Foster v. White Cloud &c. Co.*, 32 Mo. 505; *Evans v. Southern Tpk. Co.*, 18 Ind. 101, it is held that the original articles and not copies are the best evidence. *Warner v. Daniels*, 1 Woodb. & M. 90, 29 Fed. Cas. No. 17181, it is held that oral testimony of those who aided in the organization is not the best evidence.

⁹¹*Coffin v. Collins*, 17 Me. 440; *Hudson v. Carmon*, 41 Me. 84.

⁹²*Pittsburgh &c. R. Co. v. Gazzam*, 32 Pa. St. 340, but secondary evidence is admissible if the proper foundation is laid; *York Park &c.*

Asso. v. Barnes, 39 Neb. 834, 58 N. W. 440; *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

⁹³*Supreme Lodge v. Robbins*, 7 Ark. 364, 67 S. W. 758; *Cincinnati &c. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Sobieski v. St. Paul &c. R. Co.*, 41 Minn. 169, 42 N. W. 863, and Vol. I, § 213, n. 55.

⁹⁴*Skowhegan Bank v. Cutler*, 4 Me. 315.

⁹⁵*Ramsdell v. Nat. Rivet &c. Co.*, 104 Fed. (U. S.) 16; *Madison &c. R. Co. v. Whitesel*, 11 Ind. 55; *Board of Education v. Moore*, 17 Minn. 412; *Owings v. Speed*, 5 Wheat. (U. S.) 420; *Everts v. Dist. Tp. of Rose Grove*, 77 Iowa 37, 41 N. W. 478, 14 Am. St. 264.

⁹⁶*Langsdale v. Bonton*, 12 Ind. 467; *City of Aurora v. Fox*, 78 Ind. 1; *Indianapolis &c. R. Co. v. Jewett*, 16 Ind. 273; *White v. State*, 69 Ind. 273, so parol evidence may be admissible where there is no record; *Weber v. Fickey*, 52 Md. 500.

as secondary evidence after the proper foundation has been laid.⁹⁷ So, a recital, in an instrument executed by the corporation, to the effect that it has accepted a certain charter, has been held admissible as secondary evidence, after laying the proper foundation.⁹⁸ And in one case it was held that although the corporate charter was the best evidence of the powers of the corporation, where it existed and could be produced, the next best evidence, as against the corporation, was that as to its actual business and the powers it actually exercised.⁹⁹

§ 1942. **Records of public corporations.**—The Supreme Court of the United States, speaking of a corporation established by the legislature for a public purpose, long ago said: "The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved."¹⁰⁰ Under this rule municipal records, properly authenticated, are generally admissible as evidence of the corporate acts, and of facts required by law to be therein stated.¹⁰¹ Such records are usually the best evidence of the corporate acts and by-laws, and are frequently made conclusive.¹⁰² It is often provided that a duly certified copy of the record shall be admissible, but this does not render the original record inadmissible.¹⁰³ Where the charter requires a record to be kept and makes it the only evidence, it has been held that no other evidence is admissible even though no record is kept.¹⁰⁴ But, where there is no such law, parol or other secondary

⁹⁷ *Walker v. Shelbyville &c. R. Co.*, 80 Ind. 452; *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494.

⁹⁸ *Sinking Fund Comis. v. Northern Bank of Ky.*, 1 Metc. (Ky.) 174.

⁹⁹ *Union T. Co. v. Kendall*, 20 Kans. 515.

¹⁰⁰ *Owings v. Speed*, 5 Wheat. (U. S.) 420, 424.

¹⁰¹ *Weith v. City of Wilmington*, 63 N. Car. 24; *Greenfield v. Camden*, 74 Me. 56; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Boston v. Inhabitants of Weymouth*, 4 Cush. (Mass.) 538; *Rex v. Mothersell*, 1 Str. 93; and numerous authorities cited in Vol. I, § 416; *Scheafer v. Seivage*, (Ky.) 41 S. W. 569, recital in ordinance held to show accept-

ance of dedication of street; *Parsons v. Trustees*, 44 Ga. 529.

¹⁰² *Sawyer v. Manchester &c. R. Co.*, 62 N. H. 135, 13 Am. St. 541, and note; see also, *Hutchinson v. Pratt*, 11 Vt. 402; *Gilbert v. New Haven*, 40 Conn. 102; *People v. Zeyst*, 23 N. Y. 140; *Morrison v. City of Lawrence*, 98 Mass. 219.

¹⁰³ *Green v. City of Indianapolis*, 25 Ind. 490, the statutory method of proving ordinances is not exclusive of the common law method; *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576; *Johnson v. Finley*, 54 Neb. 733, 74 N. W. 1080; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49.

¹⁰⁴ *City of Logansport v. Crockett*.

evidence is usually admissible when no record is kept or where other recognized ground for the admission of such evidence is duly shown.¹⁰⁶ And, in many jurisdictions, provision is made by statute for the admission in evidence of books of ordinances published by authority without accounting for the original.¹⁰⁶ In one case where the secretary of a board of education was required by law to keep a record of the proceedings, and he had made memoranda thereof at the meeting, and the next day transcribed the minutes into the regular record book, it was held that the record so made, and not the original memoranda, constituted the best evidence, and that the memoranda were no longer admissible.¹⁰⁷ As elsewhere shown, records required by law to be kept by public corporations or public officers, or even books necessarily or properly kept by such officers in the discharge of such duties, are usually regarded as public records and are evidence, in a proper case, even as to some matters that might otherwise be regarded as within the rule against hearsay.¹⁰⁸

§ 1943. Records of private corporations.—The records of a private corporation, as well as those of a public corporation, are admissible, in a proper case as evidence of its acts, by-laws, and the like.¹⁰⁹

64 Ind. 319; *Byer v. Town of Newcastle*, 124 Ind. 86, 24 N. E. 578.

¹⁰⁶ *City of Indianapolis v. Imberry*, 17 Ind. 175; *Ross v. City of Madison*, 1 Ind. 281; *White v. State*, 69 Ind. 273; *City of Troy v. Atchison &c. R. Co.*, 11 Kans. 519, 13 Kans. 70; *Hutchinson v. Pratt*, 11 Vt. 402; *Wells v. Pressy*, 105 Mo. 164, 16 S. W. 670.

¹⁰⁶ See, Vol. I, § 416, n. 53; Vol. II, § 1304, where the subject of the admission and authentication of municipal records is treated. Proof by introducing original ordinance. *Johnson v. Finley*, 54 Neb. 733, 74 N. W. 1080; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 21 S. W. 8, proof by authenticated copy; *Western &c. R. Co. v. Hix*, 104 Ga. 11, 30 S. E. 424; *McChesney v. Chicago*, 159 Ill. 223, 42 N. E. 894; *People v. Wilson*, 16 N. Y. S. 583, proof by record book

or ordinances; *Merced County v. Fleming*, 111 Cal. 46, 43 Pac. 392; *Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460; *Rutherford v. Swink*, 90 Tenn. 152, 16 S. W. 76. As to recital in journal, however, see, *State v. Curry*, 134 Ind. 133, 33 N. E. 685; but compare, *Billings v. Dunnaway*, 54 Mo. App. 1; *Columbus v. Ogle-tree*, 102 Ga. 293, 29 S. E. 749.

¹⁰⁷ *Board of Education v. Moore*, 17 Minn. 412.

¹⁰⁸ Vol. I, §§ 331, 405, 406; Vol. II, §§ 1273, 1539; see also, *People v. Hancock County*, 21 Ill. App. 271; *Dent v. Bryce*, 16 S. Car. 1; *Shutesbury v. Hadley*, 133 Mass. 242; *Sandborn v. School Dist.*, 12 Min. 17; *St. Louis Gas L. Co. v. St. Louis*, 86 Mo. 495; *Weith v. Wilmington*, 68 N. Car. 24; *Brown v. Bon Homme County*, 1 S. Dak. 216.

¹⁰⁹ Vol. I, § 416, and numerous au-

The minutes of the corporation written by the proper officer upon pieces of paper have also been held admissible where they were not recorded or kept in any other manner.¹¹⁰ So, in some instances ancient records of old proprietaries have been held admissible as ancient documents without the usual testimony of the lawful custodian required in other cases.¹¹¹ The corporate records are usually admissible against it when relevant and material, but not, ordinarily, against strangers; and they have often been held admissible as against members; but, as hereafter shown, there is much conflict among the authorities upon the subject. The organization of the corporation and the performance of conditions may also generally be shown by the corporate records.¹¹² And the same is true as to the acceptance of a charter or an amendment,¹¹³ or as to user.¹¹⁴ Although the general rule is that the books of a corporation are evidence of its proceedings, yet such books do not generally prove themselves, and do not, ordinarily, carry within themselves intrinsic evidence of their own authenticity. It must be made to appear, *prima facie* at least, that they are the corporate books, that they have been kept as such, and that the entries were made by a proper officer for that purpose.¹¹⁵ This, it seems, cannot be shown by the mere certificate of the secretary of the corporation, unless there is a statute making such a certificate evidence for that purpose. "An exemplified copy made and certified by the secretary of a private corporation is not evidence; but it is necessary to show, by the oath of a competent witness, even if a copy could be pro-

thorities cited; also, Vol. II, § 1292; *Madison &c. R. Co. v. Whitesel*, 11 Ind. 55; *Mandel v. Swan Land &c. Co.*, 154 Ill. 177, 40 N. E. 462, 45 Am. St. 124.

¹¹⁰ *Pruden v. Alden*, 23 Pick. (Mass.) 184; *Walters v. Gilbert*, 56 Mass. 27; see also, *Boggs v. Lakeport &c. Asso.*, 111 Cal. 354, 43 Pac. 1106.

¹¹¹ Vol. II, § 1335.

¹¹² *Duke v. Cahawba &c. Co.*, 10 Ala. 82, 44 Am. Dec. 472; *Simple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. 894; *Penobscot &c. R. Co. v. Dunn*, 39 Me. 587; *Lane v. Brainerd*, 30 Conn. 565; *Washer v. Allensville &c. Co.*, 81 Ind. 78; *Mc-*

Coy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. 288; *Glenn v. Orr*, 96 N. Car. 413, 2 S. E. 538; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.) 392; *Glen v. Liggett*, 47 Fed. (U. S.) 472.

¹¹³ *Golder v. Bressler*, 105 Ill. 419; *Dows v. Naper*, 91 Ill. 44.

¹¹⁴ *Duke v. Cahawba &c. Co.*, 10 Ala. 82, 44 Am. Dec. 472; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Reynolds v. Myers*, 51 Vt. 444; *Ramsey v. Peoria &c. Co.*, 55 Ill. 311; *Narragansett Bank v. Atlantic &c. Co.*, 3 Metc. (Mass.) 282.

¹¹⁵ *Whitman v. Granite Church*, 24 Me. 236.

best evidence for that purpose.¹²⁶ There is, however, a well recognized exception or limitation to the effect that entries in the books of a corporation of matters respecting any property or right claimed by the corporation against third parties are not admissible in evidence in its behalf.¹²⁷ Indeed, it is often stated as the general rule that, except for the purpose of proving what the corporation did, or what action its incorporators took in effecting its organization, its books and records are not, ordinarily, evidence as against a stranger.¹²⁸ "The sound rule is, then," says Judge Thompson,¹²⁹ "is that the records of a private corporation cannot be used in evidence against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers in any way. They merely have the effect of admissions against the corporation, or of admissions against members of the corporation, in suits against other members."¹³⁰ As between members of the corporation, they are evidence of corporate acts therein recorded; but they cannot be used in an action against a stranger to connect him with the corporation,¹³¹ unless made so by an act of the legislature."¹³²

§ 1946. Corporate books as evidence against members.—The stockholders of a corporation are in one sense strangers to the corporation "and stand in that relation in the law where they contract with it as individuals; but in many cases they are in privity with it in such a sense that the books and records of the corporation are admissible in

¹²⁶ *Owings v. Speed*, 5 Wheat. (U. S.) 420; *Bill v. Fourth Great Western Tpk. Co.*, 14 Johns. (N. Y.) 416; *Townsend v. First Freewill Baptist Church*, 6 Cush. (Mass.) 279, 282; *Haven v. New Hampshire Asylum*, 13 N. H. 532, 38 Am. Dec. 512.

¹²⁷ *Jones v. Florence & Co. University*, 46 Ala. 626; *Philadelphia R. Co. v. Hickman*, 28 Pa. St. 318; *Pittsburg & Co. v. Noel*, 77 Ind. 110; *Haynes v. Brown*, 36 N. H. 545, 568; *Coosaw Min. Co. v. Carolina Min. Co.*, 75 Fed. 860; Vol. I, § 416, n. 55.

¹²⁸ *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. 87; *Brown v. State*, 64 Md. 199, 1 Atl. 54; *Chase v. Sycamore &*

R. Co., 38 Ill. 215; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Mayor of London v. Lynn*, 1 H. Bl. 206, 214; but see, *Moises v. Thornton*, 8 Terr. R. 303; *Edgerly v. Emerson*, 23 N. H. 555, 566.

¹²⁹ 6 Thompson Corp., § 7740.

¹³⁰ *Commonwealth v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628; *Wheeler v. Walker*, 45 N. H. 355; *Chase v. Sycamore & Co. R. Co.*, 38 Ill. 215.

¹³¹ 1 *Greenleaf Ev.*, § 493; *Chase v. Sycamore & Co. R. Co.*, 38 Ill. 215; *Mudgett v. Horell*, 33 Cal. 25; *Fox's Case*, 3 De Gex, J. & S. 465.

¹³² *Bristol Canal Co. v. Amos, Maule & S.* 569.

an action between the corporation and one of its members, whichever party is plaintiff, and whichever party seeks to avail himself of their use.¹²³ As between the members, or the corporation and its members, the books of a private corporation are often said to be quasi-public or in the nature of public documents.¹²⁴ "It is not to be inferred from the foregoing, however," says Judge Thompson,¹²⁵ "that the books and records of a corporation are evidence in all cases in a contest between the corporation and one of its stockholders. At the outset, it may be observed that where it becomes material to prove what the corporation did in a given instance, the best evidence of what it did is to be sought for in its books and records, because that would be the best evidence in an action between it and a stranger. But this is restrained by another principle, founded in natural justice, which is, that the corporation cannot be permitted, by fixing up its books and records at its own pleasure, to make evidence in its own behalf against strangers, and consequently against its own members where it deals with them as individuals. Therefore, on principle and authority, the books of a corporation are not admissible against one of its members, as evidence of his private contracts and dealings with it.¹²⁶ Still less are they admissible in an action by one not a member of the corporation against a stockholder for the purpose of charging¹²⁷ the stockholder upon a matter of account between him and his corporation, . . . as, for instance, to show by the stock book of the corporation entries of assessments against the stockholder. But even this must depend upon the nature of the issue between the contending parties." Special circumstances may, however, be shown, which bring the particular stockholder into such privity with the record sought to be introduced in evidence against him, as to make it, on any proper theory, competent evidence.¹²⁸ And the weight of authority is to the

¹²³ 6 Thompson Corp., § 7729.

¹²⁴ See, Vol. I, § 416.

¹²⁵ 6 Thompson Corp., § 7731.

¹²⁶ *Wheeler v. Walker*, 45 N. H. 355; *Hager v. Cleveland*, 36 Md. 476; *Hill v. Manchester &c. Water Works*, 5 B. & A. 866, 2 N. & M. 573; compare, *Chenango Bridge Co. v. Lewis*, 63 Barb. (N. Y.) 111; *Olney v. Chadsey*, 7 R. I. 224; see also, *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046; *Jermain v. Worth*, 5

Denio (N. Y.) 342; *Black v. Shreve*, 13 N. J. Eq. 455.

¹²⁷ *Haynes v. Brown*, 36 N. H. 545, 566; *Hager v. Cleveland*, 36 Md. 476.

¹²⁸ Records kept by the clerk of a railroad corporation of the proceedings of the directors, in ordering assessments upon the shares of the capital stock, may be used as evidence by the corporation in a suit brought to recover an assessment upon the shares subscribed for by

effect that the stock books and proper records of the corporation are competent evidence, in a proper case, of membership, or ownership of the stock,¹³⁹ although there are recent authorities, as well as those cited by Judge Thompson, which require additional evidence, such as participation in the corporate affairs, or the like.¹⁴⁰ The stock or transfer books are also evidence on the question of the right to vote,¹⁴¹ and, in some jurisdictions, such books have been made by statute conclusive evidence of membership, so far at least as concerns the right to vote.¹⁴²

the defendant, he being one of the original grantees in the charter, and a director at the time the assessment was ordered, and having exercised the privileges of a stockholder in virtue of the shares upon which the assessment was made: *White Mountains R. Co. v. Eastman*, 34 N. H. 124, 137. So, the books of a corporation, though not generally evidence against a stranger, are evidence against a corporator, who is shown to have been present at the time of transactions therein recorded, and to have assented to the entries therein made: *Graff v. Pittsburgh & C. R. Co.*, 31 Pa. St. 489. But, one who had subscribed for stock upon the condition, expressed in the contract, that it was not to be paid until a certain sum should first be raised, was held not to be a member of the corporation so as to make the books admissible in evidence against him.

¹³⁹ *Glenn v. Orr*, 96 N. Car. 413, 2 S. E. 538, stating reason for the rule; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. 156; *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. 145; *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Plumb v. Bank of Enterprise*, 48 Kans. 484, 29 Pac. 699; *Pennobscot R. Co. v. Dummer*, 40 Me.

172, 63 Am. Dec. 654; *Coffin v. Collins*, 17 Me. 440; *Hammond v. Straus*, 53 Md. 1; *Holyoke Bank v. Goodman & Co.*, 9 Cush. (Mass.) 576; *Holland v. Duluth & C. Co.*, 61 Minn. 324, 68 N. W. 50, 60 Am. St. 480; *Chapman v. Porter*, 69 N. Y. 276; *Consolidated Tel. & C. Co.*, In re (N. J.) 43 Atl. 433; *South Branch R. Co. v. Long*, 43 W. Va. 131, 27 S. E. 297; *Heaston v. Cincinnati & C. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Turnbull v. Payson*, 95 U. S. 418.

¹⁴⁰ *Carey v. Williams*, 79 Fed. 906; *Siqua Iron Co. v. Greene*, 104 Fed. 854; *National Ex. & C. Co. v. Morris*, 15 D. C. App. 262, they are generally held only prima facie evidence; *Mudgett v. Horrell*, 33 Cal. 25; *Joint Stock Co.'s Acts, Matter of*, 3 De G. J. S. 465, 68 Eng. Ch. 351. And other books have been held inadmissible. *Hinsdale Sav. Bank v. New Hampshire & C. Co.*, 59 Kans. 716, 54 Pac. 1051, 68 Am. St. 391.

¹⁴¹ *Smith v. San Francisco & C. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309; *Commonwealth v. Dalzell*, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. 640; *State v. Ferris*, 42 Conn. 560; *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658; see also, *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183.

¹⁴² *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *Cedar Grove Cemetery Co.*

§ 1947. **Parol evidence.**—The subject of the admissibility of parol evidence to show user as an element of proof of corporate existence and the like, and in connection with the best evidence rule, has already been considered, but questions as to the admissibility of parol evidence, under the general rules upon the subject are as numerous in cases in which corporations are parties as they are in most other cases; and there are some instances in which they are more apt to arise in such cases than in others. The most important of these will now be considered briefly. As elsewhere shown, there is no general rule excluding parol evidence to vary or contradict unofficial records, but the rule requiring the best evidence may exclude parol evidence as secondary evidence in the particular case, or the nature of the case may be such as to require the exclusion of parol evidence.¹⁴³ Thus, the terms and provisions of the articles of incorporation duly executed and filed cannot be varied or limited by parol evidence.¹⁴⁴ So, in an action to enforce the stockholders' liability, an oral agreement among themselves, although made at the time of subscribing or signing the articles of incorporation, that they should not be individually liable, is not admissible.¹⁴⁵ The rule prohibiting the reception of parol evidence to vary or to contradict the terms of a written contract is also applied to written stock subscriptions;¹⁴⁶ and it has been held that an unambiguous

In re, 61 N. J. L. 422, 39 Atl. 1024; State v. Cronan, 23 Nev. 437, 49 Pac. 41.

¹⁴³ Vol. I, § 619. For cases in which oral evidence of steps taken in organizing the corporation and the like was admitted, see, Miller v. Wild Cat G. R. Co., 52 Ind. 51; Weber v. Fickey, 52 Md. 500; Memphis &c. R. Co. v. Rivers, 21 Ark. 302; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457.

¹⁴⁴ Kalamazoo v. Kalamazoo &c. Co., 124 Mich. 74, 82 N. W. 811; Gould v. Fuller, 79 Minn. 414, 82 N. W. 673; Craig v. Benedictine &c. Asso., (Minn.) 93 N. W. 669; see also, as to the effect of the certificate, Stedman v. Eveleth, 6 Metc.

(Mass.) 114; Dooley v. Cheshire G. R. Co., 15 Gray (Mass.) 494.

¹⁴⁵ Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15; see also, San Joaquin Land &c. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Royce v. Tyler, 1 Ohio Cir. D. 428.

¹⁴⁶ Martin v. Pensacola &c. R. Co., 8 Fla. 370, 73 Am. Dec. 713; Wurtzburger v. Anniston Rolling Mills, 94 Ala. 640, 10 So. 129; Johnson v. Crawfordsville &c. Co., 11 Ind. 280; Topeka Mfg. Co. v. Hale, 39 Kans. 23, 17 Pac. 601; Jewell v. Rock Paper Co., 101 Ill. 57; Langford v. Otumwa &c. Co., 59 Iowa 283, 13 N. W. 303; Shattuck v. Robbins, 68 N. H. 565, 44 Atl. 694; Phoenix &c. Co. v. Badger, 6 Hun (N. Y.) 293; Davis v. Shafer, 50 Fed. 764.

at the time of the commission of the alleged trespass, and at the time of the trial.¹⁶⁴ Again, in an action by a corporation on a stock subscription, it was held competent for the defendant to show by parol testimony, in the absence of record evidence, that the subscription list upon which his name appeared had been annulled and abandoned and that another subscription had subsequently been opened and made the basis of the organization of the company by the stockholders.¹⁶⁵ It has been held, however, that the testimony of freight conductors, that they had, contrary to the rule of the company, ridden on freight trains without passes, and had permitted former employees of the railroad company so to ride, is, in the absence of knowledge of such facts on the part of the officers of the company, insufficient to establish a custom which will render it liable to a former employee who is hurt while so riding.¹⁶⁶

§ 1948. **Admissions and declarations.**—As already shown, statements in the corporation's books may often be used as admissions on its part,¹⁶⁷ and, under the doctrine considered in another section,¹⁶⁸ where it holds itself out as, and contracts as a corporation it is generally estopped from denying its corporate existence and power to contract. So, it has been held that in an action against an alleged corporation, its appearance as such under a name importing a corporation is an admission that it is in fact a corporation.¹⁶⁹ And, in some

¹⁶⁴ *White v. State*, 69 Ind. 273.

¹⁶⁵ *Southern Hotel Co. v. Newman*, 30 Mo. 118; *Imboden v. Etowah & Co.*, 70 Ga. 86, 109.

¹⁶⁶ *Powers v. Boston & R. Co.*, 153 Mass. 188, 26 N. E. 446; but see also, 3 *Elliott R. R.*, § 1282. But a usage of a Masonic mutual benefit association, constituting a part of the contract with each of its members, that Masonic questions shall be decided by Masonic Tribunals, with respect to whether the members are Masons or not, as required by the by-laws of the association, has been held conclusive on the association: *Connelly v. Masonic Mut. Ben. Asso.*, 58 Conn. 552, 20 Atl. 671, 18 Am. St. 296, 9 L. R. A. 428.

¹⁶⁷ *Ante*, § 1944.

¹⁶⁸ *Ante*, § 1940. As to when they are or are not conclusive, see, *Smelser v. Wayne & Co.*, 82 Ind. 417; *Porter v. State*, 141 Ind. 488, 40 N. E. 1061.

¹⁶⁹ *Western U. Tel. Co. v. Eyser*, 2 Colo. 141; *Gauthier & Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484; *First Nat. Bank v. Dovetail & Co.*, 143 Ind. 534, 42 N. E. 924; *Ward v. Minnesota & Co.*, 119 Ill. 287, 10 N. E. 365; *Jones v. Congregation & Co.*, 30 La. Ann. 711; *State v. Independent School Dist.*, 44 Iowa 227; *Black River & Co. v. Holway*, 80 Wis. 344, 55 N. W. 418; *Shoun v. Armstrong*, (Tenn.) 59 S. W. 790; see also, *United Brotherhood v. Dinkle*, 32 Ind. App. 278, 69 N. E. 707.

jurisdictions where it sues as a corporation, an answer to the merits is, in effect, an admission of corporate existence.¹⁷⁰ Admissions and declarations of officers and agents are subject to rules that govern in similar cases,¹⁷¹ and the authority of an agent of a corporation cannot be shown by his own admissions and declarations unknown to the corporation.¹⁷² But it has been held that the authority of an agent to act for the corporation may be shown, by the admissions and declarations of its proper officers.¹⁷³ Evidence of recognition by the corporation of an officer's authority in other similar transactions,¹⁷⁴ or of ratification,¹⁷⁵ has also been held competent to show his authority to bind the corporation. The fact that a defendant, sued as a member of a corporation, was a member may be shown against him by his own admissions and declarations.¹⁷⁶ And it has been held that declarations of the chief executive officer of a corporation, made in the performance of his duty as such, denying the membership of another are admissible against such officer and his associates.¹⁷⁷ But it has been held, on the other hand, that a mere declaration by a corporate officer that a certain person was a subscriber to the capital stock is not admissible against such person.¹⁷⁸

¹⁷⁰ *West Winstead Sav. Bank &c. v. Ford*, 27 Conn. 282, 71 Am. Dec. 66; see also, *Darrell v. Hilligoss*, 90 Ind. 264; *Brady v. Nat. Sup. Co.*, 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. 753; *Society &c. v. Pawlet*, 4 Pet. (U. S.) 480.

¹⁷¹ See, Vol. I, § 255, as to admissions and declarations of officers and of private corporations; also, § 254, as to admissions and declarations of officers and agents of public corporations.

¹⁷² *Extension Gold Min. &c. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198; *Bank of N. Y. &c. v. American &c. Co.*, 143 N. Y. 559, 38 N. E. 713; *Heusinveld v. St. Paul &c. Co.*, 106 Iowa 229, 76 N. W. 696; but see, *Texas &c. Co. v. National &c. Co.*, (Tex. Civ. App.) 40 S. W. 159.

¹⁷³ *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565, the corporate records showing his employ-

ment are admissible. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

¹⁷⁴ *Moss v. Averell*, 10 N. Y. 449; *Conover v. Mut. Ins. Co.*, 1 N. Y. 290; *Scribner v. Flagg Mfg. Co.*, 175 Mass. 536, 56 N. E. 603; *Equitable Gas &c. Co. v. Baltimore &c. Co.*, 65 Md. 73, 3 Atl. 108; *Williams v. Christian Female College*, 29 Mo. 250, 77 Am. Dec. 569.

¹⁷⁵ *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *McMahan v. Canadian &c. R. Co.*, 40 Ore. 148, 66 Pac. 708.

¹⁷⁶ *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939; see also, *Graff v. Pittsburgh &c. R. Co.*, 31 Pa. St. 489.

¹⁷⁷ *Tipton Fire Co. v. Barnhiesel*, 92 Ind. 88.

¹⁷⁸ *Troy &c. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; see also, *Western Md. R. Co. v. Manro*, 32 Md. 280.

CHAPTER XCVI.

COVENANT.

Sec.	Sec.
1949. Generally.	1954. When breach occurs.
1950. Burden of proof.	1955. Real covenants.
1951. Evidence under particular pleas.	1956. Covenant of seisin.
1952. Actions by and against assignees.	1957. Covenant against incumbrance.
1953. Evidence in particular cases.	1958. Covenant for quiet enjoyment.
	1959. Covenant of warranty.

§ 1949. **Generally.**—Covenant is the form of action to recover damages for breach of covenant, or written promise under seal, whether the damages are liquidated or unliquidated; and, at common law, it was usually the only proper form of action on such a promise where the damages were unliquidated.¹ It is distinguished from debt mainly by the fact that it will lie for unliquidated as well as liquidated damages, and from assumpsit by the fact that the latter action lies only where the contract is a simple contract, not under seal, while in covenant it is a specialty or contract under seal.

§ 1950. **Burden of proof.**—"The evidence in an action of covenant," says Starkie, "is closely confined by the nature of the pleadings; the plaintiff is bound to show his title, and to point out the particular breaches of covenant of which he complains; and the defendant is obliged to show the grounds of his defense specially upon the record."² The burden of proof is generally upon the plaintiff, although, in some instances, he may have nothing to prove except the

¹Shipman Com. L. Pl. (2d ed.) S.) 141; Sawtelle v. Sawtelle, 337. In Jerome v. Ortman, 66 Mich. Me. 228; Lansing v. Van Alstyne, 668, 33 N. W. 759, it is held that Wend. (N. Y.) 561. See as to proof of damages on default, Bartlet v. Braunsdorf, 57 Wis. 1; and compare, Courcier v. Graham, 1 Ohio 347.

²2 Starkie Ev., § 429.

³Simonton v. Winter, 5 Pet. (U.

damages. The burden of producing evidence to establish the defendant's plea may, however, be upon the defendant.⁴

§ 1951. **Evidence under particular pleas.**—Under the plea of non est factum the plaintiff must produce the deed, if pleaded with a proferret, and prove the execution in the usual way.⁵ If there is no other plea on the record, all the other averments stand admitted; and after proof of the defendant's execution of the deed, nothing remains on the part of the plaintiff but to prove the amount of his damages.⁶ The deed itself, when proved, is evidence against the defendant who has executed it, of all the facts recited in the deed. If, for instance, a lease describes the demised land as meadowland, this is evidence that it was so at the commencement of the term.⁷ If the defendant by his plea admits the execution of the deed, he admits so much of the deed as is stated in the declaration, but no more; and if the plaintiff seeks to prove some other recital of the deed not specified in the declaration, he must prove the execution of the deed.⁸ The manner of proving the formal execution of a deed has already been considered.⁹ In addition to producing the deed and showing that it was signed, sealed and delivered by the grantor or obligor, it should also be shown, where required, that the statutory formalities have been

⁴Douglass v. Hennessy, 15 R. I. 272, 10 Atl. 583; Linder v. Pryor, 8 Car. & P. 518; Scott v. Hull, 8 Conn. 296, where issue was joined on a plea of performance, it was held that the defendant had the burden of proof and the right to open and close.

⁵See, Williams v. Sills, 2 Campb. 519.

⁶Cole v. Robins, B. N. P. 172; Michael v. Scockwith, Cro. Eliz. 120; Kane v. Sanger, 14 Johns. (N. Y.) 89.

⁷Smith v. Woodward, 4 East 585.

⁸Williams v. Sills, 2 Campb. 519; Watson v. King, 4 Campb. 272.

⁹As to proof by attesting witnesses, see also, Manns v. Dupont, 3 Wash. (U. S.) 31, 42; Ledger v. Thompson, 11 M. & W. 41; Leshar v. Lavan, 2 Dall. (Pa.)

96; Pigott v. Holloway, 1 Bin. (Pa.) 436; Berks Tpk. Co. v. Myers, 6 S. & R. (Pa.) 12. As to when evidence of subscribing witnesses may be dispensed with, see, Vol. I, § 431; Marsh v. Collnett, 2 Esp. 665; Fetherly v. Waggoner, 11 Wend. (N. Y.) 603; Pearce v. Hooper, 3 Taunt. 60; Burghardt v. Turner, 12 Pick. (Mass.) 534; Barnes v. Trompowsky, 7 Term R. 261; Anonymous, 12 Mod. 607. As to delivery, see, McKinney v. Rhoads, 5 Watts (Pa.) 343; Foster v. Mansfield, 3 Metc. (Mass.) 412; Porter v. Cole, 4 Greenl. (Me.) 19, 25; Scrugham v. Wood, 15 Wend. (N. Y.) 545; Midland Steel Co. v. Citizen's Nat. Bank, (Ind. App.) 72 N. E. 290, the averment that an instrument was executed was held to include a signing and delivery.

complied with. It has been held that a lessee in possession cannot controvert his lessor's title to a demise or give in evidence what amounts to a license, under a plea of non est factum.¹⁰ It has also been held that a misrepresentation as to the legal effect of a deed, by which its execution was induced, cannot be shown under such a plea;¹¹ but evidence that the deed was delivered in escrow¹² has been held admissible under a plea of non est factum; and, under the general issue, it has been held that the defendant may show that the deed is not his, by evidence of the lack of power in the agent who assumed to execute it for him.¹³ Proof of the performance of a condition precedent, when put in issue by the defendant's plea, and required to be proved by the plaintiff, cannot be dispensed with, although the condition has been performed according to a subsequent parol agreement. Thus, in one case, the plaintiff covenanted to build two houses for a certain sum of money, and in an action for the money, averred that he had built the houses within the time. It was held that he could not be admitted to show that the time had been enlarged by a subsequent parol agreement, and that the houses had been built within the enlarged time.¹⁴ So, generally, the plaintiff cannot prove by parol an agreement different from the written contract declared on.¹⁵ The breach must be proved as it is laid in the declaration. Thus, where the covenant was to keep all trees standing in an orchard whole and undefaced, reasonable use and wear only excepted, the cutting down of trees past bearing, the landlord being likely to get back his premises at the end of the term in an improved condition, was held to be no breach of the covenant.¹⁶ In support of a plea of entry and eviction in excuse for the non-performance of a covenant, the de-

¹⁰ *Friend v. Estabrook*, 2 W. Bl. 1152; *Ratcliff v. Pemberton*, 1 Esp. 35.

¹¹ *Edwards v. Brown*, 1 Tyr. 182, 281, 3 Y. & J. 423.

¹² *Stoytes v. Pearson*, 4 Esp. 255; *Cole v. Robbins*, Buller N. P. 172; *Union Bank of Md. v. Ridgley*, 1 H. & G. (Md.) 324.

¹³ *Agent of State Prison v. Lathrop*, 1 Mich. 438.

¹⁴ *Littler v. Holland*, 3 Term R. 590; see also, *Baldwin v. Munn*, 2 Wend. (N. Y.) 399.

¹⁵ See, *Barndollar v. Tate*, 1 S. &

R. (Pa.) 160; *Vicary v. Moore*, 2 Watts (Pa.) 451, 27 Am. Dec. 323; *Flynn v. Bourneuf*, 143 Mass. 277, 9 N. E. 650; *Phillip & Co. Constr. Co. v. Seymour*, 91 U. S. 646; but see, in case of fraud, *Hunter v. McHose*, 100 Pa. St. 38.

¹⁶ *Good v. Hill*, 2 Esp. 690; see also, *Hawkes v. Orton*, 5 A. & E. 367; *Harris v. Mantle*, 3 Term R. 307; *Long v. Sinclair*, 38 Mich. 90; *Dugger v. Oglesby*, 3 Ill. App. 94; *Mathews v. Sims*, 2 Mill. Con. (S. Car.) 103.

fendant must prove such an entry or eviction as were sufficient to prevent the performance of the covenant.¹⁷

§ 1952. **Actions by and against assignees.**—"Where the plaintiff declares as assignee,¹⁸ and his title is put in issue by one or more of the defendant's pleas, he must prove his title as alleged, whether as assignee of the reversion by proof of the due execution of the assignment, as assignee of the estate of a bankrupt by proof of the several steps in bankruptcy, and of the assignment, as heir of the covenantor, or as his devisee or his executor, according to the circumstances of the case."¹⁹ So, in such cases, if the defendant denies that he is bound by the covenant, the plaintiff must prove the liability as assignee. Upon a covenant which runs with the land, proof that the defendant is heir will support a declaration which charges him generally as assignee.²⁰ Proof of possession by the defendant, or of payment of rent, is also prima facie proof that he is assignee. But the defendant may nevertheless show that the title is in another, and prove that he is under-tenant only, even though the reversion of but one day be left in the original lessee.²¹ An actual entry or possession is not essential to render the assignee of the whole term of a lease liable to the covenant for payment of rent.²² If the plaintiff charge the defendant through a variety of deeds, instead of charging him generally by virtue of divers mesne assignments, and these be put in issue by the plea, the plaintiff must prove the deeds as

¹⁷ 2 Starkie Ev., 2d Am. ed. 435.

¹⁸ Before the stat. 32 Hen. VIII. c. 34, the action of debt for rent lay for the assignee of the reversion at common law, and the action being founded on privity of estate was local. Walker's case, 3 Coke 22, b. Glover v. Cope, 4 Mod. 81; Barker v. Damar, 3 Mod. 338, 1 Will. Saund. 240, c. in notes. The effect of the above statute was to transfer a privity of contract, and to enable the assignee of the lessor to maintain covenant against the lessee (Thursby v. Plant, 1 Will. Saund. 237). The lessor might at common law maintain debt or covenant for rent, or not repairing, or other covenant running with the land; but the action was local, as

founded in privity of estate (Walker's case, 3 Coke 22, 5 Hen. VII. 19, a. 1 Will. Saund. 241, c. in note); and consequently such an action by the assignee of the reversion against the assignee of the lessee is also local, and must be brought in the county where the land lies. Ibid. Lienow v. Ellis, 6 Mass. 331.

¹⁹ 2 Starkie Ev., 2d Am. ed. 435.

²⁰ Derisley v. Custance, 4 Term R. 75.

²¹ Holford v. Hatch, Doug. 183; Hare v. Cator, 1 Cowp. 766.

²² Williams v. Bossanquet, 1 B. & B. 238; overruling, Eaton v. Jaques, Doug. 454; see, Stone v. Evans, Woodfall's L. & T. c. 273, 275, Coke Litt. 46, b. 1 Ld. Raym. 367.

stated.²³ Under the plea of release, it must be proved that the release was executed subsequently to the breach of covenant.²⁴

§ 1953. Evidence in particular cases.—Under a plea of conditions performed, evidence of a waiver or other excuse for non-performance is not admissible.²⁵ And in an action for breach of covenant against incumbrances, a judgment for a breach of covenant in another later deed for the same land, was held inadmissible on the question of damages.²⁶ In an action on a covenant to pay a certain sum of money on a certain day, although the same instrument contained an assignment by the covenantor to the covenantee of certain goods "as per schedule," non est factum being pleaded, it was held that the plaintiff need not produce the schedule referred to in proof of his case.²⁷ In an action for damages for breach of the covenant against incumbrances, where it appeared that the land was incumbered by a mortgage which was foreclosed, it was held that evidence of an agreement between the purchaser at the foreclosure sale and the covenantee, in relation to a conveyance of the land by the former to the latter upon the payment of his proportion of the debt, was admissible as part of the transaction whereby such incumbrance was extinguished; but that evidence that the vendee knew that the land was more valuable than the contract price, was not admissible to show that he assumed such incumbrance as part of the purchase price, nor was a statement made by the vendor at the time he employed an attorney to remove the incumbrance, in the absence of the vendee, admissible as part of the *res gestae*.²⁸

§ 1954. When breach occurs.—Where the defendant has voluntarily destroyed the subject of the agreement or otherwise voluntarily

²³ *Turner v. Eyles*, 3 B. & P. 456, 461.

²⁴ *Myers v. Munson*, 65 Iowa 423, 21 N. W. 759.

²⁵ *2. Starkie Ev.*, 2d Am. ed. 437.

²⁶ *Daines v. Heath*, 3 C. B. 15, 938, 11 Jur. 185.

²⁷ *Baldwin v. Munn*, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; *Oakley v. Morton*, 11 N. Y. 25; see also, *Webster v. Warren*, 2 Wash. (U. S.) 456; *Marine Ins. Co. v. Hodgson*, 6 Cranch. (U. S.) 206; but see as to tender, *Holmes v. Holmes*, 9 N. Y. 525; *Carman v. Pultz*, 21 N. Y. 547.

²⁸ *Morehouse v. Heath*, 99 Ind. 509, a memorandum of the various amounts that composed the consideration made by one party in the presence of the other at the time of the conveyance, was, however, held admissible to show the consideration.

put it out of his power to perform his covenant, it is a breach even though the time for performance may not have arrived.²⁹ But in other cases evidence of an absolute refusal before the time fixed for performance is not enough to show a breach³⁰ unless, perhaps, where the refusal was communicated for the purpose of influencing, and did influence, the conduct of the other party to his damage.³¹ Yet, as will be hereinafter shown, certain covenants may be considered as broken, under certain circumstances, as soon as the deed is executed, as, for instance, where the grantor has neither title nor possession.

§ 1955. Real covenants.—The principal real covenants in deeds are the covenant of seisin and the similar, or practically same, covenant of right to convey, the covenant of freedom from incumbrances, the covenant for quiet enjoyment, and the covenant of warranty.³² These will be briefly considered in the following sections. A full treatment would be out of place, but attention will be called to questions of evidence usually arising in actions on such covenants.

§ 1956. Covenant of seisin.—To prove a breach of covenant of seisin, it is, in most jurisdictions, necessary to show that the covenantor was not seised in fact; for this covenant is usually satisfied by seisin in fact, even though it is wrongful and defeasible.³³ But though the covenantor was in possession of the land at the time of the conveyance, yet where he did not exclusively claim it as his own, it was held that the covenant was broken.³⁴ So, if there was a concurrent seisin by another, as tenant in common;³⁵ or, if there was an

²⁹ *Hopkins v. Young*, 11 Mass. 302; *Sears v. Conover*, 4 Abb. Ct. App. Dec. (N. Y.) 179; *Griffith v. Goodhand*, T. Raym. 464; *Teat's Case*, Cro. Eliz. 7.

³⁰ *Daniels v. Newton*, 114 Mass. 530, 19 Am. R. 384.

³¹ *Skinner v. Tinker*, 34 Barb. (N. Y.) 333.

³² For an elaborate note on such covenants, including a consideration of the question as to when they run with the land and when there is a breach, see, *Geiszler v. DeGraaf*, 166 N. Y. 339, 82 Am. St. 664-690.

³³ *Marston v. Hobbs*, 2 Mass. 433;

Bearce v. Jackson, 4 Mass. 408; *Chapel v. Bull*, 17 Mass. 213; *Walt v. Maxwell*, 5 Pick. (Mass.) 217; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Willard v. Twitchell*, 1 N. H. 177; *Backus v. McCoy*, 3 Ohio 211, 220; but see, *Allen v. Allen*, 48 Minn. 462; *Richardson v. Dorr*, 5 Vt. 9, 21; *Lockwood v. Sturdevant*, 6 Conn. 373, 385; *Coleman v. Lyman*, 42 Ind. 289; *Kingdon v. Nottle*, 1 Maule & S. 355.

³⁴ *Wheeler v. Hatch*, 3 Fairf. (Me.) 389.

³⁵ *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Wheeler v.*

adverse seisin of a part of the land, within the boundaries described in the deed.³⁶ But it has been held that if the possession by a stranger was not adverse, it is no breach.³⁷ This covenant, however, is generally considered as broken as soon as it is made if the grantor has not a good title and is not in possession at that time.³⁸ Evidence of the existence of a mere easement, however, which does not affect the technical seisin has been held insufficient to show a breach of the covenant of seisin.³⁹ And, before eviction, at least in the absence of evidence of some actual injury, only nominal damages can be recovered for breach of the covenant of seisin.⁴⁰

§ 1957. Covenant against incumbrances.—The covenant of freedom from incumbrances is generally sufficiently proved to have been broken, by any evidence, showing that a third person has a right to, or an interest in, the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed containing the covenant.⁴¹ A public highway over the land;⁴²

Hatch, 12 Me. 389; Downer v. Smith, 38 Vt. 464. For evidence held insufficient to show a breach, see also, Hamilton v. Shoaff, 99 Ind. 63.

³⁶ Wilson v. Forbes, 2 Dev. (N. Car.) 30; see also, Bird v. Smith, 3 Eng. (Ark.) 368; Brandt v. Foster, 5 Iowa 285, 295; Van Wagner v. Nostrand, 19 Iowa 422.

³⁷ Commonwealth v. Dudley, 10 Mass. 403, a deed of land reciting a pecuniary consideration, and to take effect after the death of the grantor, upon condition of certain services to be rendered him, has been held to amount to a covenant to stand seised to the grantor's use, though there is no relationship of blood or marriage between the parties; Trafton v. Hawes, 102 Mass. 533.

³⁸ Jackson v. Green, 112 Ind. 341, 14 N. E. 89; Foote v. Burnet, 10 Ohio 317, 332, 36 Am. Dec. 90; Mitchell v. Warner, 5 Conn. 497; Raymond v. Raymond, 10 Cush. (Mass.) 135; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379;

Pecare v. Chouteau, 13 Mo. 527; Peters v. Bowman, 98 U. S. 56; Howell v. Richards, 11 East 642.

³⁹ Vaughn v. Stuzaker, 16 Ind. 338, 340; Reasoner v. Edmundson, 5 Ind. 394; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 140; Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; Kellogg v. Malin, 50 Mo. 496, 11 Am. R. 426; but see, Traster v. Snelson, 29 Ind. 96.

⁴⁰ King v. Gilson, 32 Ill. 356; Richard v. Bent, 59 Ill. 38, 14 Am. R. 1; Whitney v. Dinsmore, 6 Cush. (Mass.) 124, 127; Tufts v. Adams, 8 Pick. (Mass.) 547; Cockrell v. Proctor, 65 Mo. 41; Funk v. Creswell, 5 Iowa 62; Smith v. Hughes, 50 Wis. 620, 12 Cent. L. J. 17. See as to actual damages, Akerly v. Vilas, 21 Wis. 88.

⁴¹ Prescott v. Trueman, 4 Mass. 627, 629; Bronson v. Coffin, 108 Mass. 175; Mitchell v. Warner, 5 Conn. 497, 527.

⁴² Kellogg v. Ingersoll, 2 Mass. 97, 101; Pritchard v. Atkinson, 3 N. H.

a private right of way;⁴³ a claim of dower;⁴⁴ a lien by judgment,⁴⁵ or by mortgage,⁴⁶ unless it be one which the covenantee assumes and is bound to pay;⁴⁷ or any other outstanding, elder, and better, title⁴⁸

335; *Hubbard v. Norton*, 10 Conn. 422, 431; *Beach v. Miller*, 51 Ill. 206; *Burk v. Hill*, 48 Ind. 52; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; but see, *Jordan v. Eve*, 31 Gratt. (Va.) 1; *Harrison v. Des Moines &c. R.*, 91 Iowa 114, 58 N. W. 1081; cf. *Cincinnati v. Brachman*, 35 Ohio St. 289, the right of a city to open a street without paying damages has been held to be an incumbrance; *Evans v. Taylor*, 177 Pa. St. 286, 35 Atl. 636, and so has an assessment for betterments on account of the widening of a street, although at the time of the conveyance the grantee had only constructive notice of the widening; *Blackie v. Hudson*, 117 Mass. 181, an assessment for a street or sewer is also an incumbrance; *Smith v. Abington Bank*, 165 Mass. 285, 43 N. E. 1133; *Elliott Roads & Sts.* (2d ed.), § 731, so is a railroad right of way. *Fierce v. Houghton*, (Iowa) 98 N. W. 306

"*Harlow v. Thomas*, 15 Pick. (Mass.) 66, 68; *Mitchell v. Warner*, 5 Conn. 497, and this is held to be so, although the existence of the way was known to the grantee at the time of the purchase; *Butler v. Gale*, 27 Vt. 739, so a right to overflow the land; *Patterson v. Sweet*, 3 Ill. App. 550.

"*Cary v. Daniels*, 8 Metc. (Mass.) 466, 482, 41 Am. Dec. 532; *Bigelow v. Hubbard*, 97 Mass. 195, even though inchoate only, *Porter v. Noyes*, 2 Greenl. (Me.) 22, 11 Am. Dec. 30; *Shearer v. Ranger*, 22 Pick. (Mass.) 447; *Russ v. Perry*, 49 N. H. 547, 550.

"*Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Smith v. McCampbell*,

1 Blackf. (Ind.) 100; *Holman v. Creagmiles*, 14 Ind. 177; *Hall v. Dean*, 13 Johns. (N. Y.) 105.

"*Bean v. Mayo*, 5 Greenl. (Me.) 94; *Freeman v. Foster*, 55 Me. 508; see also, *Morehouse v. Heath*, 99 Ind. 509; *Brooks v. Moody*, 25 Ark. 452.

"*Watts v. Welamn*, 2 N. H. 458; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Funk v. Voneida*, 11 S. & R. (Pa.) 109; *Stewart v. Drake*, 4 Halst. (N. J.) 175; *Wyman v. Ballard*, 12 Mass. 304; as to evidence held not admissible to show an assumption of the incumbrance, see, *Morehouse v. Heath*, 99 Ind. 509.

"*Prescott v. Trueman* 4 Mass. 627; *Chapel v. Bull*, 17 Mass. 213; *Potter v. Taylor*, 6 Vt. 676; *Garrison v. Sandford*, 7 Halst. (N. J.) 299; *Sheetz v. Longlois*, 69 Ind. 401, if land partly occupied by a railroad is conveyed with the usual covenants, the covenant against incumbrances may be broken, but not that against seisin; *Kellogg v. Mallin*, 50 Mo. 496; *Smith v. Hughes*, 50 Wis. 620, it is held that the grantee in such a case is presumed to know of the incumbrance, and there is no breach of the usual covenant; but see, *Elliott Roads & Sts.* (2d ed.), §§ 728-730, an attachment or an assessment for betterments, or a tax, if a lien on land, is within the covenant against incumbrances; *Kelsey v. Remer*, 43 Conn. 129; *Barlow v. St. Nichols Nat. Bank*, 63 N. Y. 399; *Briggs v. Morse*, 42 Conn. 258; *Carr v. Dooley*, 119 Mass. 294; *Cochran v. Guild*, 106 Mass. 29; *Blackie v. Hudson*, 117 Mass. 181; *Bemis v. Caldwell*, 143 Mass. 299,

is an incumbrance, the existence of which is a breach of this covenant. It is the existence of the incumbrance which constitutes the right of action, irrespective, in most jurisdictions, of any knowledge on the part of the grantee,⁴⁹ or of any eviction, or of any actual injury it has occasioned to him. If he has not paid it off, nor bought it in, he will still be entitled to nominal damages, but to nothing more;⁵⁰ unless it has ripened into an indefeasible estate; in which case he may usually recover full damages by proof of the diminished value of the estate, in consequence of the existence of the incumbrance, as for example, a prior lease of the premises, unless he purchased the estate for the purpose of a resale, and this was known to the grantor at the time of the purchase.⁵¹ There is some conflict among the au-

9 N. E. 623; as to what is not an incumbrance, see, *Parich v. Whitney*, 3 Gray (Mass.) 516; *Plymouth v. Carver*, 16 Pick. (Mass.) 183. The following are incumbrances: An unpaid tax, *Maddocks v. Stevens*, 89 Me. 336, 36 Atl. 398; an outstanding lease, *Brass v. Vandecar*, (Neb.) 96 N. W. 1035; *Clark v. Fisher*, 54 Kans. 403, 38 Pac. 493; a lien for improvements, *Lafferty v. Milligan*, 165 Pa. St. 534, 30 Atl. 1030; and various easements, *Burk v. Hill*, 48 Ind. 52; 17 Am. R. 731; *Desvergers v. Willis*, 56 Ga. 515; *Lamb v. Danforth*, 59 Me. 322, 8 Am. R. 426; *Smith v. Sprague*, 40 Vt. 43; *Harlow v. Thomas*, 15 Pick. (Mass.) 66, 68. Upon the general subject of highways as incumbrances and the effect of knowledge thereof by the grantee, see, *Elliott Roads and Sts.* (2d ed.), §§ 728-730, and conflicting authorities there cited, especially, *Trice v. Kayton*, 84 Va. 217, 10 Am. St. 836; *Hymes v. Estey*, 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. 421; *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969; *Ream v. Goslee*, 21 Ind. App. 241, 52 N. E. 93; *Burk v. Hill*, 48 Ind. 52, 17 Am. R. 731, and authorities reviewed in these cases.

⁴⁹ *Evans v. Taylor*, 177 Pa. St. 286, 35 Atl. 635; *Yancey v. Tatlock*, 93 Iowa 386, 61 N. W. 997; *Gragg v. Wagner*, 71 N. Car. 316; *Page v. Midland R.*, 1894, 1 Ch. 11.

⁵⁰ *Delavergne v. Norris*, 7 Johns. (N. Y.) 358; *Stanard v. Eldridge*, 10 Johns. (N. Y.) 254; *Bean v. Mayo*, 5 Greenl. (Me.) 94; *Wyman v. Ballard*, 12 Mass. 304; *O'Meara v. McDaniel*, 49 Kans. 685; *Norton v. Colgrove*, 41 Mich. 544; *Bundy v. Ride-nour*, 63 Ind. 406, the amount recovered cannot, it has been held in any case, exceed the consideration of the deed, or the amount paid to buy in the incumbrance; *Andrews v. Appel*, 22 Hun (N. Y.) 429; *Lowrance v. Robertson*, 10 S. Car. 8, the covenant against incumbrances is considered broken, in many jurisdictions, at the time it is made, if an incumbrance exists at that time and the statute of limitations begins to run from that date; *Chapman v. Kimball*, 7 Neb. 399; *Bellamy v. Chambers*, 50 Neb. 146, 69 N. W. 770; *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. 658.

⁵¹ *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201, the purchaser under such a covenant has been held entitled to recover damages due to the

thorities as to when the cause of action accrues, but the prevailing rule is that there is a breach of this covenant at once if there is an outstanding incumbrance,⁵² or at least when the covenantee has to pay money thereon to protect his interests.⁵³

§ 1958. Covenant for quiet enjoyment.—The covenant of quiet enjoyment goes to the possession and not to the title; and, to prove a breach of such covenant, it is usually necessary to give evidence of an entry, or eviction, or of some actual disturbance in the possession;⁵⁴ and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired.⁵⁵ It will not, ordinarily, be sufficient to prove a demand of possession, by one having title;⁵⁶ nor a recovery in ejectment,⁵⁷ or in trespass;⁵⁸ unless there has also been an actual ouster. If, however, the covenantor himself enters tortiously, claiming title, it is a breach.⁵⁹ There

fact that the incumbrances causes the land to bring less at sale under foreclosure of mortgage given him; *McGuckin v. Milbank*, 152 N. Y. 297, 46 N. E. 490. As to damages: *Morehouse v. Heath*, 99 Ind. 509.

⁵²*Brass v. Vandecar*, (Neb.) 96 N. W. 1035; *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. 658; see also, *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Frink v. Bellis*, 33 Ind. 135; *Richards v. Bent*, 59 Ill. 38, 14 Am. R. 1.

⁵³*Priest v. Deaver*, 22 Mo. App. 276.

⁵⁴*Fraunce's Case*, 8 Cro. 177; *Waldron v. McCarty*, 3 Johns. (N. Y.) 471; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Fowler v. Poling*, 6 Barb. (N. Y.) 165, 170; *Coble v. Wellborn*, 2 Dev. (N. Car.) 388; *Safford v. Annis*, 7 Greenl. (Me.) 168; 2 Sugden Vend. 514-522 (10th ed.); 4 Cruise Dig. tit. 32, c. 26, § 51, n. (Greenleaf's ed.); *Cheney v. Straube*, 35 Neb. 521; *Moore v. Frankenfield*, 25 Minn. 540; *Ware v. Lathgow*, 71 Me. 62.

⁵⁵*Ellis v. Welch*, 6 Mass. 246; *Tisdale v. Essex*, Hob. 34b; *Hurd v. Fletcher*, 1 Doug. 43; *Evans v. Vaughan*, 4 B. & C. 261; *Spencer v. Marriott*, 1 B. & C. 457; *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723, it is held that notice of pendency of action brought against covenantee is not essential to sustain a recovery for deprivation of the premises, but must be given in order to recover special damages for defending the action.

⁵⁶*Cowan v. Silliman*, 4 Dev. (N. Car.) 46; nor a mere forbidding to pay rent; *Witchcot v. Nine*, 1 B. & G. 81; *Hodgskin v. Queensborough*, Willes 129.

⁵⁷*Kerr v. Shaw*, 13 Johns. (N. Y.) 236.

⁵⁸*Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Cushman v. Blanchard*, 2 Greenl. (Me.) 266.

⁵⁹*Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; 2 Sugden Vend. 512 (10th ed.), but not if the entry was without claim of title: *Seddon v. Senate*, 13 East 63, 72; *Penn v. Glover*, Cro. El. 421, as for the pur-

must, however, be an actual or constructive eviction by some one under claim of a paramount or superior title.⁶⁰

§ 1959. Covenant of warranty.—The covenant of warranty extends only to lawful claims and acts, and not to those which are tortious;⁶¹ and it is restricted to evictions under titles existing at the date of the covenant,⁶² but it runs with the land and goes to the title as well as the possession. A breach of this covenant is proved only by evidence of an actual ouster or eviction, or what is in law equivalent thereto,⁶³ but it need not be with force, nor by process of law, for if it appears that the covenantee has quietly yielded to a paramount title, whether derived from a stranger or from the same grantor, either by giving up the possession, or by becoming the tenant of the rightful claimant, or has purchased the better title,⁶⁴ it is

pose of making repairs; *Bostwick v. Williams*, 36 Ill. 69.

⁶⁰ *McGary v. Hastings*, 39 Cal. 360, 2 Am. R. 456; *Schilling v. Holmes*, 23 Cal. 227, 230; *Clark v. Linberger*, 44 Ind. 223; *Sherman v. Williams*, 113 Mass. 481, 18 Am. R. 522; *Smith v. Shepard*, 15 Pick. (Mass.) 147, 25 Am. Dec. 432; *Thomas v. Stickle*, 32 Iowa 76.

⁶¹ 4 Cruise Dig. tit. 32, c. 26, § 51 n. (Greenleaf's ed.); *Hayes v. Bickerstaff*, Vaugh. 122; 2 Sugden Vend. 510, 511 (10th ed.); *Dudley v. Follett*, 3 Term R. 584, 587; *Horton v. Bauer*, 129 N. Y. 148; 29 N. E. 1; *Norton v. Schmucker*, 83 Tex. 212, 18 S. W. 720.

⁶² *Ellis v. Welch*, 6 Mass. 246; *Norton v. Schmucker*, 83 Tex. 212, 18 S. W. 720, and this does not warrant against the exercise of the right of eminent domain by the government after the conveyance; *Lewis v. Woodfolk*, 58 Tenn. 25, notice of the existence of the incumbrance does not affect the right of recovery; *Comstock v. Son*, 154 Mass. 389; 28 N. E. 296; *Osborn v. Pritchard*, 104 Ga. 145; 30 S. E. 656;

Demars v. Koehler, 60 N. J. L. 314, 38 Atl. 808.

⁶³ *Scott v. Kirkendall*, 88 Ill. 465; *Green v. Irving*, 54 Miss. 450; *Ansutz v. Miller*, 81 Pa. St. 212; *Jones v. Warner*, 81 Ill. 343; *Cheney v. Straube*, 35 Neb. 521; *Price v. Hubbard*, 8 S. Dak. 92; *Northern Pacific R. Co. v. Montgomery*, 56 U. S. App. 579; *Thompson v. Brazile*, 68 Ark. 495, 47 S. W. 299, so, it is held that a grantee in a deed cannot maintain an action upon a covenant of warranty therein unless there has been an actual eviction, or what is, in law, equivalent thereto.

⁶⁴ *Emerson v. Props. of Minot*, 1 Mass. 464; *Kelly v. Dutch Church of Schenectady*, 2 Hill (N. Y.) 105; *Hamilton v. Cutts*, 4 Mass. 349; *Sprague v. Baker*, 17 Mass. 586; *Clarke v. McAnulty*, 3 S. & R. (Pa.) 364; *Mitchell v. Warner*, 5 Conn. 497; *Stewart v. Drake*, 4 Halst. N. J. Eq. 175; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Bigelow v. Jones*, 4 Mass. 512; 4 Kent Comm. 471; *Security Bank v. Holmes*, 65 Minn.

sufficient.⁶⁵ So, a formal entry by a mortgagee, for foreclosure, though made under a statute, which does not require that the possession of the mortgagee should be continued, has been held to be a breach.⁶⁶ And it has been held that if the grantor covenants against all incumbrances, except a certain mortgage, which he engages to discharge, and also covenants generally to warrant the premises against lawful claims of all persons, he is liable on the latter covenant, if the grantee is obliged himself to remove this incumbrance.⁶⁷ A judgment in ejectment, recovered by a stranger, against the covenantee, and an entry under it, with proof that the covenantor had due notice

531, 68 N. W. 113, if the covenantee yields peaceably to a dispossession, the burden of proof is on him to show that the dispossession was by one having a better title: *Hamilton v. Cutts*, 4 Mass. 349; *McGrew v. Harmon*, 164 Pa. 115, 30 Atl. 265.

* *Allis v. Nininger*, 25 Minn. 525; *Hauck v. Single*, 10 Phila. (Pa.) 551; *Kenney v. Norton*, 10 Heisk. (Tenn.) 384; *Cheney v. Straube*, 43 Neb. 879, 62 N. W. 234; *McGrew v. Harmon*, 164 Pa. St. 115, 30 Atl. 265; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; it is held in some states that proof that the covenantee has been obliged to pay off a superior claim or buy in the title is not enough to support an action on the warranty; *Dyer v. Britton*, 53 Miss. 270, as stated in the text, the eviction need not be by process of law, but when one yields to paramount title, without judicial proceedings, the title must be paramount not only to his grantor, but also paramount to the title of any other person; *Crance v. Collenbaugh*, 47 Ind. 256, he must at least show that the title to which he yielded without legal proceedings was paramount; *Claycomb v. Munger*, 51 Ill. 377; *Ryerson v. Chapman*, 66 Me. 557; *Hamilton v. Cutts*, 4 Mass. 352, 3 Am. Dec. 222; *Clark*

v. Mumford, 62 Tex. 531; *Sheets v. Longlois*, 69 Ind. 491, the right of action has been held to accrue when substantial damage is suffered; *Post v. Campau*, 42 Mich. 90, 3 N. W. 272, a covenant of warranty is broken where the premises or the time of conveyance are held adversely under a paramount title; *Isley v. Wilson*, 42 W. Va. 757, 26 S. E. 551, a judgment merely establishing title to occupied property has been held not to be a constructive eviction; *Wagner v. Finnegan*, 54 Minn. 251, 55 N. W. 1129, in Texas, proof of superior title without notice of which the purchase is made is said to establish a breach; *Groesbeck v. Harris*, 82 Tex. 411, 19 S. W. 850. In South Carolina, it has been held that the existence of a paramount title in a third person is a breach, although there is no eviction: *Biggs v. Bradley*, 1 McC. 500; *Mackey v. Collins*, 2 Nott. & M. 186, 10 Am. Dec. 586.

* *White v. Whitney*, 3 Metc. (Mass.) 81; see also, *Burrage v. Smith*, 16 Pick. (Mass.) 56; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Ingersoll v. Jackson*, 9 Mass. 495; *Furnas v. Durgin*, 119 Mass. 500.

* *Bemis v. Smith*, 10 Metc. (Mass.) 194.

of the pendency of the action, and was requested by the covenantee to defend it, is also sufficient evidence of a breach of the covenant of warranty.⁶⁸ A prima facie case, at least, is made when the deed is introduced and evidence is given showing that the grantor had no title to the land which he assumed to convey.⁶⁹ And in one case the grantor's declarations before making a deed were held admissible to show that certain liens and defects in the title, although known to the grantee, were intended to be covered by the warranty.⁷⁰

⁶⁸ *Hamilton v. Cutts*, 4 Mass. 349; *Prescott v. Trueman*, 4 Mass. 627; *Ferrell v. Alder*, 8 Humph. (Tenn.) 44, in such case, an actual ouster by writ of possession has been held immaterial; *Williams v. Weatherbee*, 1 Aik. (Vt.) 233, the judgment in ejectment has been held a breach without showing actual eviction; *Norton v. Jackson*, 5 Cal. 263; *Hannah v. Henderson*, 4 Ind. 174; *Hale v. New Orleans*, 13 La. Ann. 499; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. R. 690, he need not appeal; *Bever v. North*, 107 Ind. 544, 8 N. E. 576, it has been held that the notice of the suit may be verbal; *Collingwood v. Irwin*, 3 Watts (Pa.) 306; *Miner v. Clark*, 15 Wend. (N. Y.) 425, but if such notice is not given the burden of proof is on the plaintiff to show that the title of the recovering party is superior, that the actions were reasonably defended, and that the costs were fairly incurred; *Ryerson v. Chapman*, 6 Me. 557; *Tiernay v. Whiting*, 2 Colo. 620, we have elsewhere considered this subject, ante, Vol. II, § 1526; see also, *Morgan v. Muldoon*, 82 Ind. 347; *Browning v. Stillwell*, 86 N. Y. S. 707, that the judgment is where the covenantor is duly notified to defend.

⁶⁹ *Wines v. Woods*, 109 Ind. 291, 10 N. E. 399.

⁷⁰ *Skinner v. Moye*, 69 Ga. 476.

CHAPTER XCVII.

DAMAGES.

Sec.	Sec.
1960. Scope of chapter.	1983. Special damages—Expenses of trial.
1961. Damages generally.	1984. Earning capacity — Impairment.
1962. Presumption as to damages.	1985. Earning capacity—Special employment.
1963. Burden of proof.	1986. Earning capacity diminished —Proof under general allegations.
1964. Burden of proof—Open and close.	1987. Injury—Proof of items of damages.
1965. Burden of proof — Unliquidated damages.	1988. Injury—Permanent.
1966. Burden of proof — Sutherland's rule.	1989. Injury—Aggravating disease.
1967. Presumptions against party—Withholding of proof.	1990. Plaintiff's occupation—Proof as affecting damages.
1968. Prima facie case.	1991. Physical and mental pain and suffering.
1969. Damnum absque injuria.	1992. Pain and suffering — How proved.
1970. Injuria sine damno—Exceptions.	1993. Injury to property—Earning capacity.
1971. Injury from proper exercise of lawful right.	1994. Profits as damages.
1972. Infringement of legal right as a basis of a cause of action.	1995. Wrongful death — Proof of damages.
1973. Legal measurements for estimating damages.	1996. Exemplary or punitive damages.
1974. Nominal damages.	1997. Exemplary damages—Proof of defendant's financial standing.
1975. Damages—Pleading.	1998. Absence of pecuniary basis—Jury estimates.
1976. General damages particularly pleaded.	1999. Limitations — Assessment by jury.
1977. Special damages.	2000. Breach of contract—Liquidated damages.
1978. Special damages — Proximate results.	2001. Proof when a character is in issue.
1979. Special damages — Pleading and proof.	
1980. Special damages—Pleading insufficient to admit proof.	
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Sec.	Sec.
2002. Proof of character as affecting damages.	2005. Mitigation of damages—Illustrations.
2003. Proof of character—Mitigation of damages.	2006. Proof of damages—Opinion of witnesses.
2004. Aggravation of damages—Illustrations.	2007. Proof of damages—Opinion of witnesses—Exceptions.

§ 1960. **Scope of chapter.**—It is not within the scope of this work to treat generally the substantive law of damages. The discussion of the subject in this chapter will be limited, except incidentally, to the introduction and application of evidence on the question of the recovery of damages that may apply to different classes of cases and to subjects that cannot be treated in separate chapters. The object here is to state the rules governing the production and admissibility of evidence which in any wise affect the recovery of damages or enhance or mitigate the amount of the recovery. This treatment of the subject will also involve questions as to burden of proof and presumptions as well as damages that are implied in the absence of all proof. It also involves the question of the admissibility of evidence to prove general damages under the facts pleaded and such averments as will admit proof of special damages. It is not the purpose here to consider questions as to the existence of a cause of action in favor of one party or of a liability on the part of the other. The intention is to limit the discussion in this chapter to the sole question of damages after the proofs have been introduced creating a liability for a breach of contract or duty, or on account of negligence or of any wrongful act.

§ 1961. **Damages generally.**—A great part of the common law as practiced in all jurisdictions is mainly remedial in its character, and its remedies, as distinguished from those furnished by equity, are usually exhausted in the awarding of pecuniary remuneration. Its judgments simply make satisfaction or compensation by awarding to a sufferer a certain amount of money by way of damages. However inadequate this may appear the law is generally powerless to do more. But it stands ready in almost every conceivable case to yield its remedial effects for breach of contract or duty, negligence or wrong. Its aid is sought and its remedial power afforded "whenever by virtue of a lawful contract, some right, duty or obligation is created or assumed, or where, by common law or by statute, some legal duty exists or is imposed with reference to the rights of others, then a legal right of action for damages will accrue from the breach of such con-

tractual obligation, or from the violation by negligence, willfulness, etc., of such legally imposed duty, having regard to those rules of law which constitute exceptions to the general rule."¹ The policy of the law in its attempts to grant pecuniary compensation is thus stated by the Supreme Court of New York: "In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy."²

§ 1962. **Presumption as to damages.**—In actions for damages it is not always possible to prove either actual or special damages; but the general rule is that when the evidence shows a clear breach of duty, or the violation of a contract, the law presumes damages. Or, as sometimes stated, every wrong imports a damage. Generally in such cases if no actual or special damages are proved this presumption of law entitles the plaintiff to nominal damages in the absence of proof of any specific injury.³ In an action for damages for

¹ *Joyce Damages*, § 61; *Sedgwick Damages*, §§ 2, 29.

² *Baker v. Drake*, 53 N. Y. 211; *Thayer v. Manley*, 73 N. Y. 305; *United States &c. Co. v. O'Brien*, 143 N. Y. 284; *Smith v. Brown*, 3 Tex. 360; *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489; *Sedgwick Damages*, § 30.

³ *Bagby v. Harris*, 9 Ala. 173; *Adams v. Robinson*, 65 Ala. 586; *Drum v. Harrison*, 83 Ala. 384, 3 So. 715; *Barlow v. Lowder*, 35 Ark. 492; *Browner v. Davis*, 15 Cal. 9; *Attwood v. Fricot*, 17 Cal. 37; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Parker v. Griswold*, 17 Conn. 288; *Nicholson v. New York &c. R. Co.*, 22 Conn. 74; *Watson v. New Milford &c. Co.*, 71 Conn. 442, 42 Atl. 265; *Quillen v. Betts*, 1 Pen. (Del.) 53, 39 Atl. 595; *Plumleigh v. Dawson*, 6 Ill. 544; *McConnel v.*

Kibbe, 33 Ill. 176; *Radloff v. Haase*, 196 Ill. 365, 68 N. E. 729; *Van Velsor v. Seeberger*, 35 Ill. App. 598; *Foster v. Elliott*, 33 Iowa 216; *Madison Co. v. Tullis*, 69 Iowa 720, 27 N. W. 487; *Rosenbaum v. McThomas*, 34 Ind. 331; *Wimberg v. Schwegeman*, 97 Ind. 528; *Coffin v. State*, 144 Ind. 578, 43 N. E. 654; *Browning v. Simons*, 17 Ind. App. 45, 46 N. E. 86; *City of Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463; *Dudley v. Tilton*, 14 La. Ann. 283; *Bourdette v. Steward*, 107 La. Ann. 258, 31 So. 630; *Butman v. Hussey*, 12 Me. 407; *Seldensparger v. Spear*, 17 Me. 123; *Winslow v. Lane*, 63 Me. 161; *Howard v. Wilmington &c. R. Co.*, 1 Gill. (Md.) 311, 344; *Woodman v. Tufts*, 9 N. H. 88; *Cowles v. Kidder*, 24 N. H. 364; *Gerrish v. New Market &c. Co.*, 30 N. H. 478; *Tillotson v. Smith*, 32 N. H. 90; *Amos*

breach of contract where all the allegations as to special damages were stricken out on motion, it was held error to dismiss the action for the reason that the law presumed damages from the breach of the contract as alleged in the pleading. Every contract founded on a valuable consideration is presumed to be of some value to the party from whom the consideration moved, and the allegation of the breach of such a contract is sufficient to imply damages.⁴ The law always presumes actual damages sufficient to sustain the action. And as stated in one case, "the fact that the plaintiff insists upon substantial damages, and neither tries his case upon a claim of, asked for, or would have been satisfied with nominal damages, cannot alter the rule."⁵

§ 1963. **Burden of proof.**—The general rule in actions for damages, as to the burden of proof, is the same as in other classes of cases, that is, the burden of the issue rests upon the party holding

Keag & Co. v. Goodale, 46 N. H. 53; Blodgett v. Stone, 60 N. H. 167; Newhall v. Ireson, 8 Cush. (Mass.) 595, 599; Appleton v. Fullerton, 1 Gray (Mass.) 186; Rose v. Louisville & C. R. Co., 70 Miss. 725, 12 So. 825; Jones v. Hannovan, 55 Mo. 462; Hahn v. Cotton, 136 Mo. 216, 37 S. W. 919; State v. Rayburn, 22 Mo. App. 303; Allaire v. Whitney, 1 Hill (N. Y.) 484; Crooker v. Bragg, 10 Wend. (N. Y.) 260; Graver v. Sholl, 42 Pa. St. 58; Clark v. Pennsylvania R. Co., 145 Pa. 438, 22 Atl. 989; McDaniel v. Terrill, 1 Nott. & McC. (S. Car.) 343, 207; Champion v. Vincent, 20 Tex. 811; Paul v. Slason, 22 Vt. 231; Fullam v. Stearns, 30 Vt. 443; Green Bay & Co. v. Kaukauna & Co., 112 Wis. 323; Whittemore v. Cutter, 1 Gall. (U. S.) 429; Webb v. Portland Mfg. Co., 3 Sumn. (U. S.) 189; Whipple v. Cumberland Mfg. Co., 2 Story (U. S.) 661; Ashby v. White, 2 Ld. Raym. 938, 948; Whittemore v. Cutter, 1 Gall. (U. S.) 429; Clifton v. Hooper, 6 A. & E. (N. S.) 468;

Barker v. Green, 2 Bing. 317; Williams v. Mostyn, 4 M. & W. 145; Embrey v. Owen, 6 Exch. 353; Turner v. Starling, 2 Lev. 50, Vent. 25; Hunt v. Dowman, Cro. Jac. 478, 2 Roll. 21; Herring v. Finch, 2 Lev. 250; Harman v. Taffenden, 1 East 555; Drewe v. Coulton, 1 East 563.

⁴Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Browner v. Davis, 15 Cal. 9; Hancock v. Hubbell, 71 Cal. 537, 1 Pac. 618; Howard v. Wilmington & C. R. Co., 1 Gill. (Md.) 311; First Nat. Bank v. Western U. Tel. Co., 30 Ohio St. 555; Moore v. Anderson, 30 Tex. 225.

⁵Blanchard v. Burbank, 16 Ill. App. 375.

⁶Van Velsor v. Seeberger, 35 Ill. App. 598. It would seem from the result as well as from the expression of the adjudicated cases that the damages which the law presumes are nominal only: Foster v. Elliott, 33 Iowa 216; see post § 1963.

the affirmative. The issue is tendered or made by the plain averment of the truth of certain facts on which the cause of action depends, by the complaining party, and by direct denial by the opposite party. The party thus making the allegation, ordinarily is required to sustain it by proof whenever a denial is interposed by his opponent. This burden remains upon the affirmant of the issue throughout the entire course of the action, although the duty of producing or going forward with evidence may be shifted by the state of the pleadings or by the proofs as they are introduced or by presumptions of law. The burden of proof must be distinguished from the weight of the evidence, or the duty of going forward with evidence. Thus, the law may presume the existence of certain matters of fact which will require the production of evidence to meet and overcome it or such presumed facts will be sufficient to sustain a recovery. But where no such presumptions prevail then the burden is on the complaining party to make some proof of the existence of the facts as alleged to entitle him to a recovery before his adversary is required to produce any evidence. The rule as sometimes stated is that the burden of proof is on the party against whom a judgment must be rendered in the absence of all evidence.⁷ Under this rule a party alleging a breach of contract or of duty, or injury from negligence is required to prove the breach either of contract or duty or the negligence as alleged; but, as elsewhere shown, he is not always required to make proof of actual damages to entitle him to recover, for the reason that when such breach or injury is shown the presumption of law usually supplies the proof of actual damages,⁸ at least to the extent of nominal damages. The rule tersely stated is that the burden of proof is upon the party claiming damages from another as compensation for an injury or loss, to prove such facts as are necessary to ascertain

⁷ *Judah v. Trustees &c.*, 23 Ind. 272; *Kent v. White*, 27 Ind. 390; *Veiths v. Hagge*, 8 Iowa 163; *Leete v. Gresham &c. Ins. Co.*, 8 Eng. L. & Eq. 578; *Huckman v. Fernie*, 3 M. & W. 510.

⁸ *Clarke v. Western U. Tel. Co.*, 112 Ga. 633; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Central Bridge Co. v. Butler*, 2 Gray (Mass.) 132; *Windle v. Jordan*, 75 Me. 149; *Collier v. Jenks*, 19 R. I. 493, 34 Atl.

998; *Heinemann v. Heard*, 62 N. Y. 448, 455; *Lamb v. Camden &c. Co.*, 46 N. Y. 271; *Calumet &c. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Chicago &c. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357; *Quaife v. Chicago &c. R. Co.*, 48 Wis. 513, 4 N. W. 658; *Hamilton v. Great Falls &c. R. Co.*, 17 Mont. 334, 42 Pac. 860; 1 *Jones Ev.*, §§ 174, 178; see also, Vol. I, § 128, et seq.

the extent of his loss with reasonable certainty, and failing to do this he is entitled to nominal damages only.⁹

§ 1964. Burden of proof—Open and close.—The party having the affirmative issue, or the party on whom the burden of proof rests, is usually entitled to the right to open and close the case both as to evidence and argument. Neither this burden nor this privilege is always with the plaintiff. In actions for damages there may be cases and instances in which the plaintiff will be relieved from the burden of proving the allegations of his complaint, and hence he will be deprived of the right to open and close. In the preceding sections the rule has been stated that it is not always necessary to make proof of damages, but that damages will be presumed; and in such cases the plaintiff may be relieved of the necessity of proving damages. It therefore follows that in this class of cases where the defendant fails to file a general denial, or where he admits the fact and answers affirmative matter, and the damages to be recovered are nominal only, or where they are mere matters of computation, or the amount is admitted or not disputed, the plaintiff may be relieved of the necessity of making any proof, the burden may fall upon the defendant, and with it may go the right to open and close the case.¹⁰

§ 1965. Burden of proof—Unliquidated damages.—The rule as to the burden of proof and the consequent right to open and close cases where the damages are unliquidated has given rise to difficulties in practice and some contrariety in the decisions. The rule in this class of cases is stated by Mr. Greenleaf as follows: "The difficulty in determining this point exists chiefly in those cases, where the action is for unliquidated damages, and the defendant has met

⁹ *Seaboard Mfg. Co. v. Woodson*, 178; *Doe v. Barnes*, 1 Moo. & Rob. 98 Ala. 378; *Howard v. Taylor*, 99 Ala. 450, 13 So. 121; *Hair v. Barnes*, 26 Ill. App. 580; *Brown v. Emerson*, 18 Mo. 103; *Missouri Val. &c. Ins. Co. v. Kelso*, 16 Kans. 481.

¹⁰ *Fowler v. Coster*, 1 Moo. & Mal. 241; *Cooper v. Wakely*, 1 Moo. & Mal. 248; *Cotton v. James*, 1 Moo. & Mal. 273; *Robey v. Howard*, 2 Stark. 487; *Stansfeld v. Levy*, 3 Stark. 8; *Lacon v. Higgins*, 3 Stark. 178; *Doe v. Barnes*, 1 Moo. & Rob. 386; *Doe v. Smart*, 1 Moo. & Rob. 476; *Hodges v. Holder*, 3 Campbell 366; *Pearson v. Coles*, 1 Moo. & Rob. 206; *Jackson v. Hesketh*, 2 Stark. 454; *Holtum v. Lotum*, 6 Car. & P. 725; *Scott v. Hull*, 8 Conn. 296; *Norris v. Insurance Co. &c.*, 3 Yates (Pa.) 84; *McCormick &c. Co. v. Gray*, 100 Ind. 285; see ante, §§ 133, 134.

the whole case with an affirmative plea. In these actions the practice has been various in England; but it has at length been settled by a rule, by the fifteen judges, that the plaintiff shall begin in all actions for personal injuries, libel and slander, though the general issue may not be pleaded, and the affirmative be on the defendant. In actions upon contracts, it was, until recently, an open question of practice; having been sometimes treated as a matter of right in the party, and at other times regarded as resting in the discretion of the judge, under all the circumstances of the case. But it is now settled, in accordance with the rule adopted in other actions. In this country it is generally deemed a matter of discretion, to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, or to be settled by the jury upon such evidence as may be adduced, and not by computation alone."¹¹

§ 1966. Burden of proof—Sutherland's rule.—Mr. Sutherland, in his valuable work on damages, states the rule on this subject as follows: "An important consideration at the outset of the inquiry of damages, and at every step in its progress, is the burden of proof, or to what extent the plaintiff has made a *prima facie* showing. If his action is upon an express promise to pay money, the establishment of the right to maintain it involves a *prima facie* showing of the amount due according to the purport and tenor of the promise.

¹¹ 1 Greenleaf Ev., § 76, in support of this rule Mr. Greenleaf cites the following cases: *Carter v. Jones*, 6 Car. & P. 64; *Bedell v. Russell*, Ry. & M. 293; *Fowler v. Coster*, 1 Moo. & Mal. 241; *Revett v. Braham*, 4 Term R. 497; *Burrell v. Nicholson*, 6 Car. & P. 202; *Hoggett v. Exley*, 9 Car. & P. 324; *Mercer v. Whall*, 9 Jur. 576, 5 I. B. 447; *Young v. Balrner*, 1 Esp. 103; *Robey v. Howard*, 2 Stark. 487; *Stansfeld v. Levy*, 3 Stark. 8; *Lacon v. Higgins*, 3 Stark. 178; *Cotton v. James*, 1 M. & M. 273; *Scott v. Hull*, 8 Conn. 296; see also, *Camp v. Brown*, 48 Ind. 575; *Rouyer v. Miller*, 16 Ind. App. 183, 44 N. E. 51; *Johnson v. Josepha*, 75 Me. 544; Vol. I., § 134, in some of the American jurisdictions it is held that in cases of slander and libel, where the speaking or the publication is admitted and a plea of justification filed, the burden is upon the defendant, and he has the right to open and close; *Gaul v. Fleming*, 10 Ind. 253; *Tull v. David*, 27 Ind. 377; *Heilman v. Shanklin*, 60 Ind. 424; but see, *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425.

Matter of discharge or reduction must be shown by the defendant. A promise, not fulfilled, or something else which is definite in quantity and capable of valuation, presents at first, only the one question of value at the time when the contract should have been performed."¹²

§ 1967. Presumptions against party—Withholding of proof.—

The party who purposely or fraudulently withholds or destroys evidence is not in a position to expect or ask favors at the hands of a court or jury;¹³ and where this is done all legal intendments are taken most strongly against him. And every proper presumption is made against a wrongdoer.¹⁴ This is true, also, where he fails or even refuses to call a witness who is in a position to know the facts where such witness is in the employ or under the control of the interested party, and not equally accessible to the other party. This rule was applied in an action for damages against a defendant for the death of a horse caused by one of the defendant's employees where he failed to introduce him as a witness or account for his absence, and it was manifest that he alone knew the real cause of the death of the animal.¹⁵ And where a person was charged with the conversion of goods, in the absence of a showing of the actual value or the quality, it was held that the wrongdoer could not complain if it were assumed to be of the highest price or best quality.¹⁶

§ 1968. Prima facie case.—The plaintiff is entitled to recover damages when he has proved the facts alleged in his declaration to the extent of making a prima facie case. He is only called on in the first instance to make such proof as will entitle him to a recovery if no evidence is offered to meet his prima facie case; his prima facie case will prevail unless met by evidence of his adversary. But in this state of a case the defendant is not bound to produce more than sufficient evidence to meet the prima facie case made by

¹² 2 Sutherland Dam., § 438.

¹³ Preston v. Leighton, 6 Md. 88; Hubbert v. Borden, 6 Whart. (Pa.) 79; Jones v. Murphy, 8 W. & S. (Pa.) 275.

¹⁴ Whiteside v. Connolly, 21 Misc. (N. Y.) 19; Gray v. Halg, 20 Beav. 219.

¹⁵ Postal Tel. & Co. v. Douglass. 96 Ga. 816; Schwieler v. New York

&c. R. Co., 90 N. Y. 558; see also Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 68 N. E. 609; Darnell v. South Carolina &c. R. Co., 4 Rich. L. (S. Car.) 329, 55 Am. Dec. 678.

¹⁶ Curry v. Wilson, 48 Ala. 638; Mortimer v. Cradock, 7 Jur. (O. S.) 45.

the plaintiff; he is not required to produce a preponderance of evidence to overcome a *prima facie* case, as this would be shifting the burden of proof, whereas it remains with the plaintiff throughout. Hence a *prima facie* case is defeated by evidence of equal weight and without preponderance. The burden of sustaining the affirmative of the issue involved is upon the party alleging the facts constituting the issue, and usually remains throughout the trial; the mere giving of evidence sufficient to establish a *prima facie* case does not necessarily relieve the plaintiff of this burden. It remains for the jury to determine from all the evidence whether or not the *prima facie* case has been met or whether, under these rules, the *prima facie* case prevailed.¹⁷

§ 1969. *Damnum absque injuria*.—The rules that damages are presumed from a breach of contract or of duty, and that the presumption of damages arises from proof of injury, have their exceptions and limitations. Damages do not naturally and necessarily follow from every injury; nor does every breach of duty necessarily imply a right to recover damages. The law recognizes that there are damages without legal injury, and this is denominated *damnum absque injuria*. A complaining party, in many instances, may show that he has been injured, but the damages resulting from such injury may be such as that in law no action can be maintained therefor; Broom defines this phrase as follows: "*Damnum absque injuria* is a loss which does not give rise to an action of damages against the party causing it."¹⁸ Under this rule if the proof shows that the complaining party suffers an injury and if the proof further shows that no person is legally liable for the injury inflicted, then there can be no recovery. The rule is aptly stated by an English court as follows: "If a man sustains damages by the wrongful act of another he is entitled to a remedy; but to give him that title two things must occur; damage

¹⁷ *Scott v. Wood*, 81 Cal. 398; *State v. Flye*, 26 Me. 312; *Tarbox v. Eastern & Co.*, 50 Me. 339, 345; *Small v. Clewley*, 62 Me. 155; *Powers v. Russell*, 13 Pick. (Mass.) 69, 76; *Morgan v. Morse*, 13 Gray (Mass.) 150, 152; *Nichols v. Munsel*, 115 Mass. 567; *Shepardson v. Perkins*, 60 N. H. 76; *Blodgett v. Cummings*, 60 N. H. 115; *Heinemann v. Heard*, 62 N. Y. 455; *Heilman v. Lazarus*, 90 N. Y. 672; *Tingue v. Village of Port Chester*, 101 N. Y. 294; 1 *Wharton Ev.*, § 357; 1 *Jones*, §§ 174, 175, 177.

¹⁸ *Broom Legal Max.*, 195.

to himself, and a wrong committed by the other party."¹⁹ "The doctrine of *damnum absque injuria* embraces a multitude of cases where serious inconvenience and damage arise without a corresponding right to recover satisfaction in a judicial proceeding. The owner of property within the proper exercise of dominion may do many acts resulting in damage to others and no action will lie for such acts."²⁰ Familiar illustrations of this principle are found in cases in some jurisdictions denying a right of action and the consequent recovery of damages where buildings or walls have been erected obstructing windows in the buildings of other persons, commonly known as the doctrine of obstructing ancient lights; a person placing windows in his residence overlooking the privacy of his neighbor; terminating a license before it has ripened into an easement; erecting a mill in close proximity to that of another by reason of which the patronage of the first is diverted; establishing a competing school or starting a similar enterprise or business to the injury of that already established. Damages in these and many other cases similar in principle, may be said naturally to follow and yet they are without legal injury, being without a breach of legal duty on the part of the defendant.²¹

§ 1970. *Injuria sine damno*—Exceptions.—The maxim *injuria sine damno* is the converse of the maxim *damnum absque injuria*. This maxim is the embodiment of the principle that the wrongful act

¹⁹ *Rex v. Commissioners &c.*, 8 B. & C. 355; *Wittich v. First Nat. Bank*, 20 Fla. 843; 1 *Joyce Damages*, §§ 71, 72, and the application of the principle in the cases cited; 1 *Sutherland Damages*, § 3; 1 *Sedgwick Damages*, § 32.

²⁰ *Friend v. United States*, 30 Ct. Cl. (U. S.) 94.

²¹ *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Pixley v. Clark*, 32 Barb. (N. Y.) 268; *Auburn &c. R. Co. v. Douglass*, 9 N. Y. 444; *Chenango &c. Co. v. Lewis*, 63 Barb. (N. Y.) 111; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Palmer v. Wetmore*, 2 Sandf. (N.

Y.) 316; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Shipman v. Beers*, Abb. N. Cas. (N. Y.) 435; *Shell v. Kemmerer*, 13 Phila. Super. Ct. (Pa.) 502; *Hurwitz v. Hurwitz*, 1 Misc. (N. Y.) 353; *Phelps v. Nowlen*, 72 N. Y. 39; *Chenango &c. Co. v. Paige*, 83 N. Y. 178; *Barkley v. Wilcox*, 86 N. Y. 140; *Kliff v. Youmans*, 86 N. Y. 324; *Radcliffe v. Mayor &c.*, 4 N. Y. 195; *Doyle v. Lord*, 39 N. Y. Super. Ct. 421; *Wyatt v. Harrison*, 3 B. & A. 871; *Partridge v. Scott*, 3 M. & W. 220; *Penry, In re*, 7 El. & Bl. 660; *Reg. v. Barry*, 2 Can. Exch. 333; *Pollock Torts*, § 131.

of a person afford no ground for the recovery of damages to another unless he is injured by such wrongful acts. In speaking of the contrast in these maxims Mr. Sutherland says: "When we say that a person who suffers an injury which does not arise from any other person's fault has no cause of action, a self evident proposition is stated; and equally so when we say that no person has a cause of action against another for the latter's wrongful act unless he is injured by it. The former precludes any action for lawful acts lawfully done, though some actual loss or hurt results to some person therefrom."²² This maxim *injuria sine damno* or *injuria absque damno*, like many other general rules, has its exceptions and limitations. It is elsewhere shown in this chapter that the bare infringement of a legal right may be sufficient for the recovery of nominal damages even where no real injury is shown.²³ But another and a general exception to this maxim is found in the principle as stated by an English court: "Whenever any act injures another's right and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury."²⁴ The enforcement of this principle may be of the highest interest to the person whose right is invaded without any proof whatever of actual damages. Indeed it may be the only method by which he can assert and maintain his right as against a wrongdoer, for the reason that a continued exercise of the wrongful acts might sweep away his claim of right or title and give to the wrongdoer a right acquired by his wrongful acts. It is therefore evident that the recovery of the smallest possible amount in such cases is as effectual as the recovery of a large sum, as it would establish once for all the complainant's right or title.²⁵ The objection that courts

²¹ *Sedgwick Damages*, § 32; 1 *Sutherland Damages*, § 3; 1 *Joyce Damages*, §§ 4, 56, 74; *Anderson Law Dict.* 310; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Heidt v. Minor*, 89 Cal. 115; *Blanchard v. Burbank*, 16 Ill. App. 375; *Davies v. Jenkins*, 1 D. & L. 321; *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith Lead. Cas. 264; *Paul v. Slason*, 22 Vt. 231; *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 45; *Mason v. Hill*, 3 B. & A. 304, 5

B. & A. 1; *Butman v. Hussey*, 12 Me. 407; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S.) 661.

²² See post, §§ 1972, 1974.

²³ *Mellor v. Spateman*, 1 Saund. 338, 346, a.

²⁴ *Searles v. Cronk*, 38 How. Pr. (N. Y.) 320; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269; *Blanchard v. Baker*, 8 Me. 253; *Delaware &c. Co. v. Torrey*, 33 Pa. St. 143; *Graver v. Sholl*, 42 Pa. St. 58; *Cole v. Drew*,

will not entertain actions for the recovery of mere nominal damages or cases where the damages are insignificant or too small to be assessed, will not avail where the action itself shows that its purpose is to maintain a right rather than to recover a specific sum as damages. The maxim *de minimus non curat lex* is not applied to actions brought for injuries from the invasion of a right.²⁶ The same principle is expressed in an early Maine case: "When one encroaches upon the inheritance of another, the law gives a right of action, and even if no actual damages are proved, the action will be sustained and nominal damages recovered; because unless this could be done the encroachment acquiesced in, might ripen into a legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title."²⁷

§ 1971. Injury from proper exercise of lawful right.—As a corollary from the maxim *injuria sine damno* the rule follows that there is no right of action for damages for the proper exercise of a lawful right. Under this rule the proofs may show that the complaining party has been greatly injured in the use of his property or property rights, but if the proofs show that such injury resulted from the complainant from the proper and careful exercise of a lawful right on the part of the defendant there can be no recovery of damages. This rule has been variously stated as follows: "An act done under a lawful authority, if done in a proper manner, will not, as a general rule, subject the party doing it to an action for the consequences which may follow from it." Or, as stated by the same court: "An action will not lie for a damage resulting from a lawful act." "The maxim that a man must so make use of his own property as not to injure his neighbor, is undoubtedly to be so limited in its applica-

44 Vt. 49; *Moore v. New York & C. R. Co.*, 4 Misc. (N. Y.) 132; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Herrick v. Stover*, 5 Wend. (N. Y.) 580; *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *Blodgett v. Stone*, 60 N. H. 167; *Ashby v. White*, 2 Ld. Raym. 938, 955; *Sedgwick Damages*, §§ 40, 44, 45.

²⁶ *Fullman v. Stearns*, 30 Vt. 443; *Cole v. Drew*, 44 Vt. 49; *White-*

more v. Cutter, 1 Gall. (U. S.) 42; *Dudley v. Tilton*, 14 La. Ann. 283.

²⁷ *Hathorne v. Stinson*, 12 M. 183; *Seldensparger v. Spear*, 17 M. 123; *Moore v. New York El. R. Co.*, 4 Misc. (N. Y.) 132; *Maitland Manhattan R. Co.*, 9 Misc. (N. Y.) 616.

²⁸ *Donovan v. City of New Orleans*, 11 La. Ann. 711; *Stewart State*, 20 Md. 97; *Mahan v. Brown*, 13 Wend. (N. Y.) 261.

cation as not to restrain the owner of property from a prudent and reasonable exercise of his right of dominion. If, in such an exercise of his right, another sustains damage it is *damnum absque injuria*."²⁹

"No principal of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is a wrong for which there is no liability. This must be so or every man would be at the mercy of his neighbor in the use or enjoyment of his own. No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence, and where the act is not done maliciously."³⁰ Judge Cooley states the rule as follows: "It is *damnum absque injuria* also if through the lawful and proper exercise by one man of his own rights a damage results to another even though he might have anticipated the result and avoided it. That which is right and lawful for one man to do cannot furnish the foundation for an action in favor of another."³¹ So, in many instances, where the proof shows that the acts done are authorized by law, or are done pursuant to a statute, there can be no recovery for the injury suffered. This rule is stated thus: "A legislature may and often does authorize, and even direct, acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances unless the power has been exceeded."³²

²⁹ *Gardner v. Heartt*, 2 Barb. (N. Y.) 165.

³⁰ *Barnard v. Sherley*, 135 Ind. 547, 34 N. E. 600; *Barnard v. Shirley*, 151 Ind. 160, 47 N. E. 671; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 99; *Howland v. Vincent*, 10 Metc. (Mass.) 371; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453; *National &c. Co. v. Minnesota &c. Co.*, 57 Mich. 83, 23 N. W. 781; *Carson v. Western R. Co.*, 8 Gray (Mass.) 423; *Pennsylvania &c. Co. v. Sanderson*, 113 Pa. St. 126; 6 Atl. 453; *McMillin v. Staples*, 36 Iowa 532; *Morris &c. R.*

Co. v. Newark, 10 N. J. Eq. 352; *Radcliff v. Mayor &c.*, 4 N. Y. 195; *Bellinger v. New York &c. R. Co.*, 23 N. Y. 42; *Goodale v. Tuttle*, 29 N. Y. 459; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316.

³¹ Cooley Torts, p. 81 (93).

³² *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578; *Chatfield v. Wilson*, 28 Vt. 49; *Patton v. Holland*, 17 Johns. (N. Y.) 92; *Cogswell v. New York &c. R. Co.*, 103 N. Y. 10; *Transportation Co. v. Chicago*, 99 U. S. 635; *New Haven &c. Co. v. New Haven*, 72 Conn. 276, 44 Atl. 229; *Highway Com'rs &c. v.*

§ 1972. **Infringement of legal right as a basis of a cause of action.**—Whenever a legal right is violated the law recognizes an injury and gives an absolute claim to damages. What are termed legal rights are those protected by law. The law affords an action for damages in such cases for the reason that an invasion of a legal right threatens the right itself and may ultimately impair the enjoyment of such right. In such cases it is not an absolute requisite that the proof should show actual damages as the legal implication of damage remains. The legal propositions stated by Mr. Sutherland are collected by a New York case and stated thus: "For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Every invasion of such right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence,—a legal injury; this entitles the injured party to compensation. If there is no inquiry as to actual damages, and none appear on inquiry, the legal implication of damage remains. The damages which the law thus infers from the infraction of a legal right are absolute; they cannot be controverted; they are the necessary consequent. The act complained of may produce no actual injury; it may be in fact beneficial, by adding to the value of the property or by averting a loss, which would otherwise have happened; yet it will be equally true, in law and in fact, that it was in itself injurious if violative of a legal right. The implied injury is from that circumstance; the fact that beyond violating a right it was not detrimental or was even advantageous, is immaterial to the legal quality of the act itself, 'and the right to recover at least nominal damages' applies to all actions, whether for tort or breach of contract and whether the right is personal or relates to property."³³ *Almond*

Ely, 54 Mich. 173, 19 N. W. 940; *Tate v. Greensboro*, 114 N. Car. 392, 19 S. E. 767; *Robert v. Les Cure &c.*, 9 Queb. 489; *Skinner v. Hartford &c. Co.*, 29 Conn. 523; *Rigney v. City of Chicago*, 102 Ill. 64; *Irwin v. Great So. T. Co.*, 37 La. Ann. 63; *Commissioners &c. v. Withers*, 29 Miss. 21; *Bellinger v. New York &c. R. Co.*, 23 N. Y. 42; *Darlington v. Mayor*, 31 N. Y. 164; *City of Glasgow &c. R. Co. v. Hunter*, L. R. 2 Sc. & D. 78; *Penny v.*

Southeastern R. Co., 7 E. & B. 66; *Hammersmith &c. R. Co. v. Brand*, L. R. 4 H. L. 171; *Allegheny County v. Gibson*, 90 Pa. St. 397; *Coolidge v. United States*, 100 U. S. 346; *Const. Lim.*, pp. 542, 543.

³³ *Moore v. New York &c. R. Co.*, 4 Misc. (N. Y.) 132; *Stein v. Borden*, 24 Ala. 130, 60 Am. Dec. 45; *Ulbricht v. Eufaula &c. Co.*, 86 Ala. 587, 6 So. 78; *Parker v. Griswold*, 17 Conn. 288; *Branch v. Doane*, 1 Conn. 233; *Peck v. Loyd*, 38 Conn. 566; *Plumleigh v. Dawson*, 6 I.

the entire current of judicial decisions now flows in favor of the proposition that a cause of action will accrue for the bare infringement of a legal right, and that in all such cases nominal damages will be awarded without regard to any proof of actual damages.⁵⁴ As said by one court: "Nominal damages are constantly given for the most barren infractions of legal rights, and wholly without reference to the question whether such infractions have resulted in loss to the plaintiff or not."⁵⁵ And it has been held that a party may be entitled

- 544; *Blanchard v. Baker*, 8 Me. 253; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Newhall v. Ireson*, 8 Cush. (Mass.) 595; *Lund v. New Bedford*, 121 Mass. 286; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Welton v. Martin*, 7 Mo. 307; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9; *Williams v. Esling*, 4 Pa. St. 486; *Bower v. Hill*, 1 Bing. N. Cas. 549; *Young v. Spencer*, 10 B. & C. 145; *Hobson v. Todd*, 4 Term R. 71; *Ashby v. White*, 2 Ld. Raym. 938; *Mellor v. Spateman*, 1 Saund. 346, a, b, n. 2; *Wells v. Watling*, 2 W. Bl. 1233; *Weller v. Baker*, 2 Wils. 414; *Pindar v. Wadsworth*, 2 East 154; *Marzetti v. Williams*, 1 B. & A. 415.
- ⁵⁴ *Bagby v. Harris*, 9 Ala. 173; *Adams v. Robinson*, 65 Ala. 586; *Drum v. Harrison*, 83 Ala. 384, 3 So. 715; *Barlow v. Lowder*, 35 Ark. 492; *Warner v. Capps*, 37 Ark. 32; *Browner v. Davis*, 15 Cal. 9; *Empire &c. Co. v. Bonanza &c. Co.*, 67 Cal. 406, 7 Pac. 810; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Hammond v. Solriday*, 8 Colo. 610, 9 Pac. 781; *Parker v. Griswold*, 17 Conn. 288; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Greensborough v. McGibbony*, 93 Ga. 672, 20 S. E. 37; *Foote v. Malony*, 115 Ga. 985; *Bur- nap v. Wight*, 14 Ill. 301; *McConnell v. Kibbe*, 33 Ill. 175; *Dent v. Davi- son*, 52 Ill. 109; *Brant v. Gallup*, 111 Ill. 487; *Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729; *Williamson Co. v. Farson*, 199 Ill. 71, 64 N. E. 1086; *State v. Hammond*, 72 Ind. 472; *Madison Co. v. Tullis*, 69 Iowa 720, 27 N. W. 487; *Winslow v. Lane*, 63 Me. 161; *Webb v. Gross*, 79 Me. 224, 9 Atl. 612; *Brown v. Emerson*, 18 Mo. 103; *Owen v. O'Reilly*, 20 Mo. 603; *Jones v. Hannovan*, 55 Mo. 462; *State v. Dunn*, 60 Mo. 64; *Hahn v. Cotton*, 136 Mo. 226, 37 S. W. 919; *Clay v. Board*, 85 Mo. App. 287; *Cravens v. Hunter*, 87 Mo. App. 456; *Northrop v. Hill*, 57 N. Y. 351; *New York &c. R. Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Pierce v. Hosmer*, 66 Barb. (N. Y.) 345; *Daw v. Humbert*, 91 U. S. 294; *Watts v. Phoenix &c. Ins. Co.*, 16 Blatch. (U. S.) 228; *Marzetti v. Williams*, 1 B. & A. 415; *Felze v. Thompson*, 1 Taunt. 121; *Barker v. Green*, 2 Bing. N. Cas. 317; *Clifton v. Hooper*, L. R. 6 Q. B. 468; *Nosotti v. Page*, L. R. 10 C. B. 643; 1 Sedgwick Damages, § 98.
- ⁵⁵ *State v. Rayburn*, 22 Mo. App. 303; *Jones v. Hannovan*, 55 Mo. 462; *Mize v. Glenn*, 38 Mo. App. 98; *Board &c. v. Perry*, 69 Conn. 461, 37 Atl. 1059; *Foster v. Elliott*, 33 Iowa 216; *Diers v. Edwards*, (Ky.) 63 S. W. 276; *Bourdette v. Seward*, 107 La. Ann. 258, 31 So. 630; *Webb v. Gross*, 79 Me. 224, 9 Atl. 612; *Whitman v. Merrill*, 125 Mass. 127;

to recover nominal damages for the invasion of a right even when the proof shows that the complainant was benefitted by the acts complained of.³⁶ The rule, it has been held, applies to a breach of contract where the performance by the plaintiff would be a positive injury to him.³⁷

§ 1973. Legal measurements for estimating damages.—Under the rule that the evidence must correspond with and support the allegations of the complaint it follows that the evidence in each separate case varies with the nature of the facts stated. But while the evidence must thus vary to meet the facts alleged in each case the matter of damages may be divided into two classes in respect to the matter of proof. The first embraces such as are fixed by rules of law and measurable by pecuniary valuation; the second, the damages recoverable in cases in which the elements may be considered by the jury without exact and specific rules of law or pecuniary estimate, or any

Hooten v. Barnard, 137 Mass. 36; Todd v. Keene, 167 Mass. 157, 45 N. E. 81; Detroit Gas Co. v. Moreton Truck &c. Co., 111 Mich. 401, 69 N. W. 659; Sloggy v. Crescent, 72 Minn. 316, 75 N. W. 225; Thompson v. New Orleans &c. R. Co., 50 Miss. 315; Blodgett v. Stone, 60 N. H. 167; New Jersey School &c. Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. 397; Pickett v. West Monroe, 47 App. Div. (N. Y.) 629; Meadville &c. Bank v. New York &c. Bank, 77 N. Y. 320; New York &c. Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841; White v. Griffen, 49 N. Car. 139; Tootle v. Clifton, 22 Ohio St. 247; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Pastorious v. Fisher, 1 Rawle (Pa.) 27; Williams v. Esling, 4 Pa. St. 486; Bash v. Bash, 9 Pa. St. 260; Humphrey v. Irvin, (Pa.) 6 Atl. 479; Cronin v. Sharp, 16 Super. Ct. (Pa.) 76; Stevens v. Rogers, 16 Utah 105, 51 Pac. 651; Brown v. Richmond, 27 Vt. 583; Fullam v. Stearns, 30 Vt. 443; Thomas v. Wiesmann, 44 Wis. 339;

Watts v. Phoenix &c. Ins. Co., 1 Blatch. (U. S.) 228; Whipple v. Cumberland Mfg. Co., 2 Story (U. S.) 661; Munroe v. Stickney, 4 Me. 458, 462; Chaffee v. Pease, 1 Allen (Mass.) 537; Stowell v. Lincoln, 11 Gray (Mass.) 434; Basset v. Company, 28 N. H. 438; Woodman v. Tufts, 9 N. H. 88; Tillotson v. Smith, 32 N. H. 90; Blodgett v. Stone, 60 N. H. 167.

³⁶ Excelsior &c. Co. v. Smith, 6 Conn. 56; Pond v. Merrifield, 1 Cush. (Mass.) 181; Mize v. Glenn, 38 Mo. App. 98; Wilson v. Wagar, 26 Mich. 452; Fisher v. Dowling, 5 Mich. 370, 33 N. W. 521; Murphy v. City of Fond du Lac, 23 Wis. 365; Drummond v. City of Eau Claire, 3 Wis. 556, 563, 55 N. W. 1028; Johnson v. Conant, 64 N. H. 109, 136, Atl. 116; Jewett v. Whitney, 43 Me. 242; 3 Sedgwick Damages, § 923; 1 Joyce Damages, § 76.

³⁷ Chamberlain v. Parker, 45 N. Y. 569; Ellisler v. Brooks, 22 Jones & S. (N. Y.) 73.

other precise legal guide for determining the amount. "The inquiry of damages, when it is properly entered upon, whether upon trial of an issue, or mere assessment, presupposes a right of action established, except where actual injury and damage are the gist of the action. In either case a specific cause of injury, stated in the declaration, is assumed; and unless it can be legally assumed the inquiry of damages is premature. On trial the plaintiff is entitled to that assumption when he has introduced proof of that cause which gives him a right to go to the jury upon it; in cases of default or demurrer overruled, the cause stated is admitted by failure to deny it by pleading. If that assumption or admission is maintained the law declares, except in cases where actual injury is the gist of the action, that the plaintiff has sustained some damages. Whether he shall have more than nominal damages depends on whether the case stated and proved or admitted includes the legal measurement of his damages to a larger amount; or, otherwise, whether the required proof to show them has been introduced. In the nature of things, therefore, evidence appropriate to the mere question of damages must relate to and tend to show the extent of the injury, and aid the jury in fixing an equivalent expression in money."²

§ 1974. **Nominal damages.**—There are certain classes of cases in which the plaintiff is entitled to recover nominal damages and the action is not subject to be defeated because of failure to make proof of actual damages. This right to nominal damages may arise from the nature of the action, from which damages will be presumed, or from the failure on the part of the complainant to make definite proof of any actual damages. Of the first class Mr. Sutherland says: "In abstract principle the law is that the person whose rights have been invaded is entitled to compensation proportioned in amount to the injury. The extent of the actual injury, however, is seldom a matter of law; and when it is not, merely showing the wrong or breach of contract which constitutes the injury, will only authorize the court judicially to declare that the party injured is entitled to some damages. If there is no inquiry as to actual damages, or none appear on inquiry, the legal implication of damages remains. This requires some practical expression as the compensation for a technical injury:

² 2 Sutherland Damages, § 437; 185; Berlin v. Thompson, 61 Mo. Baltimore &c. R. Co. v. Fifth Bap. App. 234; Jacksonville v. Loar, 65 1st Church, 137 U. S. 568, 11 S. Ct. Ill. App. 218.

therefore, nominal damages are given, as six cents, a penny, or a farthing, a sum of money that can be spoken of, but has no existence in point of quantity."³⁹ As to the second class, and these are not inclusive, the general rule as established by a large number of cases is that where the proof fails to show actual damages, or, where the proof of actual damages is so indefinite and uncertain that a jury is unable to determine from the evidence the amount of such actual damages, then only nominal damages can be given.⁴⁰ But the law

³⁹ 1 Sutherland Damages, § 9; 1 Joyce Damages, §§ 76-79; Adams v. Robinson, 65 Ala. 586; Barlow v. Lowder, 35 Ark. 492; Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Foster v. Elliott, 33 Iowa 216; Munroe v. Stickney, 48 Me. 462; Lund v. New Bedford, 121 Mass. 286; Hooten v. Barnard, 137 Mass. 36; Fulkerson v. Eads, 19 Mo. App. 620; Paul v. Slason, 22 Vt. 231; Webb v. Portland Mfg. Co., 3 Sumn. (U. S.) 196; Lonsdale Co. v. Moles, 2 Cliff. (U. S.) 538.

⁴⁰ Adams v. Robinson, 65 Ala. 586; Drum v. Harrison, 83 Ala. 384, 3 So. 715; Browner v. Davis, 15 Cal. 9; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Green v. Weaver, 63 Ga. 302; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; City of Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37; Wilcus v. Kling, 87 Ill. 107; Peoria &c. R. Co. v. Peoria &c. R. Co., 105 Ill. 110; Chicago &c. R. Co. v. Town of Cicero, 157 Ill. 48, 41 N. E. 642; Radloff v. Haase, 196 Ill. 365, 63 N. E. 729; Van Velsor v. Seiberger, 59 Ill. App. 322; Fox v. Wray, 56 Ind. 423; Atkins v. Van Buren &c. Tp., 77 Ind. 447; Rhine v. Morris, 96 Ind. 81; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Browning v. Simons, 17 Ind. App. 45, 46 N. E. 86; Carl v. Granger Coal Co., 69 Iowa 519, 29 N. E. 437; Williams v. Brown, 76 Iowa 643, 41 N. W. 377; Missouri Val. &c. Ins. Co. v. Kelso, 16 Kans. 481; Diers v. Edwards, (Ky.) 63 S. W. 276; Wilde v. City of New Orleans, 1 La. Ann. 15; Burbank v. Gould, 1 Me. 118; Howard v. Wilmington &c. R. Co., 1 Gill. (Md.) 311; Hagan v. Riley, 12 Gray. (Mass.) 515; McAnean v. Jewett, 10 Allen (Mass.) 151; Noble v. Hand, 163 Mass. 289, 39 N. E. 1020; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Todd v. Keene, 167 Mass. 157, 45 N. E. 81; Mitchell v. Shuert, 16 Mich. 444; Cowley v. Davidson, 10 Minn. 392; Whitehead v. Ducker, 11 Sm. & M. (Miss.) 98; Barrie v. Seidel, 30 Mo. App. 559; Middleton v. Moore, 30 Mo. App. 627; Dulaney v. St. Louis &c. Co., 42 Mo. App. 659; Weber v. Squier, 51 Mo. App. 601; Cravens v. Hunter, 87 Mo. App. 456; Richardson v. Jones, 1 Nev. 405; Truckee Lodge &c. v. Wood, 14 Nev. 293; French v. Bent, 43 N. H. 448; Shaw v. Wallace, 25 N. J. L. 453; Gerl v. Poidebard &c. Co., 57 N. J. L. 432, 31 Atl. 401; Jurnick v. Manhattan &c. Co., 66 N. J. L. 380, 43 Atl. 681; Conger v. Weaver, 20 N. Y. 140; Chamberlain v. Parker, 4 N. Y. 569; Horton v. Bauer, 129 N. Y. 148, 29 N. E. 1; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Goulding v. Hewitt, 2 Hill (N. Y.) 644; Devendorf v. Wert, 42 Barb. (N. Y.) 227; Niendorff v. Manhattan R. Co., 38 N. Y. S. 690; Union Press v. N. Y. &c. Co., 54 N. Y. S. 807; Bond v.

sometimes recognizes nominal damages as substantial; in such cases some courts have denominated this as necessary damages. The rule seems to be that where an action is necessary to establish or maintain a right where no actual damages have been sustained and only a nominal sum can be given, it is then called real or necessary damages. The rule is thus stated by one court: "This necessary damage is actual as distinguished from the mere nominal damage involved in a purely technical and harmless breach of contract, or in some casual and inoffensive tort; but it is nominal as distinguished from any specific damage suffered and proved. In certain cases some damage results from a mere invasion of the plaintiff's rights, and its amount, not being determinable by proof, must be comparatively small and in that sense nominal."⁷¹ This rule perhaps finds its best illustrations in cases of naked trespasses to real estate where nominal damages are recovered where the evidence shows no actual damages, and even where no proof whatever is offered of any actual damages.⁴²

- Hilton, 47 N. Car. 149; Anders v. Ellis, 87 N. Car. 207; First Nat. Bank &c. v. Western U. Tel. Co., 30 Ohio St. 555; Wilson v. Whitaker, 49 Pa. St. 114; Smith v. Loag, 132 Pa. St. 301, 19 Atl. 137; Humphrey v. Irwin, (Pa.) 6 Atl. 479; Hudson v. Archer, 9 S. Dak. 240, 68 N. W. 541; Seat v. Moreland, 7 Humph. (Tenn.) 575; State v. Ward, 9 Heisk. (Tenn.) 100; Moore v. Anderson, 30 Tex. 224; Laredo v. Russell, 56 Tex. 398; American &c. Asso. v. Hart, 2 Wash. 594; Douglass v. Railroad Co., 51 W. Va. 523; Watts v. Norfolk &c. R. Co., 39 W. Va. 196, 19 S. E. 521; Guinn v. Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87; Hibbard v. Western U. Tel. Co., 33 Wis. 558; Western U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 557; Troy &c. Co. v. Dolph, 138 U. S. 617, 8 S. Ct. 412; Rosenfield v. Express Co., 1 Woods. (U. S.) 131; Watts v. Weston, 62 Fed. 136; Hemingway &c. Co. v. Council Bluffs &c. Co., 62 Fed. 897.
- ⁴² Watson v. New Milford &c. Co., 71 Conn. 442, 42 Atl. 265; Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300; Michael v. Curtis, 60 Conn. 363, 22 Atl. 949; Allen v. Woodruff, 63 Conn. 369, 28 Atl. 532; New York &c. R. Co. v. Rothery, 132 N. Y. 298, 30 N. E. 841; Paul v. Slason, 22 Vt. 231.
- ⁷¹ Parker v. Griswold, 17 Conn. 288; Merriam v. City of Meriden, 43 Conn. 173; Reeder v. Purdy, 41 Ill. 279; Herrington v. Herrington, 11 Ill. App. 121; Kurrus v. Selbert, 11 Ill. App. 319; Spear v. Hubbard, 4 Pick. (Mass.) 143; Clark v. Hart, (Miss.) 3 So. 33; Ross v. New Home &c. Co., 24 Mo. App. 353; Flynt v. Chicago &c. R. Co., 38 Mo. App. 94; Rich v. Rich, 16 Wend. (N. Y.) 663; Dixon v. Clow, 24 Wend. (N. Y.) 188; Searles v. Cronk, 38 How. Pr. (N. Y.) 320; Lyon v. Kramer, 24 Hun (N. Y.) 231; Shannon v. Burr, 1 Hilt. (N. Y.) 39; Blake v. Jerome, 14 Johns. (N. Y.) 406; Harris v. Sneed, 104 N. Car. 369, 10 S. E. 477; Kidder v. Kennedy, 43 Vt. 717; Murphy v. City of Fond du Lac, 23

§ 1975. **Damages—Pleading.**—In actions for damages arising from breach of contract or duty or from negligence, it is not always necessary to aver the actual damages as a matter of pleading. The rule as stated by a law writer on this subject is as follows: "If the contract be broken the plaintiff will be entitled to some damages, however small, whether they be stated or not, for damages will be implied from the very breach itself; and wherever the damages sustained necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated." But as a matter of pleading, where the damages are the principal object of the action, the declaration should at least conclude that the injuries complained of were the damages of the plaintiff in a sum sufficient to cover the damages sustained.⁴³ It was said by one court that "the damages sustained are matters of evidence, and need not be alleged, nor are they rarely even stated, but in a general manner."⁴⁴ As recently stated by another court: "When the facts are stated from which the law raises the inference of damages, they are necessarily implied, and no direct allegation of the conclusion is necessary."⁴⁵

§ 1976. **General damages particularly pleaded.**—There are many cases where proof may be made under the pleadings of general damages which, however, partake of the nature of special damages; but these generally may be brought under the principle of general damages which flow naturally and proximately from the injury as pleaded. An illustration of this rule in a case where the plaintiff was injured in a collision the complaint averred that "his back and spine and brain were thereby, then and there severely and dangerously and permanently injured, and divers bones of his body, arms and limbs were then and there and thereby fractured and broken, and plaintiff was otherwise severely, dangerously and permanently injured both internally and externally;" that by reason of said injuries "plaintiff became sick, sore, lame, disordered and injured, and so remained for a long space of time, during which said time he suffered great bodily pain and mental anguish, and still is languishing and intensely suffering in body and mind, and in future will continue to suffer from the

Wis. 365; *Benson v. Village of Waukesha*, 74 Wis. 31, 41 N. W. 1017.

⁴³ *Saunders Pl. & Ev.*, 165; *Howard v. Wilmington &c. R. Co.*, 1 Gill. (Md.) 311.

⁴⁴ *Barnso v. Madan*, 2 Johns. (N. Y.) 145.

⁴⁵ *Green Bay &c. Co. v. Kaukauna &c. Co.*, 112 Wis. 323; *McDaniel v. Terrill*, 1 Nott. & McC. (S. Car.) 343 (207).

effect of said injuries for the rest of his natural life," it was held proper to prove an injury to the plaintiff's eyes by showing atrophy of the optic nerve, and that a loss of two-thirds of the power of sight had resulted as a consequence of the injury.⁴⁶ So, in an action for shooting the plaintiff the evidence showed that one of the shots lodged upon or near the optic nerve of one eye, and that other shots lodged in other parts of his body, and that as a result of these injuries the plaintiff became subject to fits and it was held that he was entitled to recover for such damage without any special allegations of such results, as well as for pain and disability which followed the injury.⁴⁷ And in an action for damages for an injury from the bite of a dog, the plaintiff was entitled to recover for injury to his nervous system, or for any loss in his mental or physical capacity, and that the evidence was proper to prove that after the injury the plaintiff had shown signs of fright and excitement at the sight of any dog. In an Indiana case involving this principle the court say: "The complaint in this case alleges that by reason of the injuries inflicted by the appellants he was hurt and injured, and became and was sick. Under these allegations we think the appellee might prove the extent of his injuries, as well as the extent of his physical and mental suffering, resulting immediately from the assault and battery alleged in his complaint. Such physical and mental suffering was not the subject of special damages within the legal meaning of that term, and it was not necessary to set them out specifically in the complaint."⁴⁸ So it is held that the expense of nursing may be recovered as a necessary consequence of the wrongful injury complained of, although such expense had not been specially pleaded.⁴⁹ And permanent bodily infirmity, caused or aggravated by the injury complained of, may be proved under a general allegation of

⁴⁶ *West Chicago &c. R. Co. v. Levy*, 82 Ill. App. 202; *Baltimore City &c. R. Co. v. Baer*, 90 Md. 97, 44 Atl. 992; *Baltimore &c. R. Co. v. Kemp*, 61 Md. 619; *Washington &c. R. Co. v. Dashiell*, 7 App. Cas. (D. C.) 507.

⁴⁷ *Tyson v. Booth*, 100 Mass. 258; *Sloan v. Edwards*, 61 Md. 89; *Hussey v. Ryan*, 64 Md. 426; *Wade v. Leroy*, 20 How. (U. S.) 34; *Denver &c. R. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Fye v. Chapin*, 121 Mich. 675.

⁴⁸ *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143; *Wright v. Compton*, 53 Ind. 337; *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443; 17 N. E. 297; *Roswell v. Leslie*, 133 Mass. 589; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Croco v. Oregon &c. R. Co.*, 18 Utah 311, 54 Pac. 985; *City of Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527.

⁴⁹ *Hopkins v. Atlantic &c. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

sickness and pain caused by the alleged injury. Under this rule it is said in a Michigan case: "When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of."^{49*}

§ 1977. **Special damages.**—The law attempts to make a clear distinction between general and special damages. The former are such as the law presumes to have accrued from the wrong complained of; the latter may be presumed or proved by the facts and circumstances of the case. Special damages are not implied by law but are such as the party has actually sustained; these must be pleaded specifically and must be proved as alleged, as the complaining party will not be aided by any presumption. The rule both as to pleading and proof was stated in an early case as follows: "But where the plaintiff expects to recover special damages, he must state them specifically and circumstantially in order to apprise the defendant of the facts intended to be proved, or he will not be permitted to give evidence of such damages on the trial. An omission to set forth any special damages may deprive the plaintiff of the benefit of testimony to which he would otherwise have been entitled."⁵⁰

^{49*} *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Mich. 49; *Fye v. Chapin*, 121 Mich. 675; *Keyser v. Chicago &c. R. Co.* 66 Mich. 390, 33 N. W. 867; *Montgomery v. Lansing &c. R. Co.*, 103 Mich. 46, 61 N. W. 543; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Indianapolis &c. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310; *Louisville &c. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Quackenbush v. Chicago &c. R. Co.*, 73 Iowa 458; *Ehrgott v. Mayor &c.*, 96 N. Y. 264; *Delle v. Chicago &c. R. Co.*, 51 Wis. 400; *Quirk v. Siegel-Cooper Co.*, 43 App. Div. (N. Y.) 464; *Mogk v. New York &c. Co.*, 78 App. Div. (N. Y.) 560; *Montgomery v. Lansing City &c. R. Co.*, 103 Mich. 46, 61 N. W. 543; *Sloan v. Edwards*, 51 Md. 89; *Hussey v. Ryan*, 64 Mich. 426; *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Manley v. Delaware &c. Co.*, 6 Vt. 101, 37 Atl. 279; *Garbaczewski v. Third Ave. R. Co.*, 39 N. Y. S. 33; *Hall v. City of Cadillac*, 114 Mich. 99, 72 N. W. 33; *City of Harvard v. Stiles*, 54 Neb. 26, 74 N. W. 399; *Stevenson v. Morris*, 37 Ohio St. 10; *Mississippi &c. Co. v. Smith*, 6 Miss. 299; *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Robinson v. Marino*, 3 Wash. 434; see post § 1989.

⁵⁰ *McDaniel v. Terrill*, 1 N. & McC. (S. Car.) 343; *Brink v. Freoff*, 4 Mich. 69, 6 N. W. 94; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N.

§ 1978. **Special damages—Proximate results.**—It is difficult in certain classes to distinguish between general and special damages. There is also some difficulty in the application of the proofs to the statement of facts showing special damages. Another difficulty is found in determining whether or not the law implies a loss of time from the act complained of, as well as the inability to perform certain services for the purpose of showing the extent of the injury. It is settled, however, that any amount intended to be recovered on the ground of the diminution of the earning capacity of the complainant in his ordinary occupation must necessarily fall under the head of special damages.⁵¹ This subject is well covered in the opinion in a Connecticut case, where it is stated: "Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. It is often very difficult to distinguish general from special damage. The necessary result of an injury is often and easily confounded with the natural and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage and when it does not. It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury. If it be true that the law implies a loss of time from the act complained of, it does not seem quite fair and just, when the sole object of the rule that requires special damages to be averred is to advise the defendant of the claim to carry the implication so far as to imply also all the special consequences of such loss of time, when such consequences must depend on the peculiar circumstances of the plaintiff at the time of and previous to the injury, as that he was actually engaged in some special business which was at the time yielding a pecuniary profit. If this is so it would be as well to abolish the distinction between general and special damages."⁵²

W. 887; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761.

⁵¹ *Finken v. Elm City Brass Co.*, 73 Conn. 423, 47 Atl. 670; *Morris v. Winchester &c. Co.*, 73 Conn. 680, 49 Atl. 180.

⁵² *Tomlinson v. Town of Derby*, 43 Conn. 562; *Taylor v. Town of Monroe*, 43 Conn. 36; *Morris v. Win-*

chester &c. Co., 73 Conn. 680, 49 Atl. 180; *Wabash &c. R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353; *Chicago &c. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *North Chicago &c. R. Co. v. Barber*, 77 Ill. App. 257; *Louisville &c. R. Co. v. Reynolds*, (Ky.) 71 S. W. 516; *Baldwin v. Western R. Co.*, 4 Gray (Mass.)

§ 1979. **Special damages—Pleading and proof.**—The rule both to pleading and the proof of special damages has been stated by our court as follows: "In every case where the action is for the breach of contract and no special damages are stated in the declaration, as in this case, the plaintiff is confined in his recovery to such damages only as naturally arise from the breach complained of; but if the damages claimed do not naturally arise from that fact, they cannot be recovered, unless they are particularly stated in the declaration, and not then if they are not approximate. . . . It is a rule of pleading, whether the damages sustained have not necessarily accrued from the act complained of and consequently are not implied by law, then, in order to prevent surprise on the defendant the plaintiff must state the particular damage he has sustained or he will not be permitted to give evidence of it."⁵³ The reason of the rule requiring particularity in plead-

333; *Fuller v. Bowker*, 11 Mich. 204; *Helser v. Loomis*, 47 Mich. 16, 10 N. W. 60; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Mason v. St. Louis & C. R. Co.*, 75 Mo. App. 1; *Squier v. Gould*, 14 Wend. (N. Y.) 159; *Buckbee v. Third Ave. R. Co.*, 64 App. Div. (N. Y.) 360, 72 N. Y. S. 217; *Luessen v. Oshkosh & C. Co.*, 109 Wis. 94; *Luck v. Ripon*, 52 Wis. 196, 8 N. W. 815; *Illinois & C. R. Co. v. Davidson*, 76 Fed. 517; *Fitchburg R. Co. v. Donnelly*, 87 Fed. 135; *Southern Pac. Co. v. Hall*, 100 Fed. 760.

⁵³ *Olmstead v. Burke*, 25 Ill. 74 (86); *Furlong v. Polleys*, 30 Me. 491; *Adams v. Gardner*, 78 Ill. 568; *City of Chicago v. Crooker*, 2 Ill. App. 279; *Chicago & C. R. Co. v. Klauber*, 9 Ill. App. 613; *Wabash & C. R. Co. v. Lynch*, 12 Ill. App. 365; *Freeman v. Dempsey*, 41 Ill. App. 554; *West Chicago & C. R. Co. v. Levy*, 82 Ill. App. 202; *Franklin & C. Co. v. Behrens*, 80 Ill. App. 313; *Chamberlain v. Porter*, 9 Minn. 260; *Tomlinson v. Town of Derby*, 43 Conn. 562; *Taylor v. Town of Monroe*, 43 Conn. 36; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201; *Atchison & R. Co. v. Willey*, 57 Kans. 764, 4 Pac. 25; *Armstrong v. Percy*, 10 Wend. (N. Y.) 535, 538; *Dumont v. Smith*, 4 Denio (N. Y.) 319; *Booth v. Spuyten Duyvil & C. Co.*, 60 N. Y. 487; *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *Messmore v. New York & C. Co.*, 40 N. Y. 422; *Griffin v. Colver*, 16 N. Y. 489; *Lawrence v. Porter*, 63 Fed. 62; *Hooper v. Armstrong*, 69 Ala. 343; *Cole v. Swanston*, 1 Cal. 50; *Miller v. Burch*, 19 Ky. L. R. 629, 41 S. W. 307; *Sloss & C. Co. v. Smith*, 11 Ohio C. 213; *Citizen's St. R. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085; *Railroad v. Delaney*, 102 Tenn. 289, 5 S. W. 151; *Watkins v. Junker*, 2 S. W. 802; *Pollard v. Lyon*, 91 U. S. 225; *Hadley v. Baxendale*, 26 E. L. & E. 398; *Watson v. Ambergate & C. R. Co.*, 3 E. L. & E. 497; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602; *Lewis v. Paull*, 42 Ala. 136; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Mitchell v. Clarke*, 71 Cal. 163, 6 Am. R. 529; *Rosenberger v. Marsh*, 108 Iowa 47, 78 N. W. 837; *Rothschild v. Williamson*, 83 Ind. 387; *Hutts v. Shoaf*, 88 Ind. 395; *Atch-*

ing special damages, or of all such damages as are not implied by law in order to entitle the plaintiff to make proof thereof, is to avoid surprise on the part of the adverse party. It is readily seen that a defendant could seldom be prepared to meet the evidence as to any special damages without being apprised of that fact in the pleadings; otherwise he could only be prepared to meet the evidence of such damages as the law implies or presumes to have accrued from the wrong complained of.⁵⁴

§ 1980. Special damages—Pleading insufficient to admit proof.—

It is necessary in pleading special damages that the particular facts on which they are based shall be stated; it is not sufficient to allege the damages specially, but allegations of the particular facts as a basis of the special damages are necessary. Thus, in a case where it was averred, after stating the acts of negligence, "that by means of premises the plaintiff, as a lawyer, lecturer and journalist became and was sick, sore and incapacitated from attending to his business, and continued so for a long time, to wit, for two months, and as regards plaintiff's profession as a lecturer he has been almost wholly, ever since, disabled from pursuing it," and it was held that under these averments that it was error to permit the plaintiff to prove that he was prevented from fulfilling particular engagements to lecture by reason of the injury and he was not entitled to recover the probable loss occasioned by such failure to fulfill such engagements.⁵⁵ So, an allegation "whereby the plaintiff was subjected to great inconvenience and injury" was held not to be an allegation of special damage.⁵⁶ And where a com-

son &c. R. Co. v. Rice, 36 Kans. 593, 14 Pac. 229; Agnew v. Johnson, 22 Pa. St. 471, 62 Am. Dec. 303; North Point &c. Co. v. Utah &c. Co., 23 Utah 199, 63 Pac. 812; Carroll v. Caine, 27 Wash. 402, 67 Pac. 993.

⁵⁴ West Chicago &c. R. Co. v. Levy, 82 Ill. App. 202; Tomlinson v. Town of Derby, 43 Conn. 562; Parsons v. Sutton, 66 N. Y. 92; Chicago &c. R. Co. v. Klauber, 9 Ill. App. 613; City of Chicago v. O'Brennan, 65 Ill. 160; Mitchell v. Clarke, 71 Cal. 163, 60 Am. R. 529; English v. Danville, 69 Ill. App. 288; Cain &c. Co. v. Standard &c. Co., 108 Ala. 346, 18 So.

882; Dowdall v. King, 97 Ala. 635, 12 So. 405; Root v. Butte &c. R. Co., 20 Mont. 354, 51 Pac. 155; Spencer v. St. Paul &c. R. Co., 21 Minn. 362; Plimpton v. Gardiner, 64 Me. 360; Stevens v. Lyford, 7 N. H. 360.

⁵⁵ City of Chicago v. O'Brennan, 65 Ill. 160; Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. 537; Gulf &c. R. Co. v. Hurley, 74 Tex. 593; Brink v. Freoff, 44 Mich. 69, 6 N. W. 94; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

⁵⁶ Roberts v. Graham, 6 Wall. (U.

plaint alleged that the plaintiff was a mill operator, but contained no averments as to any other occupation or employment, it was held incompetent to show the complainant's ability to earn money on any special employment aside from that stated.⁵⁷ In another case where the complaint alleged that by reason of the injury the plaintiff was "put to the loss of a business engagement," and in another paragraph it was stated that he "was hindered and prevented from transacting and attending to his necessary and lawful business, during that time to be transacted, and lost great gains and advantages," were insufficient to admit proof of the fact that plaintiff had a business engagement whereby he would have earned three thousand dollars per annum.⁵⁸ Where a complaint charged that the plaintiff, by reason of a collision was thrown to the ground and had one leg and one arm broken, and large and severe flesh wounds on his shoulders, and alleged that there were "large contused wounds and gashes on his head," by reason of which "he was for a long time confined to his room, and for two months of such time confined to his bed, and has, during all such time endured, and does still endure, a great deal of pain and suffering on account of said injuries," it was held that the loss of memory and impaired mental constitution were not the probable results of such bodily injuries and could not be proved under the allegations of the complaint.⁵⁹

§ 1981. **Special damages—Contract with reference to.**—There is another class of cases where proof of special damages may not be given where pleaded unless justified by the peculiar circumstances of the case. To this class belong actions for damages arising from breach of contract where special circumstances are unknown to the party charged with breaking the contract. In such cases, in the absence of knowledge, or allegation of knowledge of such special or peculiar cir-

S.) 578; *Franklin & Co. v. Brehrens*, 80 Ill. App. 313.

⁵⁷ *Morris v. Winchester & Co.*, 73 Conn. 680, 49 Atl. 180.

⁵⁸ *Chicago & C. R. Co. v. Klauber*, 9 Ill. App. 613.

⁵⁹ *Atchison & C. R. Co. v. Willey*, 57 Kans. 764, 48 Pac. 25; *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411, 21 N. E. 993; *Uransky v. Dry Dock & C. R. Co.*, 118 N. Y. 304, 23 N. E. 451; *Kleiner v. Third Ave. R.*

Co., 162 N. Y. 193, 56 N. E. 497; *Sealey v. Metropolitan St. R. Co.*, 78 App. Div. (N. Y.) 530; *Ackman v. Third Ave. R. Co.*, 52 App. Div. (N. Y.) 483; *Reed v. Metropolitan St. R. Co.*, 69 App. Div. (N. Y.) 103; *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 369; *Piltz v. Yonkers R. Co.*, 83 App. Div. (N. Y.) 29; *Jones v. Niagara & C. R. Co.*, 71 N. Y. S. 647.

circumstances, the party charged with the breach of the contract can only be supposed to have had in contemplation the amount of injury which would arise generally, naturally, and in a great multitude of cases not affected by any special circumstances, from such a breach of contract. But where the facts are properly alleged, proof may be made to show that the contract was executed under special circumstances and that those circumstances were communicated by the complaining party to his adversary. This rule was recognized and stated in a now celebrated and leading English case, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may, fairly and reasonably, be considered arising naturally, that is according to the usual course of things, from such breach of the contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances, under which the contract was actually made, were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have especially provided for the breach of contract, by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."⁶⁰ In a North Carolina case a brief statement of the rule is as

⁶⁰ *Hadley v. Baxendale*, 26 E. L. & Eq. 398; *Fletcher v. Tayleur*, 33 E. L. & Eq. 187; *Gee v. Lancashire &c. R. Co.*, 6 H. & N. 211; *Simpson v. London &c. R. Co.*, L. R. 1 Q. B. 274; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Jameson v. Midland R. Co.*, 50 L. T. (N. S.) 426; *Alder v. Kelghley*, 15 M. & W. 117; *Robinson v. Harman*, 1 Exch. 855; *Sleperd v. Johnson*, 2 East 210; *Alabama Iron Works v. Hurley* 86 Ala. 217, 5 So. 418; *Murrell v. Pacific Ex. Co.*, 54 Ark. 22, 14 S. W. 1098; *Cooper v. Young*, 22 Ga. 269; *Columbus &c. R. v. Flournoy*, 75 Ga. 745; *Savannah &c. R. Co. v. Pritchard*, 77 Ga. 412, 1 S. E. 261; *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809;

follows: "Where one violates his contract he is liable only for such damages as are caused by the breach, or such as, being incidental to the act of omission or commission as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties at the time the contract was made."⁶¹ But under these rules a party will not always be permitted to escape liability for breach of contract upon the ground that the damages arising from the breach were not contemplated at the time of the execution of the contract. The law presumes that the parties contemplated the usual and natural consequences of the breach when the contract was made. The rule as to this presumption was stated by the New York court as follows: "It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded with reference to the contemplation of the parties, and damages may be assessed accordingly."⁶² But where the contract has been entered into in good faith without any notice of circumstances which would render special dam-

Chicago &c. R. Co. v. Hale, 83 Ill. 360; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25; Bierhaus v. Western U. T. Co., 8 Ind. App. 246, 34 N. E. 581; Tebbs v. Cleveland &c. R. Co., 20 Ind. App. 192, 50 N. E. 486; Western U. Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775; Baltimore &c. R. Co. v. Pumphrey, 59 Md. 390; Mather v. American Ex. Co., 138 Mass. 55; Paine v. Sherwood, 19 Minn. 315; Day v. Gravel, 72 Minn. 159, 75 N. W. 1; Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Silver v. Kent, 60 Miss. 124; Fisher v. Goebel, 40 Mo. 475; Deming v. Grand Trunk R. Co., 48 N. H. 455; Griffin v. Colver, 16 N. Y. 489; Baldwin v. United States T. Co., 45 N. Y. 744; Briggs v. New York &c. R. Co., 28 Barb. (N. Y.) 515; Leach v. New York &c. R. Co., 89 Hun (N. Y.) 377; Lindley v. Richmond &c. R. Co., 88 N. Car. 547; Rocky Mount Mills v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854; Fessler v.

Love, 48 Pa. St. 407; Fleming v. Beck, 48 Pa. St. 309; Railroad Cabinet Co., 104 Tenn. 568, 58 S. W. 308; Pacific Ex. Co. v. Darnell, 61 Tex. 639; Missouri &c. R. Co. v. Belcher, 89 Tex. 428, 35 S. W. 2; Thomas &c. Co. v. Wabash &c. Co., 62 Wis. 642, 22 N. W. 827; Holland v. Seven Hundred &c. Tobacco Coal, 36 Fed. 784; Bridgewater &c. Co. v. Home &c. Co., 59 Fed. 4; Jones v. George, 61 Tex. 349; Pacific Exp. Co. v. Darnell, 62 Tex. 639; Elizabethtown &c. R. Co. v. Pottinger, 10 Bush. (Ky.) 18; Barker v. Mann, 5 Bush. (Ky.) 679.

⁶¹ Ashe v. De Rossett, 5 Jones (N. Car.) 299; Mace v. Ramsey, 1 N. Car. 11; Hopkins v. Sanford, 4 Mich. 243, 2 N. W. 39; Howe v. North, 69 Mich. 272, 37 N. W. 21.
⁶² Booth v. Spuyten Duyvil &c. Co., 60 N. Y. 487; Barnes v. Brown, 13 N. Y. 372, 29 N. E. 760.

ages a probable or natural consequence of a breach of the contract; a subsequent notice of such circumstances cannot affect the original contract.⁵³ It has been held that parol proof is admissible to prove the purpose for which the property was to be used which was the subject matter of the original written contract, as this would tend to prove what the parties had in contemplation at the time of the execution of the original contract, and thereby show the amount of damages.⁵⁴

§ 1982. **Special damages—Counsel fees.**—The question of the right to recover counsel fees as a part of the damages has given rise to conflicting decisions in various jurisdictions. In some states the rule is now established that in all actions where the act complained of is tainted by fraud, or involves the ingredient of malice, or insult, the jury, which has the power to punish, has necessarily the right to include in its estimate of damages proper and reasonable counsel fees.⁵⁵ In jurisdictions where the right of the jury to assess such damages is conceded the further question has arisen as to the right of a party to make proof of the value of such fees. In Ohio, and in some other jurisdictions, such right has been denied and this power given to the jury in the absence of all proof. On this subject in one case it was said: "No evidence in this case appears to have been given to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received. But the fact that the plaintiff would necessarily be subjected to expenses of this kind, was properly taken into consideration and allowed as a circumstance in the case patent before them."⁵⁶ This court classifies counsel fees as consequential rather than special damages, and holds that they may be recovered without either

⁵³ *Bradley v. Chicago &c. R. Co.*, 277; *Hudson v. Voigt*, 15 Ohio C. C. 94 Wis. 44, 68 N. W. 410; *Missouri &c. R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6.

⁵⁴ *Dempsey v. Hertzfield*, 30 Ga. 866.

⁵⁵ *Sexton v. Todd*, *Wright* (Ohio) 316; *Roberts v. Mason*, 10 Ohio St. 277; *Finney v. Smith*, 31 Ohio St. 529; *Stevenson v. Morris*, 37 Ohio St. 10; *Diehl v. Friester*, 37 Ohio St. 473; *Cowden v. Lockridge*, 60 Miss. 385; *Taylor v. Morton*, 61 Miss. 24; see ante, §§ 1762, 1763.

⁵⁶ *Roberts v. Mason*, 10 Ohio St. Fed. 99.

pleading or proof and has adjudged that the allowance rests within the discretion of the jury and on this point it has said: "In leaving this matter to the discretion of the jury under all the facts before them without proof of this character, we only follow the analogy of the law in all such actions, where, without actual proof of the amount of damages the jury may in their estimate allow such an amount as will be adequate for the injury under all the circumstances."⁶⁷ In Alabama the rule is stated as follows: "In cases where malice is the gist of the action and vindictive damages recoverable, the fees paid to counsel for defending the original suit, if reasonably and necessarily incurred may be proved and taken into consideration by the jury in the assessment of damages."⁶⁸ However, authority is against the proposition of the recovery of attorney's fees as part of the damages.⁶⁹ Connecticut has expressly held that in estimating vindictive damages the jury may take into consideration the fees of the plaintiff's counsel in the case.⁷⁰ In an early New York case in an action for negligence, in speaking of an instruction on the question of the measure of damages the judge said: "The charge as to expenses beyond taxable costs and counsel fees in conducting the suit as a particular item of the damages to be taken into account, I am also inclined to think was erroneous. These have been fixed by law, which is as applicable to cases sounding in damages as in debt."⁷¹ In Indiana and Iowa, the courts of last resort have held that attorneys' fees could not be recovered as damages.⁷²

§ 1983. **Special damages—Expenses of trial.**—The courts which hold that attorneys' fees may be recovered as a part of the damages, and

⁶⁷ *Stevenson v. Morris*, 37 Ohio St. 164; *Haskell Co. Bank v. Bank &c.* 51 Kans. 39, 32 Pac. 624; *Sedgwick v. Sedgwick*, 100 N. H. 100.

⁶⁸ *Marshall v. Betner*, 17 Ala. 832; *Higgins v. Mansfield*, 62 Ala. 267; *Bolling v. Tate*, 65 Ala. 417; *Dothard v. Sheld*, 69 Ala. 135; *Flournoy v. Lyon*, 70 Ala. 308; *Baldwin v. Walker*, 94 Ala. 514, 10 So. 391.

⁶⁹ *Day v. Woodworth*, 13 How. (U. S.) 363; *Toese v. Huntingdon*, 23 How. (U. S.) 2; *Oelrichs v. Spain*, 15 Wall. (U. S.) 211; *Flanders v. Tweed*, 15 Wall. (U. S.) 450; *Pacific Ins. Co. v. Conrad*, Baldw. (U. S.) 258; *Blanchard Gunstock &c. Co. v. Warner*, 1 Blatch. (U. S.) 258; *Stimson v. Railroads*, 1 Wall. Jr. (U. S.) 164; *Haskell Co. Bank v. Bank &c.* 51 Kans. 39, 32 Pac. 624; *Sedgwick v. Sedgwick*, 100 N. H. 100.

⁷⁰ *Linsley v. Bushnell*, 15 Conn. 236; *Noyes v. Ward*, 19 Conn. 264; *Dalton v. Beers*, 38 Conn. 529; *Bennett v. Gibbons*, 55 Conn. 452; *Wynne v. Parsons*, 57 Conn. 73.

⁷¹ *Lincoln v. Saratoga &c. R. Co.* 23 Wend. (N. Y.) 425.

⁷² *Irlbeck v. Bierle*, 84 Iowa 47; *Indianapolis Journal &c. Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991; *Grotius v. Ross*, 24 Ind. App. 543, 57 N. E. 46; *Hale v. City of New Orleans*, 18 La. Ann. 321.

some others, hold that the expenses of the trial may be included by the jury in estimating the damages. This term seems to include not only the costs in the case but any actual and legitimate expenses incurred by the plaintiff in relation to the action and prior to its beginning. In one case the court said, referring to the damages under such circumstances: "They shall be sufficient to cover all the expenses and costs of the plaintiffs in litigating the matter including their loss of time,—such as will make them whole."⁷³ The Supreme Court of Connecticut, in an action involving expenses in addition to the taxable costs of the case as part of the damages, propounds this significant question: "And shall a defendant, who has refused redress for an unprovoked and severe personal injury, and thus driven the plaintiff to seek redress in the courts of law, be permitted to say, that the trouble and expense of the remedy was unnecessary, and was not the necessary result of his own acts, connected with his refusal to do justice?" The question is answered by quoting from a former case in which it was said: "We cannot, at this day, shut our eyes to the truth known by everybody that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit."⁷⁴ In a later case, where a re-trial was made necessary by the death of a juror, the same court held that the jury might consider the expenses of the former trial in assessing plaintiff's damages.⁷⁵ In a later case the court limited this rule to recovery in actions where vindictive or punitive damages might be given.⁷⁶ To permit the introduction of evidence as to such items of damages they should be stated in the pleadings with particularity.⁷⁷ In an action for a breach of contract for a sale or exchange of property, the complaining party may prove as a part of his damages the expenses incurred by him in endeavoring to perform his part of the contract before he is informed that the defendant has put it out of his power to perform the contract.⁷⁸ But in many jurisdictions it is held, and the weight of the authorities seems to be, that no items of expenses in connection with the trial of the case can be considered or allowed as damages by the jury.⁷⁹

⁷³ *Stevens v. Handly, Wright* (Ohio) 121.

⁷⁴ *Linsley v. Bushnell*, 15 Conn. 225; *Whipple v. Fuller*, 11 Conn. 582.

⁷⁵ *Noyes v. Ward*, 19 Conn. 250.

⁷⁶ *St. Peters Church v. Beach*, 26 Conn. 355.

⁷⁷ *Bradstreet Co v. Oswald*, 96 Ga. 396, 23 S. E. 423.

⁷⁸ *Warren v. Chandler*, 98 Iowa 237, 67 N. W. 242; *McCafferty v. Griswold*, 99 Pa. St. 270; *Baltimore &c. Soc. v. Smith*, 54 Md. 187.

⁷⁹ *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Henry v. Davis*, 133

§ 1984. **Earning capacity—Impairment.**—A loss or impairment of earning capacity, as previously noted, is one of the elements of damages which the jury may properly consider when supported by evidence. Where a person, by reason of an injury, is incapacitated from following his usual and ordinary vocation for any stated time; or where the injury is such that he can never again engage in his former occupation or business, it is held proper to show these matters to the jury by the most available evidence for that purpose. Such evidence is admissible for the purpose of aiding the jury in estimating the value of the time lost, but it is not given as an exact basis of damages, but as a guide to the jury to aid them in the exercise of the discretion lodged in them, and to assist them in arriving at a just amount.⁸⁰ It is held that the earning power of an injured person "involves an inquiry into the value of the labor, physical or intellectual, of the person injured before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received."⁸¹ The Indiana Supreme Court approved an instruction given by the trial court, which was as follows: "You may take into consideration the expenses actually incurred, loss of time occasioned

Mass. 345; Faneull Hall Ins. Co. v. Liverpool Ins. Co., 153 Mass. 63, 26 N. E. 244; Newton Rubber Works v. De Las Casas, 182 Mass. 436, 65 N. E. 816; Grotius v. Ross, 24 Ind. App. 543, 57 N. E. 46; Indianapolis &c. Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991; Thompson v. Powning, 15 Nev. 195; Hicks v. Foster, 13 Barb. (N. Y.) 663.

⁸⁰ Alabama &c. R. Co. v. Yarbrough, 83 Ala. 238, 3 So. 447; Alabama &c. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303; Rio Grande &c. R. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Atlanta St. R. Co. v. Beauchamp, 93 Ga. 6, 19 S. E. 24; Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389; City of Indianapolis v. Gaston, 58 Ind. 224; Town of Elkhart v. Ritter, 66 Ind. 136; City of Logansport v. Justice, 74 Ind. 378; Cleveland &c. R. Co. v. Gray, 148 Ind. 266, 46 N. E. 675; Chicago &c. R. Co. v. Posten, 59 Kans. 449, 53

Pac. 465; Chicago &c. R. Co. v. Scheinkoenig, 62 Kans. 57, 61 Pac. 414; Ballou v. Farnum, 11 Allen (Mass.) 73; Sherwood v. Chicago &c. R. Co., 82 Mich. 374, 46 N. W. 773; Griveaud v. St. Louis &c. R. Co., 33 Mo. App. 458; New Jersey &c. Co. v. Nichols, 33 N. J. L. 434; Lincoln v. Saratoga &c. R. Co., 23 Wend. (N. Y.) 425; Hanover R. Co. v. Coyle, 55 Pa. St. 396; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Wade v. Leroy, 20 How. (U. S.) 34; 4 Sutherland Damages, § 1246.

⁸¹ Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1; 35 Atl. 191; Wade v. Leroy, 20 How. (U. S.) 34; Davidson v. Southern Pac. Co., 44 Fed. 476; Richmond &c. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837; Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Nones v. Northouse, 46 Vt. 587.

by the immediate effect of the plaintiff's injuries, and physical and mental suffering caused by and arising out of such injuries. In addition you may consider the professional occupation, if any, of the plaintiff, and her ability to earn money and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries; and the amount assessed should be such a sum as in your judgment will fully compensate her for the injuries, or any of them, thus sustained." The court in approving this instruction say: "If the capacity of the plaintiff to earn money was diminished by injury she is entitled to be compensated, and the impairment of her ability to earn money is an element to be considered in computing the amount of the recovery."⁸³ The Supreme Court of the United States in speaking of the right to recover damages for impairment of earning capacity, and after designating certain other elements of damages, continues as follows, "but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant."⁸⁴ In order to assist the jury in making a proper estimate of damages on account of injuries and the consequent loss of impairment of the earning capacity, it is proper to introduce in evidence standard life and annuity tables for the purpose of showing probable duration of life and the present value of a life annuity.⁸⁴ And on this line the Supreme Court of Michigan approved an instruction as follows: "You have the right to consider in determining the amount of

⁸³ *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *Carthage Tpk. Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364; *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297.

⁸⁴ *Vicksburg &c. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1; *Wade v. Leroy*, 20 How. (U. S.) 34; *Nebraska City v. Campbell*, 2 Blatch. (U. S.) 590; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *New Jersey &c. Co. v. Nichols*, 32 N. J. L. 166; *Phillips v. South Western R. Co.*, L. R. 4 Q. B. 406; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. 1, 35 Atl. 191; *Wallace v. Pennsylvania R. Co.*, 195 Pa. 127, 45 Atl. 685; *Aiken v. City of Philadelphia*, 9 Pa. Super. Ct. 502; *Kinney v. Crocker*, 18 Wis. 74, 80; *City*

of Ripon v. Bittel, 30 Wis. 614; *Luck v. City of Ripon*, 52 Wis. 196; *Gates v. Northern Pac. R. Co.*, 64 Wis. 64, 24 N. W. 494; *Galveston &c. R. Co. v. Cooper*, (Tex.) 20 S. W. 990; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Bierbach v. Goodyear Rub. Co.*, 54 Wis. 208; *Pryor v. Metropolitan &c. R. Co.*, 85 Mo. App. 367.

⁸⁵ *Gregory, The D. S.*, 9 Wall. (U. S.) 513; *Sauter v. New York &c. R. Co.*, 66 N. Y. 50; *McDonald v. Chicago &c. R. Co.*, 26 Iowa 124; *Central R. Co. v. Richards*, 62 Ga. 306; *Rowley v. London &c. R. Co.*, L. R. 8 Exch. 221; see also, Vol. I, §§ 287, 418, and numerous authorities there cited.

this, what the plaintiff would probably have been able to earn during the period of the interruption had he not been injured; and if, by reason of the injury he is prevented from earning any money whatever, of course that would constitute the measure of damages upon that branch. If, by reason of the injuries, however, his ability to earn money has simply been impaired, so that he can earn some sum of money, but less than the amount which he otherwise could have earned, that would constitute the measure of damages upon that point."⁸⁵ As evidence of an impaired earning capacity, a plaintiff may show the falling off of the receipts of his business by reason of his inability to give his entire time to the business on account of the injuries complained of.⁸⁶ And it was held proper to prove that before the injury the plaintiff had been conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value, and that after the injury he was so infirm that his medical attendant and adviser regarded him as incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion.⁸⁷

§ 1985. **Earning capacity—Special Employment.**—On the subject of the proof of impaired earning capacity, the decisions make a distinction. This class of cases holds that the loss of earnings in a special employment or of a particular enterprise is not the direct and necessary result of the act complained of, and that in order to admit proof of such loss in this class of cases the complaint must aver definitely and with certainty the precise nature of the employment or engagement and the loss relied upon.⁸⁸ As to this rule of pleading in this respect Mr. Sedgwick says: "For loss of business, in the sense of loss of time, no allegation is necessary; but for a loss caused to the plaintiff's particular business by the defendant's act a special allegation is required. On a general allegation of loss of business the plaintiff cannot recover for the loss of a particular business venture or engagement."⁸⁹ On the question of admissibility of evidence under the plea

⁸⁵ *Geveke v. Grand Rapids &c. R. Co.*, 57 Mich. 589, 24 N. W. 675.

⁸⁶ *Hart v. New Haven*, 130 Mich. 181, 89 N. W. 677.

⁸⁷ *Wade v. Leroy*, 20 How. (U. S.) 34; *City of Bloomington v. Chamberlain*, 104 Ill. 268.

⁸⁸ *Taylor v. Monroe*, 43 Conn. 36;

Tomlinson v. Town of Derby, 4 Conn. 562; *Chicago v. O'Brennan*, 65 Ill. 160; *Bloomington v. Chamberlain*, 104 Ill. 268, 274; *Baldwin v. Western &c. R. Co.*, 4 Gray (Mass.) 333; *Pollock v. Gantt*, 6 Ala. 373.

⁸⁹ 3 *Sedgwick Damages*, § 1265.

ings, the rule as laid down by the Illinois court is as follows: "In order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage, and that proof of his particular employment or business and of his ordinary wages or earnings therein is admissible in evidence under such general averment, but that when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration."⁹⁰ Under this general rule it was held in one case for the purpose of showing the extent of the injury the complainant was permitted to prove his previous occupation, the nature of the duties he was accustomed to perform, and that since the injury he was able to do very little that required mental application or physical labor.^{90*} And it was held that proof of the income of the deceased was proper as it tended, in connection with other evidence, to show the extent of the loss. And in the same connection it was said that "the age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings, were all proper elements of the inquiry as to the compensation proper to be awarded."⁹¹ Indeed, the rule is that "all evidence tending to show the character of his ordinary pursuits and the extent to which the injury complained of prevented him from following those pursuits, was per-

Pollock v. Gantt, 69 Ala. 373; *Chicago &c. R. Co. v. Klauber*, 9 Ill. App. 613; *Taylor v. Town of Monroe*, 43 Conn. 36.

**Chicago &c. R. Co. v. Meech*, 163 Ill. 305, 43 N. W. 290; *Chatsworth v. Rowe*, 166 Ill. 114, 46 N. E. 763.

⁹⁰*Ballou v. Farnum*, 11 Allen (Mass.) 73; *Nebraska City v. Campbell*, 2 Blatch. (U. S.) 590; *Western U. Tel. Co. v. Eyser*, 2 Colo. 141; *Lund v. Tyler*, 115 Iowa 236; *Joslin v. Grand Rapids &c. Co.*, 53 Mich. 322, 19 N. W. 17; *Clifford v. Dam*, 44 N. Y. Super. Ct. 391; *Pill v. Brooklyn &c. R. Co.*, 27 N. Y. S. 230; *McIntyre v. New York &c. R. Co.*, 37 N. Y. 287; *Kessel v. Butler*, 53 N. Y. 612; *Ehrgott v. Mayor &c.*,

96 N. Y. 264, 276; *Grant v. City of Brooklyn*, 41 Barb. (N. Y.) 381, 385; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Nash v. Sharpe*, 19 Hun (N. Y.) 366; *Grinnell v. Taylor*, 85 Hun (N. Y.) 85; *Simonin v. New York &c. R. Co.*, 36 Hun (N. Y.) 214.

⁹¹*Louisville &c. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. 579; *Collins v. Davidson*, 19 Fed. (U. S.) 83; *Hall v. Galveston*, 39 Fed. 18; *Serenson v. Northern Pac. R. Co.*, 45 Fed. 407; *Southern Pac. Co. v. Hall*, 100 Fed. 760; *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191.

tributive to the issue."⁹² But it has been held that in estimating earning capacity a jury has no right to capitalize the earning power of the injured person at a sum which would yield the amount he would have earned, at a given or usual and reasonable rate of interest; his earning power comes to an end at his death.⁹³

§ 1986. Earning capacity diminished—Proof under general allegation.—To the general rule requiring special damages to be specially pleaded in order to prove them, there seems to be an exception in favor of proving impairment of earning capacity under general allegations of injury. This exception is more apparent than real, as the fact that earning capacity may be impaired by bodily or physical injury is both a natural and a proximate result. This exception, however, does not obtain where it is sought to recover damages on account of diminished capacity to earn money in a particular vocation, and in such cases it requires special pleading. But the exception here contended for reaches the extent of admitting proof of impairment of capacity generally. The rule as stated is substantially that where the capacity to earn a livelihood generally, without reference to any particular calling, is obviously impaired, the damage should be classed as general and not special. Where the resultant damage is obvious the reason for the rule requiring the damages to be specially pleaded is wanting and proof of the impaired capacity to earn a livelihood generally falls within the general allegations and can never operate as a surprise to the adverse party.⁹⁴

§ 1987. Injury—Proof of items of damages.—In an action for damages for physical injuries after establishing the liability of the defendant, it is then incumbent upon the plaintiff to make proof of the items or elements of damages. According to rules already stated the burden is upon the plaintiff to supply the jury with such evidence as will give them a basis for fixing with reasonable certainty the amount of damages which the plaintiff has sustained. In such cases the complainant is entitled under the law to be fairly and justly com-

⁹² *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990. *Vicksburg &c. R. Co. v. Putnam*, 137 U. S. 545, 7 Sup. Ct. 1.

⁹³ *Tietz v. Philadelphia &c. Co.*, 169 Pa. St. 516, 32 Atl. 583; *Todd v. Second Ave. &c. Co.*, 192 Pa. St. 587, 44 Atl. 387; *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127, 45 Atl. 685; *Texas &c. R. Co. v. Bowlin* (Tex.) 32 S. W. 918; *Texas &c. R. Co. v. Curry*, 64 Tex. 85; *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334, 42 Pac. 860.

compensated for the injuries he has sustained. Some of the items or elements which are proper to be considered, under proper averments, and which are susceptible of fairly accurate proof are as follows: (1) Expenses incurred for medical treatment; (2) medicines; (3) expenses of nursing and special care; (4) in case of death of the injured party, expenses of funeral; (5) loss of time or wages; (6) earning capacity; (7) permanent injuries; (8) physical and mental suffering past and prospective.⁹⁵ In a Michigan case the following instruction on the question of the elements of damages for injuries was held proper: "The elements of damages which the jury are entitled to take into account consist of all effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, the loss of time, all bodily and mental suffering, impairment of capacity to earn money, the pecuniary expenses, the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury; and in consideration of what will be a just sum in compensation for the sufferings or injury, the jury are not only at lib-

⁹⁵ *Wade v. Leroy*, 20 How. (U. S.) 24; *Vicksburg &c. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1; *Whelan v. New York &c. R. Co.*, 38 Fed. 15; *Davidson v. Southern Pac. Co.*, 44 Fed. 476; *Robinson v. Simpson*, 8 Houst. (Del.) 398; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 236; *West Chicago St. R. Co. v. Carr*, 170 Ill. 409, 48 N. E. 992; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *American &c. Co. v. Foust*, 12 Ind. App. 421, 39 N. E. 891; *Courtney v. Clinton*, 18 Ind. App. 620, 48 N. E. 799; *Parker v. Jenkins*, 66, 3 Bush. (Ky.) 587; *Central &c. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441; *Sandford v. Augusta (Inhabitants)*, 32 Me. 536; *Schwingschlegl v. City of Monroe*, 113 Mich. 683, 72 N. W. 7; *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609, 50 S. W. 894; *Culberson v. Chicago &c. R. Co.*, 50 Mo. App. 556; *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Chicago &c. R. Co. v. Cleminger*, 178 Ill. 536, 53 N. E. 320; *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; *McLaughlin v. San Francisco &c. R. Co.*, 113 Cal. 590, 45 Pac. 839; *Culberson v. Chicago &c. R. Co.*, 50 Mo. App. 556; *Cooney v. Southern &c. R. Co.*, 80 Mo. App. 226; *Corliss v. Worcester &c. R.*, 63 N. H. 404; *Drinkwater v. Dinsmore*, 80 N. Y. 390; *Sheehan v. Edgar*, 58 N. Y. 631; *Metcalf v. Baker*, 57 N. Y. 662; *Ganiard v. Rochester &c. R. Co.*, 50 Hun (N. Y.) 22; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191; *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. 291; *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127, 45 Atl. 685; *Walker v. City of Philadelphia*, 195 Pa. St. 168, 45 Atl. 657; *Smith v. Mauch Chunk*, 3 Pa. Super. Ct. 495; *Hart v. Charlotte &c. R. Co.*, 33 S. Car. 427; *Folsom v. Town of Underhill*, 36 Vt. 580; *Richmond &c. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211; *Houston &c. R. Co. v. Randall*, 50 Tex. 254; *McNamara v. Village of Clintonville*, 62 Wis. 207, 22 N. W. 472.

erty to consider the bodily pain, but mental suffering, anxiety, expense, and fright may be treated as elements of the injury, for which damages, by way of compensation should be allowed."⁹⁶ But no allowance can be made by the jury for damages covering the value of medical services in the absence of any evidence as to the value of such services or the amount expended.⁹⁷ Where the proof shows that an injured person is kept and cared for at a private house that is not his home, it will justify a finding that he is there upon expense.⁹⁸ The proof that a physician or surgeon attended an injured person and gave him professional assistance will justify a finding that the services were rendered for a pecuniary recompense to be paid by the injured person.⁹⁹ In order to recover the amount of expenses incurred in effort to cure an injury it has been held that it must be averred and proved that the expenses so incurred were reasonably necessary.¹⁰⁰ The expense for medical attendance is such a direct, usual and reasonable necessary result, one which is to be expected will be incurred in many instances, that it is generally held that proof of its value may be made without being pleaded specially.¹⁰¹ The amount of expenses

⁹⁶ *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Power v. Harlow*, 57 Mich. 107, 116, 23 N. W. 606; *Geveke v. Grand Rapids &c. R. Co.*, 57 Mich. 589, 596, 24 N. W. 675.

⁹⁷ *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347, 12 S. W. 636; *Smith v. Chicago &c. R. Co.*, 108 Mo. 243, 18 S. W. 971; *Slaughter v. Metropolitan St. R. Co.*, 116 Mo. 269, 23 S. W. 760; *Nixon v. Hannibal &c. R. Co.*, 141 Mo. 425, 42 S. W. 942; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500, 46 S. W. 170; *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609, 50 S. W. 894; *Robertson v. Wabash R. Co.*, 152 Mo. 382, 53 S. W. 1082; *Rhodes v. City of Nevada*, 47 Mo. App. 499; *Culbertson v. Chicago &c. R. Co.*, 50 Mo. App. 556; *Madison v. Missouri Pac. R. Co.*, 60 Mo. App. 599; *Evans v. City of Joplin*, 76 Mo. App. 20; *Eckerd v. Chicago &c. R. Co.*, 70 Iowa 353, 30 N. W. 615; *Fry v. Hillan*, (Tex.) 37 S. W. 359; *Hous-*

ton &c. R. Co. v. Kimbell, (Tex.) 43 S. W. 1049.

⁹⁸ *McGarrahan v. New York &c. Co.*, 171 Mass. 211, 50 N. E. 610.

⁹⁹ *McGarrahan v. New York &c. Co.*, 171 Mass. 211, 50 N. E. 610.

¹⁰⁰ *Hewitt v. Eisenbart*, 36 Mo. 794, 55 N. W. 252; *Houston &c. Co. v. Rowell*, 92 Tex. 147, 46 S. W. 630; see, *Scullane v. Kellogg*, Mass. 544, 48 N. E. 622.

¹⁰¹ *Evansville &c. R. Co. v. Comb*, 9 Ind. App. 198, 36 N. E. 100; *Cooney v. Southern &c. R. Co.*, Mo. App. 226; *Hopkins v. Atlantic &c. R.*, 36 N. H. 9; *Laing v. Col*, 8 Pa. St. 479; *Pennsylvania &c. v. Graham*, 63 Pa. St. 290; *Fol*, v. *Underhill*, 36 Vt. 580, some hold that expenses of medical attendance must be specially pleaded. *South Covington St. R. Co. v. W*, 84 Ky. 267, 1 S. W. 493; *O'Lea*, Rowan, 31 Mo. 117, where the suggestion is that the complainant paid certain sums for medical

medicines and medical attention was held to be sufficiently and definitely proved where the complainant admitted that he kept no account, but as near as he could get at it the sum was four hundred dollars.¹⁰² The jury are not to assess the damages necessarily from all of the facts in the case, but it has been held that they are to determine the amount of the recovery from such facts only as form proper elements for consideration in the computation of damages. This rule applies especially where improper evidence as to the basis of damages has been permitted to go to the jury.¹⁰³ It has been held that it is incumbent upon one who has been seriously injured by another's fault to procure proper medical treatment, and that a recovery may be had for services of a medical attendant or nursing where the evidence shows that such services were rendered gratuitously.¹⁰⁴

§ 1988. **Injury—Permanent.**—Recovery may be had for any permanent injury that is reasonably certain to accrue and which is the plain consequence of the wrong. But in order to recover damages on this ground the evidence must show such permanency with reasonable certainty.¹⁰⁵ The rule for determining permanent injury has been

tendence, it has been held that it will not be supported by proof that he has incurred a liability for such services; *McLaughlin v. San Francisco &c. R. Co.*, 113 Cal. 590, 45 Pac. 839; *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347, 12 S. W. 636; *Morris v. Grand Ave. R. Co.*, 144 Mo. 500, 46 S. W. 170; *Robertson v. Wabash R. Co.*, 152 Mo. 382, 53 S. W. 1082; *Muth v. St. Louis &c. R. Co.*, 87 Mo. App. 422.

¹⁰² *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609, 50 S. W. 894.

¹⁰³ *Delphi v. Lowery*, 74 Ind. 520.

¹⁰⁴ *Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania Co. v. Marlon*, 104 Ind. 239, 3 N. E. 874; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389; *Evansville &c. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Walker v. City of Philadelphia*, 195 Pa. St. 168, 45 Atl. 657, but courts of other jurisdictions have denied this principle; *Morris v.*

Grand Ave. R. Co., 144 Mo. 500, 46 S. W. 170.

¹⁰⁵ *Parker v. Jenkins*, 3 Bush. (Ky.) 587; *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453; *Central &c. R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441; *Wilson v. Pennsylvania R. Co.*, 132 Pa. St. 27, 18 Atl. 1087; *White v. Milwaukee &c. R. Co.*, 61 Wis. 536, 21 N. W. 524; *Hardy v. Milwaukee &c. R. Co.*, 89 Wis. 183, 61 N. W. 771; *Block v. Milwaukee &c. R. Co.*, 89 Wis. 371, 61 N. W. 1101; *Raymond v. Keseberg*, 91 Wis. 191, 64 N. W. 861; *Collins v. City of Janesville*, 99 Wis. 464, 75 N. W. 88; *Page v. Delaware &c. Co.*, 34 App. Div. (N. Y.) 618; *McKenna v. Brooklyn &c. R. Co.*, 41 App. Div. (N. Y.) 255; *Staal v. Grand St. &c. R. Co.*, 107 N. Y. 625, 13 N. E. 624; *Fry v. Hillan*, (Tex.) 37 S. W. 359; *Frink v. Schroyer*, 18 Ill. 416; *Murtaugh v. New York &c. R. Co.*, 49 Hun (N. Y.) 456.

thus stated: "It was proper for the doctor to describe his patient's condition, to state to what extent he was disabled, his inability to care for himself, and to state any other circumstances within his observation and knowledge bearing upon the reasonable certainty of a continuance of these disabilities in the future, that is to say, he might give evidence as to the physical facts, and his opinion upon the permanency of existing conditions; but when he has testified that the injury is permanent and that the patient is paralyzed and helpless, it seems hardly necessary or proper to permit him to enter the domain of common knowledge, and say that because of these conditions the injured person will require nursing and medical attendance in the future." The recovery of compensation for expenses, loss of time, as well as for mental and physical suffering is not limited to that which is past, but may include such expenses, loss of time, mental and physical suffering in the future as the evidence shows will be reasonably necessary and probably endured.¹⁰⁷ In a case where the evidence showed that the plaintiff's arm was badly lacerated and bruised and its use permanently impaired, an instruction was held correct which directed the jury "that they should take into consideration the extent of his injury, his bodily and mental suffering, and the fact that he is deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of its members."¹⁰⁸ A general rule approved and adopted by many courts is thus stated: "In estimating the amount of damages to be given for a permanent injury, the elements to be considered are, the former occupation of the plaintiff, amount of money he received from it, the extent to which the act of the defendant has impaired his capacity to perform the duties of that or any other calling for which he is fitted."¹⁰⁹

¹⁰⁶ *Crouse v. Chicago & C. R. Co.*, 374, 46 N. W. 773; *Murtaugh v. New York & C. R. Co.*, 49 Hun (N. Y.) 456; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266.

¹⁰⁷ *Cleveland & C. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 386; *Town of Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609; *Ganiard v. Rochester & C. R. Co.*, 50 Hun (N. Y.) 22; *Smedley v. Hestonville & C. R. Co.*, 184 Pa. St. 620, 39 Atl. 594; *Russell v. Inhabitants of Columbia*, 74 Mo. 480; *Smith v. Manch Chunk*, 3 Pa. Super. 495; *Curtiss v. Rochester & C. R. Co.*, 20 Barb. (N. Y.) 282; *Sherwood v. Chicago & C. R. Co.*, 82 Mich. 374, 46 N. W. 773; *American & C. Co. v. Foust*, Ind. App. 421, 39 N. E. 891; *Nappanee v. Ruckman*, 7 Ind. App. 361; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733; *Southern Co. v. Howell*, 135 Ala. 639, 34 S. 6; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266; *Tomlinson v. Town of Derby*, 43 Conn. 56.

§ 1989. **Injury—Aggravating disease.**—Many injuries in themselves might not result in serious impairment of physical or mental conditions, and hence would entitle the sufferer to recover only slight damages. But such injuries often induce disease, and often aggravate some existing ailment or disease. The rule permitting recovery in such cases does not conflict with the law that the damages sustained must be the proximate result of the injury. But in such cases the proof must show that the injury superinduced the disease, or that it aggravated a disease with which the person was already afflicted. The injury may be said to be the primary or immediate result, and the disease induced or aggravated, the resulting consequences of the violence, negligence or breach of duty complained of. The rule is also applied in cases where the resulting consequences produce death, and where death might not have resulted except for the aggravation. In this class of cases, if the proof shows that the original injury or wrong jeopardized the life of the injured person it is generally sufficient. The principle is, that "he who wrongfully places another's life in jeopardy is responsible for the loss of that life." The general rule covering this class of cases was stated by the Wisconsin Supreme Court as follows: "The party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."¹¹⁰ Under this rule it has been held that the wrongdoer was

Chicago v. Jones, 66 Ill. 349; Joliet v. Conway, 119 Ill. 489, 10 N. E. 223; Morris v. Chicago &c. R. Co., 45 Iowa 29; Flanagan v. Baltimore &c. R. Co., 83 Iowa 639, 50 N. W. 60; Chicago &c. R. Co. v. Posten, 59 Kans. 449, 53 Pac. 465; Bradbury v. Benton, 69 Me. 194, 199; Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Smith v. Chicago &c. R. Co., 119 Mo. 246, 23 S. W. 784; Gurley v. Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953; Lesser v. St. Louis &c. R. Co., 85 Mo. App. 326; McLaughlin v. Corry, 77 Pa. St. 109; Baltimore &c. R. Co. v. Wightman, 29 Gratt. (Va.) 431; Hall v. Fond du Lac, 42 Wis. 274; Masters v. Warren, 27 Conn. 293; Memphis &c. R. Co. v. Whitfield, 44 Miss. 466; Ransom v. New York &c. R. Co., 15 N. Y. 415; Hol-yoke v. Grand Trunk R. Co., 48 N. H. 541; Wilson v. City of Wheeling, 19 W. Va. 325; Riley v. West Virginia &c. R. Co., 27 W. Va. 145; Woodbury v. District of Columbia, 16, 5 Mackey (D. C.) 128; Peshine v. Shepperson, 17 Gratt. (Va.) 472.

¹¹⁰ Brown v. Chicago &c. R. Co., 54 Wis. 342, 11 N. W. 356; Vanderburgh v. Truax, 4 Den. (N. Y.) 464; Guille v. Swan, 19 Johns. (N. Y.) 381; Lowery v. Manhattan R. Co., 99 N. Y. 158, 163; Sharon v. Mosher, 17 Barb. (N. Y.) 518; Munger v. Baker, 65 Barb. (N. Y.) 539; Hankins v. Watkins, 77 Hun (N. Y.) 360; Swain v. Schieffelin, 134

liable for injuries arising from blood-poisoning, though it was not the ordinary effect of such a wound.¹¹¹ Where a wrongdoer sought exemption from liability for damages for the resulting consequences of his wrong the court said: "To entitle such party to exemption he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done."¹¹² Mr. Sutherland states the rule on this branch of the subject as follows: "In an action for personal violation or negligent injury it is a defense that the blows or acts of the defendant aggravated a disease which the plaintiff knew he was subject to, and that the defendant had no information in relation to it."¹¹³ This principle applies even where the injured party had rendered himself susceptible to the disease by his voluntary acts.¹¹⁴ The general rule governing the liability of a wrongdoer in this class of cases has been stated as follows: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages."¹¹⁵ And the damages for a

N. Y. 471, 31 N. E. 1025; *Brown v. Chicago &c. R. Co.*, 54 Wis. 342, 11 N. W. 356.

¹¹¹ *McGarrahan v. New York &c. R. Co.*, 171 Mass. 211, 50 N. E. 610; *Ginna v. Second Ave. R. Co.*, 8 Hun (N. Y.) 494.

¹¹² *Baltimore &c. R. Co. v. Reaney*, 42 Md. 117, 137; *Davis v. Garrett*, 6 Bing. N. Cas. 716.

¹¹³ 4 *Sutherland Damages*, § 1244; *Sawyer v. Dulany*, 30 Tex. 479; *St. Louis &c. R. Co. v. Ferguson*, (Tex.) 64 S. W. 797; *Mann-Boudoir &c. Co. v. Dupre*, 54 Fed. (U. S.) 646, 21 L. R. A. 289.

¹¹⁴ 4 *Sutherland Damages*, § 1244; *Sullivan v. Marin*, 175 Mass. 422, 56 N. E. 600; *Turner v. Nassau &c. R. Co.*, 41 App. Div. 213, 54 N. Y. S. 490; *Dickson v. Hollister*, 123 Pa. 421, 16 Atl. 684; *Maguire v. Sheehan*, 117 Fed. 819.

¹¹⁵ *Ohio &c. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Louisville &c. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284; *Terre Haute &c. R.*

Co. v. Buck, 96 Ind. 346; *Louisville &c. R. Co. v. Falvey*, 104 Ind. 463, 3 N. E. 389; *Louisville &c. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 47; *Indianapolis &c. R. Co. v. Pitzer*, 1 Ind. 179, 6 N. E. 310; *Louisville &c. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572; *Louisville &c. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 34; *Pullman &c. Co. v. Barker*, 4 Colo. 344; *Denver v. Hyatt*, 28 Colo. 126, 63 Pac. 403; *Coleman v. New York &c. R. Co.*, 106 Mass. 160; *Shumway v. Walworth &c. Co.*, 98 Mich. 41, 57 N. W. 251; *Hall v. Cadillac*, 1 Mich. 99, 72 N. W. 33; *Louisville &c. R. Co. v. Jones*, 83 Ala. 376, 9 So. 902; *Montgomery &c. R. Co. v. Mallette*, 92 Ala. 209, 9 So. 36; *Owens v. Kansas City &c. R. Co.*, 95 Mo. 169, 8 S. W. 350; *Brown v. Hannibal &c. R. Co.*, 66 Mo. 58; *Allison v. Chicago &c. R. Co.*, 4 Iowa 274; *Baltimore &c. R. Co. v. Kemp*, 61 Md. 74, 619, 18 Am. Eng. R. Cas. 220, 229; *Beauchamp v. Saginaw &c. Co.*, 50 Mich. 163, 1

gravating a disease may be recovered, as held by some courts, without pleading them specially.¹¹⁸

§ 1990. Plaintiff's occupation—Proof as affecting damages.—

In certain classes of actions for damages for personal injuries it has been held competent to show the occupation, profession and pecuniary circumstances of the plaintiff; and to prove the plaintiff's methods and means of earning a livelihood, with the view that the jury, from such evidence, may determine the amount necessary to compensate the plaintiff for the injury complained of. In an early Maryland case the court said on this subject: "In actions of this kind, the condition of life, and the circumstances of the parties, are peculiarly the proper subjects for the consideration of the jury, in estimating the damages; other pecuniary circumstances may be inquired into. It may readily be supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. . . . An injury to a person not dependent on manual labor for the support of himself and family, is in no wise as

N. W. 65; Kitteringham v. Sioux &c. Co. v. Cassell, 66 Md. 419, 7 Atl. City &c. R. Co., 62 Iowa 285, 17 N. 800; Crane Elevator Co. v. Lippert, W. 535; Helrn v. McCaughan, 32 63 Fed. 942; McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. Miss. 17; Mobile &c. R. Co. v. Mc- W. 472; Wieting v. Town of Mill- Arthur, 43 Miss. 180; Barbee v. stone, 77 Wis. 523, 46 N. W. 379; Col- Reese, 60 Miss. 906; Williams v. lins v. City of Janesville, 99 Wis. Vanderbilt, 28 N. Y. 217; Santer v. 464, 75 N. W. 88; Jordan v. City of New York &c. R. Co., 66 N. Y. 50; Ehrgott v. Mayor &c., 96 N. Y. 264; Seattle, 30 Wash. 298, 70 Pac. 743; Hickenbottom v. Delaware &c. R. Lapleine v. Railroad &c. Co., 40 La. Co., 122 N. Y. 91, 25 N. E. 279; Lake Ann. 661, 4 So. 875; Crank v. Forty- Shore &c. R. Co. v. Rosenzweig, 113 second St. R. Co., 53 Hun (N. Y.) Pa. St. 519, 6 Atl. 545; Houston &c. 425; Tice v. Munn, 94 N. Y. 621; R. Co. v. Leslie, 57 Tex. 83; Jucker Wood v. New York &c. R. Co., 83 v. Chicago &c. R. Co., 52 Wis. 150, App. Div. (N. Y.) 604; Pullman &c. 8 N. W. 862; Kellogg v. Chicago &c. Co. v. Smith, 79 Tex. 468.
¹¹⁸ Sloane v. Southern Cal. R. Co., R. Co., 26 Wis. 223; Oliver v. Town 111 Cal. 668, 44 Pac. 320; Campbell of La Valle, 36 Wis. 592; Stewart v. v. Los Angeles Tr. Co., 137 Cal. 565, City of Ripon, 38 Wis. 584; Denver &c. R. Co. v. Harris, 122 U. S. 597, 70 Pac. 624; Helm v. McCaughan, 7 S. Ct. 1286; Hope v. Troy &c. R. 32 Miss. 17; Barruso v. Madan, 2 Co., 40 Hun (N. Y.) 438; Baltimore Johns. (N. Y.) 145.

great as one to a person so situated."¹¹⁷ The rule is that all evidence is competent and proper which shows the character of the plaintiff's ordinary occupation or employment and the extent to which the jury complained of would prevent him from following his ordinary pursuits.¹¹⁸ But it is not proper to make proof of the destitute condition of the family of the deceased for the purpose of enhancing the damages. "If the intestate had died the richest of men, it could not have decreased the damages, and, if he had died the poorest, it could not have enhanced them. There are not two measures, one for the kinsmen of the poor, and one for the kinsmen of the rich; there is one standard policy, and that is for all, the rich and poor alike."¹¹⁹

§ 1991. **Physical and mental pain and suffering.**—The rule is everywhere recognized that damages may be recovered for physical pain and mental anguish or suffering in actions to recover for bodily injuries.¹²⁰ The law also recognizes the inability of a person to

¹¹⁷ *McNamara v. King*, 2 Gilm. (Ill.) 432, 436; *Gaithers v. Blowers*, 11 Md. 536; *Jones v. Jones*, 71 Ill. 562; *Clements v. Maloney*, 55 Mo. 352; *Dailey v. Houston*, 58 Mo. 361; *McAulay v. Birkhead*, 13 Ired. L. (N. Car.) 28; *Heneky v. Smith*, 10 Ore. 349.

¹¹⁸ *Vicksburg &c. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990; *Wade v. Leroy*, 20 How. (U. S.) 34; *Nebraska City v. Campbell*, 2 Black (U. S.) 590; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Caldwell v. Murphy*, 1 Kern (N. Y.) 416, 1 Duer (N. Y.) 233; *City of Ripon v. Bittel*, 30 Wis. 614; *Ewen v. Chicago &c. R. Co.*, 38 Wis. 613.

¹¹⁹ *Delphi v. Lowery*, 74 Ind. 520; *Pittsburg &c. R. Co. v. Powers*, 74 Ill. 341; *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302; *Joliet v. Conway*, 119 Ill. 489, 10 N. E. 223; *Pennsylvania Co. v. Keane*, 143 Ill. 172, 32 N. E. 260.

¹²⁰ *South &c. R. Co. v. McLendon*, 63 Ala. 266; *Alabama &c. R. Co. v.*

Hill, 93 Ala. 514, 9 So. 722; *Lowville &c. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Alabama &c. R. Co. v. Bailey*, 112 Ala. 167, 20 So. 3; *Alabama &c. R. Co. v. Davis*, 112 Ala. 572, 24 So. 862; *St. Louis R. Co. v. Dobbins*, 60 Ark. 481, 1 S. W. 887; *Fairchild v. Cal. St. R. Co.*, 13 Cal. 599; *Wall v. Livermore*, 6 Colo. 465; *Masters v. Town of Warren*, 27 Conn. 293; *Seger v. Barkhamsted*, 22 Conn. 290; *Warren v. Chamberlain*, 7 Houst. (Del.) 5; *Jones v. Belt*, 8 Houst. (Del.) 5; *Smith v. Bagwell*, 19 Fla. 117; *Conner v. Mullins*, 30 Ga. 146; *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647, 1 S. E. 825; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 1; *Brush Elec. &c. Co. v. Simonson*, 107 Ga. 70, 32 S. E. 902; *Peoria Ass'n v. Loomis*, 20 Ill. 235; *Pieper v. Millay*, 44 Ill. 189; *Consolidated &c. Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Central R. Co. v. Serfaty*, 153 Ill. 379, 39 N. E. 119; *West Chicago &c. R. Co. v. Foster*, 175 Ill. 396, 51 N. E. 690; *Chicago &c.*

afflicted to make actual proof of damages arising from these causes; but proof of certain facts must be supplied by which the jury may

- Co. v. Taylor, 170 Ill. 49, 48 N. E. 831; Western &c. Co. v. Meredith, 166 Ill. 309, 46 N. E. 720; Chicago &c. R. Co. v. Anderson, 182 Ill. 298, 55 N. E. 366; Wolf v. Trinkle, 103 Ind. 355; Indianapolis Car Co. v. Parker, 100 Ind. 181; Wright v. Compton, 53 Ind. 337; Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582; Wabash &c. R. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661; Muldowney v. Illinois &c. R. Co., 36 Iowa 462; Morris v. Chicago &c. R. Co., 45 Iowa 29; Parkhurst v. Masteller, 57 Iowa 474, 10 N. W. 864; Haden v. Sioux City &c. R. Co., 92 Iowa 226, 60 N. W. 537; Ferguson v. Davis County, 57 Iowa 601, 10 N. W. 906; Root v. Sturdivant, 70 Iowa 56, 29 N. W. 802; McKinley v. Chicago &c. R. Co., 44 Iowa 314, 319; Union St. R. Co. v. Stone, 54 Kans. 83, 37 Pac. 1012; Atchison &c. R. Co. v. Rowe, 56 Kans. 411, 48 Pac. 683; Tefft v. Wilcox, 6 Kans. 46; City of Abilene v. Wright, 4 Kans. App. 708, 46 Pac. 715; Central &c. R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441; Louisville &c. R. Co. v. Greer, (Ky.) 29 S. W. 337; Greer v. Louisville &c. R. Co., 94 Ky. 169, 21 S. W. 649; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025; Slater v. Sherman, 5 Bush. (Ky.) 206; Wyman v. Leavitt, 71 Me. 227, 229; Prentiss v. Shaw, 56 Me. 427; Mason v. Ellsworth, 32 Me. 271; Verrill v. Minot, 31 Me. 299; Stockton v. Frey, 4 Gill (Md.) 406; Bannon v. Baltimore &c. R. Co., 24 Md. 108; Sloan v. Edwards, 61 Md. 89; Canning v. Williamstown, 1 Cush. (Mass.) 451; Smith v. Holcomb, 99 Mass. 552; Sherwood v. Chicago &c. R. Co., 82 Mich. 374, 46 N. W. 773; Geveke v. Grand Rapids &c. R. Co., 57 Mich. 589, 24 N. W. 675; Tunncliffe v. Bay City &c. R. Co., 107 Mich. 261, 65 N. W. 226; Elliott v. Van Buren, 33 Mich. 49, 20 Am. R. 668; Welch v. Ware, 32 Mich. 77; Memphis &c. R. Co. v. Whitfield, 44 Miss. 466; Whalen v. St. Louis &c. R. Co., 60 Mo. 323; Gerdes v. Cristopher &c. Co., 124 Mo. 347, 25 S. W. 557; Porter v. Hannibal &c. R. Co., 71 Mo. 66, 36 Am. R. 454; West v. Forrest, 22 Mo. 344; Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. 1053; Rodney v. St. Louis &c. R. Co., 127 Mo. 676, 27 S. W. 887; Plummer v. City of Milan, 79 Mo. App. 439; Winkler v. St. Louis &c. R. Co., 21 Mo. App. 99; Hansberger v. Sedalia &c. Co., 82 Mo. App. 566; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860; Smith v. Sioux City &c. R. Co., 22 Neb. 775, 36 N. W. 285; American &c. Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051; Quigley v. Central &c. R. Co., 11 Nev. 350; Johnson v. Wells &c. Co., 6 Nev. 225, 3 Am. R. 245; Consolidated &c. Co. v. Lambertson, 60 N. J. L. 457, 38 Atl. 684; Klein v. Jewett, 26 N. J. Eq. 474; Ransom v. New York &c. R. Co., 15 N. Y. 415; Curtis v. Rochester &c. R. Co., 18 N. Y. 534; Ehr Gott v. Mayor &c., 96 N. Y. 264; Drinkwater v. Dinsmore, 80 N. Y. 390; Hamilton v. Third Ave. R. Co., 53 N. Y. 28; Matteson v. New York &c. R. Co., 62 Barb. (N. Y.) 364; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Cannon v. Brooklyn &c. R. Co., 9 Misc. (N. Y.) 282; Demann v. Eighth Ave. R. Co., 10 Misc. (N. Y.) 191; Wallace v. Western &c. R. Co., 104 N. Car. 442; Smith v. Pittsburgh &c. R. Co., 23 Ohio St. 10;

have a basis for the assessment of such damages. A Pennsylvania court has thus stated the rule: "There is no market in which the price of a voluntary subjection of one's self to pain and suffering can be fixed. There is no market standard of value to be applied, and to suggest the idea of price to be paid to a volunteer as an approximation to the money value of sufferings, is to give loose rein to sympathy and caprice. The true rule is that, in addition to loss of time and expenses actually incurred by the plaintiff by reason of the injury, the jury may consider also the nature of the injury, the pain and inconvenience resulting from it, and make such allowance therefor, in view of all the attending circumstances, as may seem to be just and reasonable. The age, the health, habits, and pursuits of the plaintiff must be taken into consideration in determining what is a reasonable allowance for inconvenience and suffering in any given case. The absence of a cruel and wanton purpose in the defendant must not be overlooked. From the whole case, the question is, what is a reasonable allowance for the suffering necessarily endured? This question is for the jury, subject, nevertheless, to the supervisory control of the court, whose duty it is to set aside a verdict that is unreasonable and excessive."¹²¹ The same court in a later case on this subject said: "Pain and suffering are not capable of being exactly measured by an equivalent in money, and v

Oliver v. North Pac. &c. Co., 3 Ore. 84; Pennsylvania &c. Co. v. Graham, 63 Pa. St. 290; Pennsylvania R. Co. v. Allen, 53 Pa. St. 276; McLaughlin v. Corry, 77 Pa. St. 109, 18 Am. R. 432; Scott v. Montgomery, 95 Pa. St. 444; Baker v. Irish, 172 Pa. St. 528, 33 Atl. 558; Pennsylvania &c. Co. v. Graham, 63 Pa. St. 290; Musick v. Latrobe, 184 Pa. St. 375, 39 Atl. 226; Bamford v. Pittsburg &c. Co., 194 Pa. St. 17, 44 Atl. 1068; Wilson v. Pennsylvania R. Co., 132 Pa. St. 27; Gillman v. Florida &c. R. Co., 53 S. Car. 210, 31 S. E. 224; Howard Oil Co. v. Davis, 76 Tex. 630; Houston &c. R. Co. v. Boehm, 57 Tex. 152; Houston &c. R. Co. v. Berling, 14 Tex. Civ. App. 544; Galveston &c. R. Co. v. Clark, 21 Tex. Civ. App. 167; San Antonio &c. R. Co. v. Keller, 11 Tex. Civ. App. 569; Texas &c. R. Co. v. Malone, Tex. Civ. App. 56; Giblin v. McIntyre, 2 Utah 384; Fulsome v. Cord, 46 Vt. 135; Robinson v. Marino, 3 Wash. 434; Boltz v. Sullivan, 101 Wis. 608, 77 N. W. 87; Fenelon v. Butts, 53 Wis. 344, N. W. 501; Kennon v. Gilmer, 1 U. S. 22, 9 Sup. Ct. 696; District Columbia v. Woodbury, 136 U. 450, 10 Sup. Ct. 990; Beardsley Swann, 4 McLean (U. S.) 333; Robertson v. Cornelson, 34 Fed. 71; Washington &c. R. Co. v. Patterson, 9 App. Cas. (D. C.) 423.

¹²¹ Baker v. Pennsylvania Co., 1 Pa. St. 503, 21 Atl. 979; Schwinsclegl v. Monroe, 113 Mich. 683, N. W. 7.

have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what under all the circumstances should be allowed the plaintiff in addition to the other items of damage to which he is entitled in consideration of suffering necessarily endured. This should not be estimated by a sentimental or fanciful standard, but in reasonable manner, as it is wholly additional to the pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases. By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of twenty days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be, what is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain instead of being devoted to labor? Some allowance has been held to be proper; but in answer to the question "how much?" the only reply yet made is that it should be reasonable in amount. Pain cannot be measured in money. It is a circumstance however that may be taken into the account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages to be compensated by a sum of money that may be regarded as a pecuniary equivalent is not only inexact, but it is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price, or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury."¹²² Damages recoverable for mental anguish and physi-

¹²² *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1, 35 Atl. 191; *Todd & Co.*, 194 Pa. St. 182, 44 Atl. 1072; *Second Ave. & Co.*, 192 Pa. St. 587, 44 Atl. 337; *Bamford v. Pittsburgh & Co.*, 194 Pa. St. 17, 44 Atl. 1068; *Owens v. People's & R. Co.*, 155 Pa. St. 334, 26 Atl. 748; *Baker v. Pennsylvania Co.*, 142 Pa. St. 503, 21 Atl. 979; *Schenkel v. Pittsburgh & Co.*, 194 Pa. St. 182, 44 Atl. 1072; *Russell v. Inhabitants of Columbia*, 74 Mo. 480; *Smith v. Mauch Chunk*, 3 Pa. Super. Ct. 495; *Morse v. Auburn & R. Co.*, 10 Barb. (N. Y.) 621; *Curtiss v. Rochester & R. Co.*, 20 Barb. (N. Y.) 282; *Geveke*

cal pain are not exemplary but compensatory; and in order to recover, a party is not bound to prove that the injury was either willful or malicious.¹²³ Nor is the recovery to be limited to past or present pain, but may cover probable future suffering. The rule on this subject in an action for personal injuries is thus stated: "In estimating the pecuniary loss or damages, in a case like this, the jury is not limited to past pain and suffering and to time already lost. They may take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future loss and suffering are inevitable."¹²⁴

§ 1992. Pain and suffering—How proved.—It is not impossible to make proof of pain and suffering aside from the evidence of the injured person. In most cases the injured person may describe the injury and state the general nature of the pain or suffering. The law infers the existence of pain upon proof of the physical injury, the degree of pain differing according to the nature and extent of such injury. And for the purpose of showing the extent of the pain it is proper to prove the nature and character of the wound or injury, or to show that a limb or a part of the body was mangled and bruised. On this subject the Illinois court said: "To satisfactorily prove a given act, also establishes, at least prima facie, the ordinary and probable consequences of such act; and as pain uniformly follows the crushing of a bone or the laceration of the flesh of one in a normal condition, which is always presumed where nothing to the contrary appears, the jury in this case were fully warranted in inferring the fact of pain from the character of appellee's injuries, which were fully shown, hence it cannot be truthfully said that there was no evidence to base the instruction upon so far as it is related to the pain or suffering of appellee. Indeed we do not think any general words of the witness, such as, 'I suffered a great deal,' 'The pain was very severe,' would have marked more definitely the quantum or degree of suffering than the sim-

v. Grand Rapids &c. R. Co., 57 Mich. 589, 24 N. W. 675; Sherwood v. Chicago &c. R. Co., 82 Mich. 374, 46 N. W. 773.

¹²³ Morse v. Auburn &c. R. Co., 10 Barb. (N. Y.) 621; Merrill v. City of St. Louis, 12 Mo. App. 466.

¹²⁴ Cleveland &c. R. Co. v. Newell,

104 Ind. 264, 3 N. E. 836; Louisville &c. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389; Fry v. Dubuque &c. R. Co., 45 Iowa 416; Aaron v. Second Ave. R. Co., 2 Daly (N. Y.) 127; Stewart v. Ripon, 38 Wis. 584; Ballou v. Lowder, 35 Ark. 492; see, Sutherland Damages, § 915.

ple recital of the mangled condition of the arm requiring amputation."¹²⁵ Mental sufferings are not special damages, but are regarded as the natural consequences of personal injuries and may be pleaded in general terms, and are not susceptible of direct or positive proof but are always implied from serious personal injuries.¹²⁶ The proof as to pain is not to be limited to the particular parts of the body as stated in the declaration, but evidence of pain in any part of the body is held to be admissible, if the proof shows it is the result of the injury.¹²⁷ The law recognizes the difficulty of making proof of pain and suffering, and hence as already stated, it presumes such pain from proof of injury; it recognizes, too, that proof of pain and the fair compensation therefor cannot be made in dollars and cents. The rule is well stated as follows: "In the nature of things, in actions for the recovery of damages for personal injuries, it is often, if not generally, impossible to prove certainly and specifically, in dollars and cents, the proper sum to be awarded. The fact showing the injury or suffering, and the circumstances under which the injury was inflicted, or by which the physical sufferings were directly produced with the actual loss in money, if any, are, in cases of this character, as we have said, generally all that can be proved. What witness in any given case could testify as to the value of a lost finger or hand or arm? Who could swear to proper compensatory damages, computed in dollars and cents, in cases where recoveries were sought for injuries or suffering not involving loss of any member of the body? Such evidence in most cases would be simply the opinion of the witness formed from the proved facts, and twelve men acting under oath can as well, or better, arrive at a proper conclusion as to the pecuniary value of the injury or suffering from the facts proved."¹²⁸ Pain may be proved by the expressions and exclamations of the injured person; but this rule is not without limitations. The whole question is aptly stated by the Illinois court: "All agree that the declarations, to be admissible, must be confined to the statement or complaint or exclamation of

¹²⁵ *Chicago &c. R. Co. v. Warner*, 108 Ill. 538; *Chicago &c. R. Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985.

¹²⁶ 1 *Sutherland Damages*, §§ 419-421; *Stewart v. Ripon*, 38 Wis. 584; *McCoy v. Milwaukee &c. R. Co.*, 88 Wis. 56, 59 N. W. 453.

¹²⁷ *Thompson v. National Ex. Co.*, 66 Vt. 358, 29 Atl. 311.

¹²⁸ *Bell v. Gulf &c. R. Co.*, 76 Miss. 71, 23 So. 268; *International &c. R. Co. v. Rhoades*, (Tex.) 51 S. W. 517.

present existing pain or suffering, and not to the past, nor to the manner and circumstances of receiving the injury; also, that under well-recognized general rules of evidence, declarations so immediately connected with the infliction of the injury as to become a part of the *res gestae* are competent, and may be proved by any competent witness who may have heard them; also, that statements of the location of an injury and existing pain, made to a physician during treatment or upon examination, and for the purpose of ascertaining the extent and nature of the injury, if made without reference to future litigation, may be properly stated by the physician in giving his opinion of the nature, character and extent of the injury. And some cases hold that whether the examination is made with view to testifying upon the trial or not, such statements are competent, the jury being left to consider that fact in giving proper weight to the testimony; and still other cases seem to hold that like declarations are competent, they being made to others than physicians, and not being so connected with the injury as to be a part of the *res gestae*.¹²⁹ As physical pain is presumed to be attended with mental anguish, it is held that it is unnecessary to prove mental suffering by direct evidence to entitle a party to recover.¹³⁰ Evidence was held admissible for the purpose of proving pain to show that morphine was administered to the injured person for a period of thirty days to alleviate the suffering caused by the injury.¹³¹ In an action for injuries to a woman which caused falling of the womb it was held proper for the attending physician to state as to whether the injury was recent or of long standing, and as to whether it was curable or incurable; and in the same case it was held competent for the plaintiff to testify that the return of menstruations was attended with great pain.¹³² And it is held proper to ask a witness

¹²⁹ *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *West Chicago St. R. Co. v. Kennelly*, 170 Ill. 508, 48 N. E. 996; *Illinois &c. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *Chicago &c. R. Co. v. Donworth*, 208 Ill. 192, 67 N. E. 797; *Lake St. &c. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374; *City of Salem v. Webster*, 95 Ill. App. 120; *West Chicago &c. R. Co. v. Dougherty*, 110 Ill. App. 204; *Barber v. Merriam*, 11 Allen (Mass.) 322; *Quaife v. Chicago &c. R. Co.*, 48 Wis. 524, 33 Am. R. 821, note.

¹³⁰ *International &c. R. Co. v. Mitchell*, (Tex.) 60 S. W. 996.

¹³¹ *Missouri Pac. R. Co. v. Hanson*, (Mo. App.) 36 S. W. 289.

¹³² *Cannon v. Brooklyn &c. R. Co.* 9 Misc. (N. Y.) 282.

to state how the injured person appeared with reference to pain and suffering.¹³³

§ 1993. **Injury to property—Earning capacity.**—Any wrongful invasion of property rights, or any trespass or wrongful injury to property will subject the wrongdoer to an action for damages. But in order to recover more than nominal damages the complainant must produce evidence to show the extent of the loss inflicted upon his property, as a basis for the assessment of his damages. No general or absolute rule can be laid down to govern all cases. The most general rule that can be stated is that for the purpose of arriving at such a basis of damages the complainant may show the earning capacity of the property before and after the injury. In doing this he may generally show the value of the property before and after the alleged injury or trespass; or, in other cases he may show the rental value of the property before and after the wrong complained of; or, he may show what the property would produce before and after the injury. The force and effect of these rules are more fully shown in the various special subjects throughout this volume; but the principles may be apparent in their application to a few illustrative cases. Thus proof may be made of the capacity of lands to produce crops before and after injury by fire, as a method for determining the value and ascertaining the damages, and witnesses possessing competent knowledge may give their opinion in such cases of the value of the property before and after the injury.¹³⁴ And damages to premises caused by noxious and poisonous gases may be shown both by proof of injuries to the freehold and rental value of the premises.¹³⁵ And where it appeared that the defendant had wrongfully driven away the tenants of the complainant, it was held that the proof of the amount of the rents which would have accrued but for the wrong was a proper basis for damages.¹³⁶ In an action where it was shown that water was wrongfully caused to flow on agricultural lands, it was held that the yearly value of the land being in question it was proper to prove the crop which it would produce, coupled with the cost of production, if free from the alleged

¹³³ *Cicero &c. St. R. Co. v. Priest*, 190 Ill. 592, 60 N. E. 814.

¹³⁴ *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277; see, Ch. CXVI.

¹³⁵ *Chicago &c. R. Co. v. Burden*, 14 Ind. App. 512, 43 N. E. 155; see,

¹³⁶ *Dale v. Hall*, 64 Ark. 221, 41 S. W. 761. post, Ch. CXXIII.

case already quoted it is said: "The general rule is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, providing they are certain." The following statement is found in the Rhode Island case: "And it will be seen from the cases upon this subject, that wherever the loss of profits is the natural and necessary result of the act charged, such as the party probably would have made, not what by chance he might have made, but what any prudent man must necessarily have made, if evidence has been, if not always, most usually admitted as to them." This rule applies to actions for breach of contract as well as actions sounding in tort.¹⁴³ The general rule seems to be that where the profits of a business or enterprise were known by both contracting parties to be the object and inducement of the contract they may be recovered in an action for the breach of such contract when susceptible of being proved with reasonable certainty.¹⁴⁴ In a very recent

&c. R. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Griveaud v. St. Louis &c. R. Co., 33 Mo. App. 458; Aiken v. City of Philadelphia, 9 Pa. Super. Ct. 502; Barnes v. Berendes, 139 Cal. 32; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Hawthorne v. Siegel, 88 Cal. 159, 167, 25 Pac. 1114; Hitchcock v. Supreme Tent, 100 Mich. 40, 58 N. W. 640; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Cooper v. Young, 22 Ga. 269; Willingham v. Hooven, 74 Ga. 233; Cleveland &c. R. Co. v. Wood, 189 Ill. 352, 59 N. E. 619; Mace v. Ramsey, 74 N. Car. 11; Elizabethtown &c. R. Co. v. Pottinger, 10 Bush. (Ky.) 185; Pennypacker v. Jones, 106 Pa. St. 237; Wells v. Nat. Life Assn., 99 Fed. (U. S.) 222; Collins v. Lavelle, 19 R. I. 45; Howard v. Stillwell &c. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500; Bass v. West, 110 Ga. 698, 36 S. E. 244; Goebel v. Hough, 26 Minn. 252; Ingram v. Lawson, 6 Bing. N. Cas. 212; McNeill v. Reid, 9 Bing. N. Cas. 68; Waters v. Towers, 20 E. L. Eq. 410; Tarleton v. McGawley, Peake 270;

Simpson v. London &c. R. Co., R. 1 Q. B. 274; Fletcher v. Tayle, 17 C. B. 21.

¹⁴³ Beck v. West, 87 Ala. 213; So. 70; Smith v. Eubanks, 72 Ala. 280.

¹⁴⁴ Cleveland &c. R. Co. v. Wood, 189 Ill. 352, 59 N. E. 619; Lapp v. Illinois &c. Co., 104 Ill. App. 28; Pittsburg &c. Co. v. Foster, 59 Pa. St. 365; Adams Ex. Co. v. Egbert, 36 Pa. St. 360; Billmeyer v. Werner, 91 Pa. St. 92; Kimports Breon, 193 Pa. St. 309, 44 Atl. 43; Oliver v. Morgan, 10 Heisk. (Tenn.) 322; Smith v. O'Donnell, 8 Ind. (Tenn.) 468; Philadelphia &c. Co. v. Howard, 13 How. (U. S.) 363; Sutherland Damages, pp. 19, 1983.

¹⁴⁵ Lapp v. Illinois &c. Co., 104 Ill. App. 255; Thorne v. McVeagh, Ill. 81; Carpenter v. First Nat. Bank, 119 Ill. 352; Glidden Pooler, 50 Ill. App. 36; Griffin Colver, 16 N. Y. 489; Messmore New York &c. Co., 40 N. Y. 43; Dillon v. Anderson, 43 N. Y. 23; Parks v. Morris &c. Co., 54 N.

Illinois case another rule on this subject was stated as follows: "When the vendor is informed at the time of the sale that the goods are purchased by a merchant to fulfill contracts already made by him for their sale, the vendor is presumed to have, in making the sale, contemplated that the merchant expected to make a profit upon the goods that had been already ordered from him, and that the loss of such expected profit, if occasioned by a failure to deliver the goods to him, may be recovered in a suit by him brought against the vendor."¹⁴⁵ There is another line of decisions which hold that proof will not be admitted to show the loss of profits in conducting a business involving the labors of others, as such loss is not regarded as the necessary consequence of the personal injury. In such cases the recovery would simply be the value of the complainant's service in the conduct of the business.¹⁴⁶ Even where profits may not be taken as the actual measure of damages and are not recoverable in bulk as such, yet it has been held proper, in many cases, to show not only the nature and character of the business, but also the loss of profits or its equivalent, the profitableness of the business, for the purpose of giving the jury a basis in estimating or assessing the amount of damages.¹⁴⁷

§ 1995. **Wrongful death—Proof of damages.**—By special enactment in most jurisdictions in this country the next of kin, frequently

586; *Booth v. Spuyten Duyvil & Co.*, 60 N. Y. 487; *Devlin v. Mayor &c.*, 63 N. Y. 8; *White v. Miller*, 71 N. Y. 118; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025; *Thomson-Houston &c. Co. v. Durant &c. Co.*, 144 N. Y. 34, 39 N. E. 7; *Robinson v. Hyer*, 35 Fla. 544, 17 So. 745; *Bell v. Reynolds*, 78 Ala. 511; *McHose v. Fulmer*, 73 Pa. St. 365; *Guetzkow v. Andrews*, 92 Wis. 214, 66 N. W. 119; *Boutin v. Rudd*, 82 Fed. 685; *Central Trust Co. v. Clark*, 92 Fed. 293; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Wells v. Nat. Life Asso.*, 99 Fed. 222; *Collins v. Lavelle*, 19 R. I. 45; *Borries v. Hutchinson*, 114 E. C. L. 443.

¹⁴⁶ *Lombardi v. California &c. R. Co.*, 124 Cal. 311, 57 Pac. 66; *Joslin*

v. Grand Rapids &c. Co., 50 Mich. 516, 15 N. W. 887; *Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111; *Marks v. Long Island &c. R. Co.*, 14 Daly (N. Y.) 61; *Blate v. Third Ave. R. Co.*, 29 App. Div. (N. Y.) 388; *Hewlett v. Brooklyn &c. R. Co.*, 63 App. Div. (N. Y.) 423.

¹⁴⁷ *Pause v. City of Atlanta*, 98 Ga. 92; *Bass v. West*, 110 Ga. 698; *Niagara &c. Ins. Co. v. Greene*, 77 Ind. 590; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345; *Goebel v. Hough*, 26 Minn. 252; *Capel v. Lyons*, 3 Misc. (N. Y.) 73; *Peshine v. Shepperson*, 17 Gratt. (Va.) 472.

sense of the jury. The ultimate question of the amount resting with the province and sound discretion of the jury."¹⁵⁰ Such damages are regarded as special, and under the rule in such cases must be specifically averred.¹⁵¹ Proof of the mental or physical suffering of the deceased resulting from the injuries, or of the grief and distress of the next kin is neither proper nor competent, as neither these nor the loss of the society of the deceased can be taken into account in such case in estimating damages.¹⁵²

§ 1996. Exemplary or punitive damages.—In the assessment of damages a jury is not always limited to the amount of actual compensation, at least so far as the amount can be estimated from a basis forming any strict method of calculation. But there is a class of cases in which the jury may assess what are usually termed punitive or exemplary damages. Generally no evidence can be adduced that will form the basis for anything like a definite or accurate computation of the amount to which a person in this class of cases will be entitled; but proof may be made of some facts and circumstances that may aid the jury in their assessment of damages. And throwing some light upon the subject, proof may usually be made in such cases, of the circumstances and surroundings of the parties and of the incident or wrong which caused the injury; and any facts

¹⁵⁰ *Pittsburgh &c. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150; *Mallott v. Shimer*, 153 Ind. 35, 54 N. E. 101.

¹⁵¹ *Pennsylvania Co. v. Lilly*, 73 R. Co., 1 E. D. Smith (N. Y.) 453; *Safford v. Drew*, 3 Duer (N. Y.) 627.

¹⁵² *Etherington v. Prospect Park &c. R. Co.*, 88 N. Y. 641; *Porter v. Hannibal &c. R. Co.*, 71 Mo. 66; *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90, 99, 105; *Hall v. Galveston &c. R. Co.*, 39 Fed. 18; *March v. Walker*, 48 Tex. 372, 375; *Board &c. v. Legg*, 93 Ind. 523; *Tilley v. Hudson River &c. R. Co.*, 24 N. Y. 471; *Louisville &c. R. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Blake v. Midland R. Co.*, L. R. 18 Q. B. 93; *Schnable v. Providence Pub. Mar-*

ket, 24 R. I. 477; *McGarr v. National &c. Mills*, 24 R. I. 447, 60 L. R. A. 122; *Cowden v. Wright*, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; *Covert v. Gray* 34 How. Prac. (N. Y.) 450, 457; *Gilligan v. New York &c. R. Co.*, 1 E. D. Smith (N. Y.) 453, 459; *State v. Baltimore &c. R. Co.*, 24 Md. 84; *Hickman v. Missouri &c. R. Co.*, 24 Md. 84; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318. This rule does not apply in actions for the seduction of a daughter and for the alienation of a wife's affections: *Bartley v. Richtmyer*, 4 N. Y. 38, 43; *Knight v. Wilcox*, 15 Barb. (N. Y.) 279; *Damon v. Moore*, 5 Lans. (N. Y.) 454; *McGarr v. National &c. Mills*, 24 R. I. 447, 60 L. R. A. 122; see, §§ 1653, 2643.

or circumstances throwing light upon mental suffering, injured feelings, sense of injustice, wrong or insult on the part of the complainant are generally admissible in evidence as well as matters which may show, or tend to show the offender's design or malice with which the act was inflicted. The rule has been stated, although, perhaps, a little too broadly, as follows: "Whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender."¹⁵³ On the same subject and in a line with this a New York case states the rule as follows: "Exemplary or punitive damages, or 'smart money,' as they are often called, are given by way of punishment for intentional wrong and to operate as an example to others. The law, in such cases, looks beyond the act and its injurious consequences to the motive, and metes out its punishments to that also. In such cases the compensation for the actual pecuniary damage is rather subsidiary and incidental. There, the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult, on the part of the sufferer, enter largely into the account, and the measure of justice is graduated by that of the offender's turpitude."¹⁵⁴

§ 1997. Exemplary damages—Proof of defendant's financial standing.—In the class of cases mentioned in the preceding section it has been so frequently held that it is now an established rule that the financial standing and the pecuniary circumstances of a defendant in such a case may usually be proved. If the damages to be assessed by the jury in such cases are in the nature of punishment then the jury must be able to determine from the evidence in the case the amount of damages that would be regarded as a punishment. The reasons for this rule are stated thus: "An amount that might be extremely punitive and severe to a defendant of small or moderate means, would be light and trivial to a defendant of very much

¹⁵³ *Memphis &c. R. Co. v. Whit-Woodworth*, 13 How. (U. S.) 371; *field*, 44 Miss. 466; *Hill v. Alabama* 1 Sedgwick Damages, 532.

&c. R. Co., 79 Miss. 587; *Day v.* ¹⁵⁴ *Morse v. Auburn &c. R. Co.*, 10 Barb. (N. Y.) 621; see, §§ 1991, 1992.

larger means; and hence the pecuniary circumstances of the defendant are proper to be considered in estimating the damages." As said in another case by the same court: "It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured. In this class of cases the jury may give exemplary damages not only to compensate the plaintiff but to punish the defendant."¹⁵⁵ The evidence on this proposition should be direct and positive and not merely the opinion of witnesses, and the jury should be given some definite idea of the extent of the defendant's means or property and not be left to speculate as to the extent of his wealth.¹⁵⁶ In this class of cases where the defendant is a corporation in making proof of its wealth or financial standing it has been held that the following elements may be considered: (1) The paid up capital stock of the company; (2) its total assets; (3) its total liabilities.

- ¹⁵⁵ *McNamara v. King*, 2 Gilm. (Ill.) 436; *Gaithers v. Blowers*, 11 Md. 536; *Bennett v. Hyde*, 6 Conn. 24; *Larned v. Buffinton*, 3 Mass. 546; *Smith v. Wunderlich*, 70 Ill. 426; *White v. Murtland*, 71 Ill. 250; *Jones v. Jones*, 71 Ill. 562; *Courvoisier v. Raymond*, 23 Colo. 113; *Wilson v. Shepler*, 86 Ind. 275; *Johnson v. Smith*, 64 Me. 553; *Webb v. Gilman*, 80 Me. 177; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Miller v. Cook*, 124 Ind. 101, 24 N. E. 750; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806; *Jones v. Greeley*, 25 Fla. 629; *Karney v. Paisley*, 13 Iowa 89; *Guengerech v. Smith*, 34 Iowa 349; *Perrine v. Winter*, 73 Iowa 645, 35 N. W. 679; *Barber v. Barber*, 33 Conn. 335; *State v. Thompson*, 80 Me. 194, 13 Atl. 892; *Sloan v. Edwards*, 61 Md. 89; *Bell v. Morrison*, 27 Miss. 68; *Brown v. Barnes*, 39 Mich. 211; *Buckley v. Knapp*, 48 Mo. 152; *Belknap v. Boston & C. R.*, 49 N. H. 358; *Pullman & C. Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Reeves v. Winn*, 97 N. Car. 246, 1 S. E. 448; *McAulay v. Birkhead*, 13 Ired. L. (N. Car. 28; *Johnson v. Allen*, 100 N. Car. 131, 5 S. E. 666; *Tucker v. Winders*, 130 N. Car. 147; *Haymer v. Cowden*, 27 Ohio St. 292; *Matheis v. Mazet*, 164 Pa. St. 580, 30 Atl. 434; *Dush v. Fitzhugh*, 2 Lea (Tenn.) 307; *Cumberland Tel. & C. Co. v. Poston*, 9 Tenn. 696, 30 S. W. 1040; *Telephone & C. Co. v. Shaw*, 102 Tenn. 313, 53 S. W. 163; *Nashville St. R. v. O'Bryan*, 104 Tenn. 28, 55 S. W. 300; *Clem v. Holmes*, 33 Gratt. (Va.) 722; *Winn v. Peckham*, 42 Wis. 493; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599; *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 511; *Dalley v. Houston*, 58 Mo. 361; *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 31 Minn. 465; *Cosgriff v. Miller* (Wyo.) 68 Pac. 206; *Wagner v. Gibbs*, (Miss.) 31 So. 434; *Brown v. Evans*, 17 Fed. (U. S.) 912; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947.
- ¹⁵⁶ *Gaithers v. Blowers*, 11 Md. 536; *Sloan v. Edwards*, 61 Md. 89; *Meibus v. Dodge*, 38 Wis. 300.

ties; (4) the surplus over and above liabilities; (5) dividends paid the stockholders in recent years.¹⁵⁷ It is a disputed question as to whether or not in the absence of any evidence by the plaintiff to prove the wealth and financial standing of the defendant, the defendant himself can introduce evidence to show his pecuniary condition. The Supreme Court of Maine has held that the defendant had this right even where the plaintiff failed to introduce any evidence on the subject.¹⁵⁸ But other courts have denied the rule.¹⁵⁹

§ 1998. Absence of pecuniary basis—Jury estimates.—There are many elements of damages that are not susceptible of proof as to actual amount; there is no pecuniary standard by which real or actual compensation can be determined. In cases involving such elements the question of damages is not one of science or skill, nor is it one requiring peculiar knowledge or skill. For these reasons the opinion of witnesses cannot be taken as to the measure or amount of damages. The question is a practical one upon which the jury are presumed to have an equal degree of knowledge and experience with other persons, and they are presumed, by some courts at least, in such cases, to be able to form a correct conclusion from their own experience of the common affairs of life; and they must assess the damages from all the proper facts and circumstances of the particular case.¹⁶⁰ Thus, it is said in a California case: "Juries are in many cases permitted to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict."¹⁶¹ In cases where physical pain or mental suffering are to be compensated the rule as to the assessment of damages has been stated as follows: "As to these elements of damages, to wit, the fright and shock to the plaintiff,—as in the very nature of things these are elements of damages which

¹⁵⁷ *Pullman &c. Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

¹⁵⁸ *Johnson v. Smith*, 64 Me. 553.

¹⁵⁹ *Case v. Marke*, 20 Conn. 248; *Mullin v. Spangenberg*, 112 Ill. 140.

¹⁶⁰ *Chamberlain v. Porter*, 9 Minn. 260; *Chapman v. Dodd*, 10 Minn. 350; *Du Laurans v. First Div. &c. R. Co.*, 15 Minn. 49; *Cederberg v.*

Robison, 100 Cal. 93, 34 Pac. 625; *North Chicago St. R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483; *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884.

¹⁶¹ *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Steele v. Marsicano*, 102 Cal. 666, 36 Pac. 920.

are not susceptible of any exact computation,—it is for the jury to determine the amount as their best, candid, and careful judgment shall dictate. Upon neither side, however, should the jury go to extremes or assume to act arbitrarily, because it is not arbitrary power which the law places in your hands. It is a power of necessity resting somewhere, and the law wisely gives that power to the jury to act upon their deliberate, conscientious judgment in determining what would be a fair compensation for the injury sustained, and if you reach this amount, you have reached a result the law contemplates, to wit, compensation purely for the injury suffered.” It has also been held proper and competent for a jury acting upon their own knowledge and without proof, to say that the services of a boy from eleven until twenty-one years of age, were valuable to the father, and even in the absence of evidence as to such value the jury could estimate it.¹⁶³ In actions sounding in tort where exemplary damages may be recovered, the jury have the right to decide as to the question of amount. The only authority or power of the court in such cases is to set the verdict aside if the damages appear to be excessive. But in all cases where a rule for the measurement of the complainant’s damages can be applied the jury is bound to adopt it. And where compensation is the rule and the evidence shows that a certain or definite sum will repair the injury sustained by the misconduct of the defendant, a jury will not be justified in going beyond this sum.¹⁶⁴

¹⁶² *Geveke v. Grand Rapids &c. R. Co.*, 57 Mich. 589, 597, 24 N. W. 675; *Seger v. Barkhamsted*, 22 Conn. 290, 298; *Ransom v. New York &c. R. Co.*, 15 N. Y. 415; *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Power v. Harlow*, 57 Mich. 107, 116, 23 N. W. 606; *Hill v. Alabama &c. R. Co.*, 79 Miss. 587, 31 So. 198; *Ostrander v. City of Lansing*, 115 Mich. 224, 73 N. W. 110; *Aldrich v. Palmer*, 24 Cal. 513; *Wall v. Levezay*, 6 Colo. 465; *Chicago &c. R. Co. v. Warner*, 108 Ill. 538; *Wadsworth v. Treat*, 43 Me. 163; *Coffin v. Coffin*, 4 Mass. 1; *Commonwealth v. Sessions of Norfolk*,

5 Mass. 435; *Hill v. Alabama &c. Co.*, 79 Miss. 587, 31 So. 198; *Salt Mill &c. Co. v. Hoyne*, (Kans.) Pac. 660; *Robinson v. Marino*, Wash. 434; *Railroad Co. v. Barro* 5 Wall. (U. S.) 90.

¹⁶³ *Quin v. Moore*, 15 N. Y. 43; *Drew v. Sixth Ave. R. Co.*, 26 N. 49; *McMahon v. Mayor &c.*, 33 N. 642; *Sheridan v. Brooklyn &c. Co.*, 36 N. Y. 39; *McIntyre v. New York &c. R. Co.*, 37 N. Y. 28; *O’Mara v. Hudson River R. Co.*, N. Y. 445.

¹⁶⁴ *Walker v. Smith*, 1 Wash. (S.) 152.

§ 1999. **Limitations—Assessment by Jury.**—But in the assessment of damages the jury is not to be left without some direction as to their duty in the premises. Whenever the facts and circumstances of a case warrant or justify the assessment of exemplary damages the jury should be so instructed, and a direction that in fixing the amount of punishment regard must be had to all the proper facts and circumstances of the case bearing upon the degree of malice, insult and aggravation.¹⁶⁵ Some controversy has arisen in courts as to whether the instruction should direct the jury that they may give such damages or that they ought to exercise the power. Perhaps neither rule should be absolute, but the right or duty to do so should be left with the jury under the proper instructions of the court.¹⁶⁶ In some jurisdictions in actions for personal torts, it is held that compensatory damages include not only the pecuniary loss but compensation for mental suffering as well; and that in awarding such damages no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong or insult.¹⁶⁷

§ 2000. **Breach of contract—Liquidated damages.**—A class of cases will not infrequently be found in actions on contracts where the parties themselves have agreed upon the amount of damages in case of a breach. The difficulty encountered by the courts in such cases is to determine whether or not the amount stipulated shall be regarded as liquidated damages or merely as a penalty. This question is usually to be determined from the intention of the parties as gathered from a view of the whole contract. The general rule is that where a specific sum is secured by the agreement to pay

¹⁶⁵ *Hooker v. Newton*, 24 Wis. 292; *Haberman v. Gasser*, 104 Wis. 98, 80 N. W. 105.

¹⁶⁶ *Platt v. Brown*, 30 Conn. 336; *Burkett v. Lanata*, 15 La. Ann. 337; *Pike v. Dilling*, 48 Me. 539; *Webb v. Gilman*, 80 Me. 188, 13 Atl. 688; *Knight v. Foster*, 39 N. H. 576; *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 406; *Goodall v. Thurman*, 1 Head (Tenn.) 209; *Coxe v. England*, 65 Pa. St. 212; *Hayes v. Creary*, 60 Tex. 445; *Hooker v. Newton*, 24 Wis. 292; *Haberman v. Gasser*, 104 Wis. 98, 80 N. W. 105.

¹⁶⁷ *Craker v. Chicago &c. R. Co.*, 36 Wis. 657; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501; *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127; *Reinke v. Bentley*, 90 Wis. 457, 63 N. W. 1055; *Robinson v. Superior &c. R. Co.*, 94 Wis. 345, 68 N. W. 961. It is assumed by some very high authorities that regardless of name or quality the damages in any given case can never be more than compensatory. For a lengthy and interesting discussion of this proposition, see, 2 *Greenleaf Ev.*, § 253, n. 2.

a large amount in case of a breach of the contract it will be regarded as a penalty only.¹⁶⁸ But where a contract is entered into between parties on an equal footing, or in the absence of fraud and where no difficulty would be encountered in proving or estimating the damages in case of a breach, and where it is clear that it is the intention of the parties as gathered from the language used and from the surrounding circumstances, to make a specific sum stated payable in case of the violation of its terms by either party, or by the party bound, as liquidated damages, such sum so agreed upon will be taken as liquidated damages.¹⁶⁹ It has been held that in the construction of such a contract, if there is any doubt as to the meaning or intention of the parties, the sum stipulated as a penalty should be discharged by the payment of the damages actually sustained. Mr. Pomeroy lays down the general rule as follows: "Whether an agreement provides for the performance or non-performance of one single act or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed as to be of such a nature and effect, that it necessarily renders the defaulting party liable in the same amount at all events, both whether his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages."¹⁷⁰

¹⁶⁸ *Hamilton v. Overton*, 6 Blackf. (Ind.) 206; *Carpenter v. Lockhart*, 1 Ind. 434; *Brewster v. Edgerly*, 13 N. H. 275; *Astley v. Weldon*, 2 B. & P. 346; *Fletcher v. Dyche*, 2 T. R. 32; 1 *Pomeroy Equity*, § 441, and note.

¹⁶⁹ *Williams v. Green*, 14 Ark. 315; *Potter v. Abrens*, 110 Cal. 674, 43 Pac. 338; *Sutton v. Howard*, 33 Ga. 536; *Reeves v. Stipp*, 91 Ill. 609; *Butler v. Wallbaum & Co.*, 47 Ill. App. 153; *Hamilton v. Overton*, 6 Blackf. (Ind.) 206; *Sanford v. First Nat. Bank*, 94 Iowa 680, 63 N. W. 459; *Gowen v. Gerrish*, 15 Me. 273; *Morse v. Rathburn*, 42 Mo. 594; *Hurd v. Dunsmore*, 63 N. H. 171; *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Hosmer v. True*, 19 Barb. (N. Y.) 106; *Wooster v.*

Kisch, 26 Hun (N. Y.) 61; *Dakin v. Williams*, 17 Wend. (N. Y.) 44; *Frank v. Block*, 9 N. Y. St. 10; *March v. Allabough*, 103 Pa. St. 33; *Durst v. Swift*, 11 Tex. 273; *Dolan v. Fitch*, 42 Wis. 679; 1 *Pomeroy Equity*, § 442.

¹⁷⁰ *Duffy v. Shockey*, 11 Ind. 7; *Foley v. McKeegan*, 4 Iowa 1; *Shurtz v. Taylor*, 5 Metc. (Mass.) 61; *Fitch v. Gray*, 11 Allen (Mass.) 13; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *O'Keefe v. Dyer*, 10 Mont. 477, 52 Pac. 196; *Davis v. Gallett*, 52 N. H. 126; *Cheddick v. Marsh*, 21 N. J. L. 463; *Kelley v. Seay*, 3 Okla. 527, 41 Pac. 615; *Baird v. Tolliver*, 6 Humph. (Tenn.) 18; *Whitfield v. Levy*, 6 Vroom (N. J.) 149; *Robinson v. Centenary Fund*, 68 N. J. L. 723.

¹⁷¹ 1 *Pomeroy Eq. Jur.*, § 444.

But the question must be determined from the circumstances of each particular case, and will not be controlled by a failure to use the term "penalty" or by the use of the term "liquidated damages."¹⁷² And though an amount certain is stated in an agreement as liquidated damages in a construction of the contract under all the circumstances it may be regarded as a penalty only.¹⁷³ In the construction of this class of contracts, in the absence of fraud, courts will not usually inquire into the adequacy of the consideration, as the parties had the right to determine that for themselves.¹⁷⁴ But the rule remains to the effect that where it appears to be the manifest intention of the parties as gathered from a full view of all the provisions of the contract, the terms employed to express such intent and the peculiar circumstances of the subject matter of the agreement, and where the actual damages would be uncertain and indeterminate, or where the amount stated is not grossly in excess of the supposed actual damages, and where it is expressly stated that the sum named should be recoverable as damages the amount so stated will be regarded by the courts as liquidated damages.¹⁷⁵ In an

¹⁷² *O'Keefe v. Dyer*, 20 Mont. 477; *Foley v. McKeegan*, 4 Iowa 1; *Condon v. Kemper*, 46 Kans. 126; *Hahn v. Horstman*, 12 Bush. (Ky.) 249; *Seay*, 3 Okla. 542, 41 Pac. 615; *Perkins v. Lyman*, 11 Mass. 76; *Davis v. Freeman*, 10 Mich. 188; *May v. Crawford*, 142 Mo. 390, 44 S. W. 260; *Hamaker v. Schroers*, 49 Mo. 406; *Basye v. Ambrose*, 28 Mo. 39; *Whitfield v. Levy*, 35 N. J. L. 151; *Hayes*, 5 Sandf. (N. Y.) 640; *Lindsay v. Anesley*, 28 N. Car. 186; *Wheatland v. Taylor*, 29 Hun (N. Y.) 70; *Shiell v. McNitt*, 9 Paige (N. Y.) 101; *Jackson v. Baker*, 2 Edw. Ch. (N. Y.) 471; *Clements v. Schuylkill River & Co.*, 132 Pa. St. 445, 19 Atl. 274; *Williams v. Vance*, 9 Rich. L. (S. Car.) 344; *Yenner v. Hammond*, 36 Wis. 277; *Tilley v. American & Co. Asso.*, 52 Fed. 618; 1 *Pomeroy Equity*, § 443. 319.

¹⁷³ *Johnson v. Gwinn*, 100 Ind. 466; *Guerand v. Dandeleit*, 32 Md. 561.

¹⁷⁴ *Watts v. Sheppard*, 2 Ala. 425; *Doans v. Chicago & Co. R. Co.*, 51 Ill. App. 353; *Dill v. Lawrence*, 109 Ind. 564, 10 N. E. 573; *Kelly v. Ferjervary*, 111 Iowa 698, 699; *Sanford v. Bank*, 94 Iowa 683, 63 N. W. 459; ¹⁷⁵ *Williams v. Green*, 14 Ark. 315; *Lincoln v. Little Rock & Co.*, 56 Ark. 405, 19 S. W. 1056; *Nilson v. Jonesboro*, 57 Ark. 168; *California*

action on a contract where the amount of damages has been agreed upon, or has been liquidated by the parties, it is unnecessary to prove special damages, and no evidence is necessary on the question

- &c. Co. v. Wright, 6 Cal. 258; Rick-
etson v. Richardson, 19 Cal. 330;
Streeter v. Rush, 25 Cal. 67; Sut-
ton v. Howard, 33 Ga. 536; Good-
man v. Henderson, 58 Ga. 567;
Foote v. Malony, 115 Ga. 985; Gob-
ble v. Linder, 76 Ill. 157; Reeves v.
Stipp, 91 Ill. 609; Boyce v. Watson,
52 Ill. App. 361; Heisen v. Westfall,
86 Ill. App. 576; Steer v. Brown, 106
Ill. App. 361; Studabaker v. White,
31 Ind. 211; Spicer v. Hoop, 51 Ind.
365; Johnson v. Gwinn, 100 Ind.
466; Stanley v. Montgomery 102
Ind. 102, 26 N. E. 213; Jaqua v.
Headington, 114 Ind. 309, 16 N. E.
527; Martin v. Murphy, 129 Ind.
464, 28 N. E. 1118; Sanford v. First
Nat. Bank, 94 Iowa 680, 63 N. W.
459; Kelley v. Ferjervary, 111 Iowa
693; Heatwole v. Gorrell, 35 Kans.
697, 12 Pac. 135; Gaumon v. Howe,
14 Me. 250; Gowan v. Gerrish, 15
Me. 273; Holbrook v. Tobey, 66 Me.
410; Pierce v. Fuller, 8 Mass. 223;
Hodges v. King, 7 Metc. (Mass.)
583; Chase v. Allen, 13 Gray
(Mass.) 42; Lynde v. Thompson, 2
Allen (Mass.) 456; Cushing v.
Drew, 97 Mass. 445; Leary v. Laf-
lin, 101 Mass. 334; Glunn v. Moran,
174 Mass. 233, 54 N. E. 535; Jaquith
v. Hudson, 5 Mich. 123; Whiting v.
New Baltimore, 127 Mich. 66; Morse
v. Rathburn, 42 Mo. 594; Hamaker
v. Schroers, 49 Mo. 406; May v.
Crawford, 150 Mo. 504, 51 S. W.
693; Brevard v. Wimberly, 89 Mo.
App. 331; St. Louis &c. R. Co. v.
Jefferson &c. Co., 90 Mo. App. 171;
Brennan v. Clark, 29 Neb. 385, 45
N. W. 472; Squires v. Elwood, 33
Neb. 127, 49 N. W. 939; Chamber-
lain v. Bagley, 11 N. E. 234; Brew-
ster v. Edgerly, 13 N. H. 275; M
v. Wheeler, 13 N. H. 351; Hough
v. Pattee, 58 N. H. 326; Hurd
Dunsmore, 63 N. H. 171; Morrill
Weeks, 70 N. H. 178, 46 Atl.
Whitfield v. Levy, 35 N. J. L. 1
Monmouth &c. Asso. v. Wallis
Works, 55 N. J. L. 132, 26 Atl. 1
Robinson v. Centenary Fund &c.,
N. J. L. 728; Bagley v. Peddie,
N. Y. 469; Ward v. Hudson R.
R. Co., 125 N. Y. 230, 26 N. E. 28
Tode v. Gross, 127 N. Y. 480, 28
E. 469; Curtis v. Van Bergh, 161
Y. 47, 55 N. E. 398; Mott v. Mott,
Barb. (N. Y.) 127; Wooster
Kisch, 26 Hun (N. Y.) 61; Pe-
skill &c. R. Co. v. Peekskill, 21 A.
Div. (N. Y.) 94; Dakin v. William
17 Wend. (N. Y.) 447; Easton
Pennsylvania &c. Co., 13 Ohio
Grasselli v. Lowden, 11 Ohio
349; Streeper v. Williams, 48
St. 450; March v. Allabough, 1
Pa. St. 335; Clements v. Schuyler
&c. R. Co., 132 Pa. St. 445, 19 A.
274; Keck v. Bieber, 148 Pa.
645, 24 Atl. 170; Burgoon v. Joh
son, 194 Pa. St. 61, 45 Atl. 65; Du
v. Swift, 11 Tex. 273; Indianola
Gulf &c. R. Co., 56 Tex. 594; Eak
v. Scott, 70 Tex. 443, 7 S. W. 77
Wright v. Dobie, 3 Tex. Civ. Ap.
194, 22 S. W. 66; Yenner v. Ha
mond, 36 Wis. 277; Manistee &
Works v. Shores &c. Co., 92 Wis.
65 N. W. 863; Crisdee v. Bolton,
Car. & P. 240; Saintner v. Ferguso
7 C. B. 716; Galsworthy v. Stru
1 Exch. 659; Atkyns v. Kinnier,
Exch. 776; Leighton v. Wales, 3
& W. 545; Rawlinson v. Clarke,
M. & W. 187; Price v. Green, 16
& W. 346.

damages; the agreement dispenses with all such proof, and it is only necessary to prove the breach.¹⁷⁶ And in actions on such contracts, the recovery is limited to the sum agreed upon by the parties.¹⁷⁷

§ 2001. **Proof when character is in issue.**—The general rule that the character of a party to a civil suit cannot be inquired into is not without its exceptions. There is a class of civil actions in which proof of character may be shown for the purpose of affecting the damages. This class of actions is where the character of the party is directly in issue or where, from the nature of the issue, the evidence of character is of special importance in the trial of the action. Nor is it material whether the act charged or complained of is indictable or not. "That putting character in issue is a technical expression which does not mean simply that the character may be affected by the result, but that it is of particular importance in the suit itself, as the character of the plaintiff in an action of slander, or that of a woman in an action on a case for seduction."¹⁷⁸ Under this rule in an action for slander involving a charge of larceny, where the defendant filed no plea of justification and introduced no evidence of

¹⁷⁶ *Spicer v. Hoop*, 51 Ind. 365; 56 N. E. 129; *Dakin v. Williams*, 17 Stanley v. Montgomery, 102 Ind. Wend. (N. Y.) 447.

¹⁷⁷ *Porter v. Seiler*, 23 Pa. St. 424; *Anderson v. Long*, 10 S. & R. (Pa.) 55; *Atkinson v. Grahma*, 5 Watts (Pa.) 411; *Scott v. Peebles*, 2 Sm. & M. (Miss.) 546; *Humphrey v. Humphrey*, 7 Conn. 116; *Church v. Drummond*, 7 Ind. 17; *Gutzwiller v. Lackman*, 23 Mo. 168; *Rogers v. Troost*, 51 Mo. 470; *Home Lumber Co. v. Hartman*, 45 Mo. App. 647; *Dudley v. McCluer*, 65 Mo. 241; *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876; *Gough v. St. John*, 16 Wend. (N. Y.) 646; *Rogers v. Lamb*, 3 Blackf. (Ind.) 155; *Givens v. Bradley*, 3 Bibb. (Ky.) 195; *Lecky v. Bloser*, 24 Pa. St. 401; *American & Ins. Co. v. Hazen*, 110 Pa. St. 530, 1 Atl. 605; *Gebhart v. Burkett*, 57 Ind. 378; *Romayne v. Duane*, 3 Wash. (U. S.) 246.

¹⁷⁸ *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Duffy v. Shockey*, 11 Ind. 70; *Johnson v. Gwinn*, 100 Ind. 466; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Bird v. St. John's & Church*, 154 Ind. 138,

the plaintiff's bad character, it was held that the plaintiff's character was not in issue and no proof could be given either on the original case or in rebuttal. The reason for the rule announced in these cases is that in actions for actual compensation only there can be no mitigation of the damages, and evidence for the purpose of mitigating damages can only be given in actions where punitive or exemplary damages may be assessed.¹⁷⁹ The same rule was applied by the same court in an action for civil damages where the defendant was charged with the burning of plaintiff's building.¹⁸⁰

§ 2002. Proof of character as affecting damages.—The law presumes all persons to be of good character, and for this reason in actions for damages proof of good character cannot be given in the first instance for the purpose of enhancing damages. Mr. Wharton gives three reasons for the rule, as follows: "First, the law assumes all characters to be good, and there is no use proving that which is assumed; second, to make good character the basis of recovery would be equivalent to saying that a person with a bad character can be injured with impunity; third, a collateral issue would be provoked which would bear hard upon many deserving cases."¹⁸¹ The rule, however, does not apply to all classes of cases. There is a clear and just distinction. The true rule is substantially, that evidence of character is not admissible in civil suits, except where it is directly in issue, and where, from the nature of the issue, such evidence is of special importance; and it is immaterial whether the act charged be indictable or not. This rule is applied especially to a defendant

¹⁷⁹ *Haun v. Wilson*, 28 Ind. 296; *Downey v. Dillon*, 52 Ind. 442; *Wuensch v. Morning Jour. Assn.*, 4 App. Div. (N. Y.) 110, 38 N. Y. S. 605.

¹⁸⁰ *Gebhart v. Burkett*, 57 Ind. 378.

¹⁸¹ 1 Wharton's Ev. § 50; *Shroyer v. Miller*, 3 W. Va. 158; *Norton v. Warner*, 9 Conn. 172; *Thompson v. Church*, 1 Root (Conn.) 312; *Quinton v. Van Tuyl*, 30 Iowa 554; *Reddin v. Gates*, 52 Iowa 210; *Simpson v. Westenberger*, 28 Kans. 756; *Thayer v. Boyle*, 30 Me. 475; *Sowell v. McDonald*, 58 Miss. 251; *Board-*

man v. Woodman, 47 N. H. 12; *Corning v. Corning*, 6 N. Y. 9; *Fowler v. Aetna & Co. Ins. Co.*, 6 Conn. (N. Y.) 673; *Jeffries v. Harris*, 105 N. Car. 105; *Nash v. Gleson*, 5 S. & R. (Pa.) 352; *Smith v. Plunket*, 1 Strob. (S. Car.) 37; *Wright v. McKee*, 37 Vt. 161; *Brown v. Evans*, 8 Sawy. 488, 17 Fed. 91; *Fahey v. Crotty*, 63 Mich. 383, 1 N. W. 876; *Robinson v. Powers*, 1 Ind. 480, 28 N. E. 1112; *Cochran Toher*, 14 Minn. 385; *Dame v. Kennedy*, 25 N. H. 318; *Townshend & Libel*, § 313.

sued for damages for injuries inflicted by an unlawful or malicious act, as good character can be no defense and as a general proposition motive or intent constitutes no element of the charge.¹⁸² This rule is consistent with the rule admitting such proof in cases of libel and slander, and in other cases where bad character may be shown on mitigation of damages.¹⁸³

§ 2003. **Proof of character—Mitigation of damages.**—The defendant in certain cases may prove the bad character of the plaintiff for the purpose of mitigating the damages.¹⁸⁴ And when any evidence is offered by the defendant for such purpose the plaintiff may in rebuttal offer evidence of his good character.¹⁸⁵ The proof in such cases must usually be confined to general character or reputation and not to particular acts or instances of misconduct.¹⁸⁶ And it

¹⁸² *Porter v. Seller*, 23 Pa. St. 424; *Gebhart v. Burkett*, 57 Ind. 378.

¹⁸³ See, §§ 170, 2459, 2478, 2481; *Bennett v. Hyde*, 6 Conn. 24; *Sample v. Wynn*, 44 N. Car. 319; *Burton v. March*, 6 Jones L. (N. Car.) 409.

¹⁸⁴ *Fuller v. Dean*, 31 Ala. 654; *Case v. Marks*, 20 Conn. 248, 251; *Hallowell v. Guntle*, 82 Ind. 554; *Mosier v. Stoll*, 119 Ind. 244, 20 N. E. 752; *Tracy v. Hackett*, 19 Ind. App. 133, 49 N. E. 185; *Stone v. Varney*, 7 Metc. (Mass.) 86; see, *Bruce v. Priest*, 5 Allen (Mass.) 100; *Parkhurst v. Ketchum*, 6 Allen (Mass.) 406; *Clark v. Brown*, 116 Mass. 504; *Lamos v. Snell*, 6 N. H. 413; *Wetherbee v. Marsh*, 20 N. H. 561; *Severance v. Hilton*, 24 N. H. 147; *Duval v. Davey*, 32 Ohio St. 604; *Fisher v. Patterson*, 14 Ohio 418; *Pease v. Shippen*, 80 Pa. St. 513.

¹⁸⁵ *Holley v. Burgess*, 9 Ala. 728; *Goldsmith v. Picard*, 27 Ala. 142; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83; *Miles v. Van Horn*, 17 Ind. 245; *Downey v. Dillon*, 52 Ind. 442; *Pratt v. Andrews*, 4 N. Y. 493; *Shroyer v. Miller*, 3 W. Va. 158; *Ketland v. Bissett*, 1 Wash. (U. S.)

144; *Ayres v. Covill*, 18 Barb. (N. Y.) 260; *Root v. King*, 7 Cow. (N. Y.) 634; *Hamer v. McFarlin*, 4 Denio (N. Y.) 509; *Sayre v. Sayre*, 25 N. J. L. 235; *Campbell v. Campbell*, 54 Wis. 97, 11 N. W. 456; *Nellis v. Cramer*, 86 Wis. 337, 56 N. W. 911; *Edwards v. Kansas City & Co.*, 32 Fed. 813; *McBee v. Fulton*, 47 Md. 403; *McRae v. Lilly*, 1 Ired. L. (N. Car.) 118.

¹⁸⁶ *Sutherland Damages*, 1226; *Watson v. Christie*, 2 B. & P. 224; *Scott v. Sampson*, L. R. 8 Q. B. Div. 491; *Bate v. Hill*, 1 Car. & P. 100; *Chapman v. Ordway*, 5 Allen (Mass.) 595; *Parkhurst v. Ketchum*, 6 Allen (Mass.) 406; *Leohard v. Allen* 11 Cush. (Mass.) 241; *Mahoney v. Bedford*, 132 Mass. 393; *McCarthy v. Coffin*, 157 Mass. 478, 32 N. E. 649; *Shilling v. Carson*, 27 Md. 175, 185; *Powers v. Presgroves*, 38 Miss. 227; *Lamos v. Snell*, 6 N. H. 413; *Pallet v. Sargent*, 36 N. H. 496; *Hawkins v. Globe Pub. Co.*, 10 Mo. App. 174; *Sayre v. Sayre*, 25 N. J. L. 235; *Dewit v. Greenfield*, 5 Ohio 225; *Folwell v. Providence & Co.*, 19 R. I. 551; *Pease v. Shippen*, 80 Pa. St. 513; *Bell v. Farnsworth*, 11

is held that this rule applies even where a defendant testifies rumors which are calculated to bring the plaintiff into disrepute before the jury, and the plaintiff may then introduce evidence of good character.¹⁸⁷ The same court stated the rule as follows: "When the adversary under his averments, gives evidence of particular acts and circumstances from which natural and designed inferences throw strong suspicion upon the probity of the person affected, such person may meet the suspicions thus aroused by proof of general good character in respect to the particular traits involved."¹⁸⁸ As for the purpose of mitigating the damages in actions of seduction it has been held that the defendant may prove the prior general bad character and also particular acts of immorality or indiscretion on the part of the person alleged to have been seduced.¹⁸⁹ So, in actions for negligently causing injury or death, proof of specific acts of intoxication has been held admissible in mitigation of damages.¹⁹⁰

§ 2004. Aggravation of damages—Illustrations.—In many instances in ordinary actions for damages certain elements exist which, if properly pleaded and proved, would aggravate the damages occasioned by the principal act or wrong charged. No general rule can be stated which will govern in all cases. There is such a diversity

Humph. (Tenn.) 608; Wuensch v. Morning Jour. Assn., 38 N. Y. S. 605.

¹⁸⁷ Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Haymond v. Saucer, 84 Ind. 3; Dame v. Kenney, 25 N. H. 318; Inman v. Foster, 8 Wend. (N. Y.) 602; Petrie v. Rose, 5 Watts & S. (Pa.) 364; Scott v. Peebles, 2 Sm. & M. (Miss.) 546; 1 Wharton Ev., § 51.

¹⁸⁸ Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81; American Ex. Co. v. Patterson, 73 Ind. 430; Graft v. Graft, 76 Ind. 136; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Bennett v. Hyde, 6 Conn. 24; McBee v. Fulton, 47 Md. 403, 431.

¹⁸⁹ Case v. Marks, 20 Conn. 251; Shattuck v. Myers, 13 Ind. 46; Long v. Morrison, 14 Ind. 595; Smith v. Yaryan, 69 Ind. 445; Hallowell v.

Guntle, 82 Ind. 554; Tracy Hackett, 19 Ind. App. 133, 49 N. E. 185; Stone v. Varney, 7 Me. (Mass.) 86; Sayre v. Sayre, 25 N. L. 235; Ayres v. Covill, 18 Bar. (N. Y.) 260; Hamer v. McFarland, 4 Denio (N. Y.) 509; Root v. Kin, 7 Cow. (N. Y.) 634; Campbell v. Campbell, 54 Wis. 97, 11 N. W. 45; Nellis v. Cramer, 86 Wis. 337, 56 W. 911; Edwards v. Kansas City & Co., 32 Fed. 813; Bamfield v. Maysey, 1 Campb. 460; Dodd v. Norris, 3 Campb. 519; Carpenter v. Wall, Ad. & El. 803; Elsam v. Fawcett, Esp. 562; Verry v. Watkins, 7 Ca. & P. 308.

¹⁹⁰ Wright v. City of Crawfordville, 142 Ind. 636, 42 N. E. 22; Nashville & C. R. Co. v. Prince, Heisk. (Tenn.) 580; Macon & C. Co. v. Johnson, 38 Ga. 409.

and variety in the elements which may aggravate or increase the damages for the primary wrong that each case must depend upon its own peculiar facts and circumstances, and as the cases arise, precedent, more than rules, must be depended upon. One rule of somewhat general application has been stated as follows: "In trespass the plaintiff may recover, not only for the pecuniary loss sustained, as the natural and legal consequence of the trespass, but he may recover vindictive or exemplary damages, in consideration of the circumstances attending the wrongful act, the malice, willfulness, wantonness or corrupt motive attending the act. He may also recover in respect to any special or peculiar damages resulting from the wrongful act and of which the wrongful act is the moving or efficient cause, if such damages are stated in the declaration."¹⁹¹ A rule adopted in some jurisdictions in actions of trespass is that "the plaintiff may prove special damages if they are strictly the consequence of the trespass committed, or if the act done by the defendant, causing such special damages, constitutes a part of one entire transaction, of which the principal trespass was the commencement." Thus where by reason of a trespass cattle escaped and were lost, the trespasser was held liable not only for the trespass but for the value of the cattle.¹⁹² The rule is that one who seeks to aggravate the damages by proof of wrongs committed in the destruction of, or injury to, personal property of another on the premises where the trespass is alleged to have been committed, must allege in his pleadings the aggravating circumstances in order to admit such proof.¹⁹³ In an action of trespass where the plaintiff was forcibly excluded from the use of certain property used to shelter his hands and teams while engaged in performing a contract in constructing a railroad, it was held proper to prove the loss of hands for the want of such shelter, the amount of expenses in providing other shelter, the protraction

¹⁹¹ *Sherman v. Dutch*, 16 Ill. 283; *Edwards v. Beach*, 3 Day (Conn.) 447; *Denison v. Hyde*, 6 Conn. 508; *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384; *Churchill v. Watson*, 5 Day (Conn.) 140; *Smith v. Wunderlick*, 70 Ill. 426; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Johnson v. Courts*, 3 H. & McH. (Md.) 510; *Dickinson v. Boyle*, 17 Pick. (Mass.) 78; *Spigelmoyer v. Walter*, 3 W. & S. (Pa.) 540; *Wort v. Jenkins*, 14

Johns. (N. Y.) 352; *Bracegirdle v. Orford*, 2 M. & S. 77; *Sears v. Lyons*, 2 Stark. 282; *Merest v. Harvey*, 5 Taunt. 442.

¹⁹² *Damron v. Roach*, 4 Humph. (Tenn.) 134.

¹⁹³ *Freelove v. Gould*, 3 Kans. App. 750; *McTavish v. Carroll*, 13 Md. 429; *Gusdorff v. Duncan*, 94 Md. 160, 50 Atl. 574; *Dickinson v. Boyle*, 17 Pick. (Mass.) 78; *Patchen v. Keeley*, 19 Nev. 404, 14 Pac. 347.

cation amounting to less than justification will render the defendant liable in less than compensatory damages.²¹⁷ In an action for breach of contract for advertising before anything had been done by the publisher, it was held that it was the duty of the publisher to make reasonable efforts and diligence to secure other matter in order to reduce the damage.²¹⁸ But in an action for personal injuries it was held that the injured person owed no duty to the defendant to work and earn money to mitigate the damages, as he could only recover for impairment of his earning capacity to the extent that the injury prevented him from earning money either in his former occupation or in some other available one.²¹⁹ But the general rule is that an injured party is bound to use reasonable effort to mitigate the loss by jury and prevent further damages.²²⁰

§ 2006. **Proof of damages—Opinions of witnesses.**—The authorities, with few exceptions, are agreed upon the proposition that witnesses cannot give their opinions as to the quantum of damages in any given case. "The ordinary, and in general, the only legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. . . . No case is cited by counsel for the plaintiff, where evidence of opinion, as to the amount of damages sustained, has ever been sanctioned as legal. The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury."²²¹ As stated

Div. (N. Y.) 215; *Lee v. Woolsey*, 19 Johns. (N. Y.) 319; *Robison v. Rupert*, 23 Pa. St. 523; *Cushman v. Ryan*, 1 Story (U. S.) 91; *Donally v. Harris*, 21 Ill. 126; *Ireland v. Elliott*, 5 Iowa 478; *Chandler v. Newton*, 13 Ky. L. R. 927; *Richardson v. Zuntz*, 26 La. Ann. 313; *Crosby v. Humphreys*, 59 Minn. 92, 60 N. W. 843; *Daniel v. Giles*, 108 Tenn. 242, 66 S. W. 1128; *Hayes v. Sease*, 51 S. Car. 534, 29 S. E. 259; *Houston &c. R. Co. v. Blatchler*, (Tex.) 73 S. W. 981; *Ward v. White*, 86 Va. 212, 9 S. E. 1021; *Thomas v. Powell*, 7 Car. & P. 807.

²¹⁷ *Scott v. Fleming*, 16 Ill. App. 539; *Goldsmith v. Joy*, 61 Vt. 488; *Birchard v. Booth*, 4 Wis. 85.

²¹⁸ *Peck v. Kansas City &c. Co.* Mo. App. 212, 70 S. W. 169.

²¹⁹ *Missouri &c. R. Co. v. F.* (Tex.) 70 S. W. 331.

²²⁰ *St. Louis &c. R. Co. v. A.* 67 Ark. 371, 55 S. W. 159; *Sche v. Baltzer*, 84 Ill. App. 126; *T. v. Courter*, 93 Mich. 473, 53 N. 621; *Sweeny v. Montana &c. R.* 19 Mont. 163, 47 Pac. 791; *Hig v. New York &c. R. Co.*, 78 Hun. Y.) 567; *Gulf &c. R. Co. v. S.* ton, 2 Tex. Civ. App. 558, 22 S. 285; *Galveston &c. R. Co. v. B.* 2 Tex. Civ. App. 545, 21 S. W. 1.

²²¹ *Norman v. Wells*, 17 Wend. Y.) 136; *Lincoln v. Saratoga &c. Co.*, 23 Wend. (N. Y.) 425; *Her v. Lapham*, 10 Johns. (N. Y.)

by another court: A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury and a witness cannot be allowed to usurp it. He may state facts showing the extent of the damages and any other permanent matters. But the measuring of the amount of damages in dollars and cents is not a fact. It is a matter of opinion or speculation."²²² The general rule is that witnesses must state facts, and are not permitted to give their opinions founded on such facts; nor can they give inferences or deductions drawn from them. These rules apply almost without exception as to the quantum of damages resulting from any act.²²³

- Hays v. Windsor, 130 Cal. 230, 62 Pac. 395; Old v. Keener, 22 Colo. 6, 43 Pac. 127; Dunham v. Simmons, 3 Hill (N. Y.) 609; Paige v. Hazard, 5 Hill (N. Y.) 603; De Witt v. Barly, 17 N. Y. 340; Van Deusen v. Young, 29 N. Y. 9; Fish v. Dodge, 4 Denio (N. Y.) 312; Harger v. Edmonds, 4 Barb. (N. Y.) 256; Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752; Burton v. Severance, 22 Ore. 91, 29 Pac. 200; Tingley v. City of Providence, 8 R. I. 493; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732; Hopkins v. Indianapolis &c. R. Co., 78 Ill. 32; City of Parsons v. Lindsay, 26 Kans. 426; Scattergood v. Wood, 79 N. Y. 263; Crane v. Town of Northfield, 33 Vt. 124; Oleson v. Tolford, 37 Wis. 327; Seliger v. Bastian, 66 Wis. 521, 29 N. W. 244.
- ²²² L. R. M. & T. Ry. v. Haynes, 47 Ark. 497; Pierson v. Wallace, 7 Ark. 282; Railway Co. v. Combs, 51 Ark. 324, 11 S. W. 418; Railway Co. v. Jones, 59 Ark. 105, 26 N. W. 595; Davis v. Central R. Co., 60 Ga. 329; Central R. Co. v. Senn, 73 Ga. 705.
- ²²³ Montgomery &c. R. Co. v. Varner, 19 Ala. 185; Alabama &c. R. Co. v. Burkett, 42 Ala. 83; Hames v. Brownlee, 63 Ala. 277; Chander v. Bush, 84 Ala. 102, 4 So. 207; Young v. Cureton, 87 Ala. 727, 6 So. 352; Woodward v. Gates, 38 Ga. 205; Central &c. R. Co. v. Kelly, 58 Ga. 107; Cannon v. Iowa City, 34 Iowa 203; Dougherty v. Stewart, 43 Iowa 648; Kirkpatrick v. Snyder, 33 Ind. 169; Ohio &c. R. Co. v. Nickless, 71 Ind. 271; Pittsburg &c. R. Co. v. Hixon, 79 Ind. 111; Yost v. Conroy, 92 Ind. 465; Elwood &c. Co. v. Harting, 21 Ind. App. 408; Wilcox v. Leake, 11 La. Ann. 178; Sowers v. Dukes, 8 Minn. 23; Chamberlain v. Porter, 9 Minn. 260; Burlington &c. R. Co. v. Beebe, 14 Neb. 463, 16 N. W. 747; Wellington v. Moore, 37 Neb. 560, 56 N. W. 200; Morehouse v. Mathews, 2 N. Y. 514; Clark v. Baird, 9 N. Y. 183; Sweet v. Tuttle, 14 N. Y. 465; De Witt v. Barly, 17 N. Y. 340; Van Deusen v. Young, 29 N. Y. 9; Teerpenning v. Corn &c. Ins. Co., 43 N. Y. 279; Green v. Plank, 48 N. Y. 669; Roberts v. New York &c. R. Co., 128 N. Y. 455, 24 N. E. 486; Roberts v. New York &c. R. Co., 155 N. Y. 31, 49 N. E. 262; Tetrault v. O'Connor, 8 N. Dak. 15, 76 N. W. 225; Kneeland v. Great Western &c. Co., 9 N. Dak. 49; Alexander v. Jacoby, 23 Ohio St. 358; Burton v. Severance, 22 Ore. 91, 29 Pac. 200; Webster v. White, 8 S. Dak. 479, 66 N. W. 1145;

So the rule is that a witness cannot be examined in such a manner that his answers will relieve the jury from considering and determining the facts submitted.²²⁴ In cases involving the question of damages for the location of highways and for the construction of railroads it has frequently been held that a witness will not be permitted to give his opinion as to the amount of damages, nor can he state that in his opinion there will be no damages.²²⁵ In an ac-

Erickson v. Sophy, 10 S. Dak. 71, 71 N. W. 758; *Tenney v. Rapid City*, (S. Dak.) 96 N. W. 96; *McWhirter v. Douglas*, 1 Coldw. (Tenn.) 591; *Houston &c. R. Co. v. Burke*, 55 Tex. 323; *San Antonio &c. R. Co. v. Long*, 87 Tex. 148, 27 S. W. 113; *Taylor v. Long*, (Tex.) 16 S. W. 1084; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 So. 315; *McNeill v. Davidson*, 37 Ind. 336; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732; *Lake Erie &c. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Clark v. Fisher*, 1 Paige (N. Y.) 171; *Pindar v. King's Co. &c. Ins. Co.*, 36 N. Y. 648; *Allen v. Stout*, 51 N. Y. 668; *Sloan v. New York &c. R. Co.*, 45 N. Y. 125; *Booth v. Cleveland &c. Co.*, 74 N. Y. 15; *Abbott v. People*, 86 N. Y. 460; *People v. Murphy*, 101 N. Y. 126, 4 N. E. 326; *Heath v. Slocum*, 115 Pa. St. 549, 9 Atl. 259; *Campbell v. State*, 10 Tex. App. 560; *Watson v. Milwaukee &c. R. Co.*, 57 Wis. 332, 15 N. W. 481; *Neilson v. Chicago &c. R. Co.*, 58 Wis. 516, 17 N. W. 310; *Ross v. Stockwell*, 19 Ind. App. 86, 49 N. E. 50; *Chicago &c. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026.

²²⁴ *Linn v. Sigsbee*, 67 Ill. 75; *Chicago &c. R. Co. v. Springfield &c. R. Co.*, 67 Ill. 142; *City of Chicago v. McGiven*, 78 Ill. 347; *Hoener v. Koch*, 84 Ill. 408; *Louisville &c. R. Co. v. Cox*; *Chicago &c. R. Co. v. Roberts*, 35 Ill. App. 137; *Loshbaugh v. Birdsell*, 90 Ind. 466; *Yost v. Con-*

roy, 92 Ind. 464; *Thompson v. Be-*
prez, 96 Ind. 67; *Hughes v. Be-*
114 Ind. 427, 16 N. E. 817; *Brun-*
v. Cummins, 133 Ind. 443, 32 N.
732; *Moore v. Auge*, 125 Ind.
25 N. E. 816; *Lake Erie &c. R.*
v. Juday, 19 Ind. App. 436, 49 N.
843.

²²⁵ *Chicago &c. R. Co. v. Spr-*
field &c. R. Co., 67 Ill. 142; *H-*
ley v. Keokuk &c. R. Co., 85 Ill.
455, 52 N. W. 352; *Prosser*
Wapello Co., 18 Iowa 327, 330; *I-*
sell v. City of Burlington, 30 I.
262, 264; *Fleming v. Chicago &c.*
Co., 34 Iowa 353, 356; *Harrison*
Iowa &c. R. Co., 36 Iowa 324; *E-*
wick v. D. & N. W. R. Co., 49 I.
664, 674; *Wichita &c. R. Co.*
Kuhn, 38 Kans. 675, 17 Pac. 322;
roy &c. R. Co. v. Ross, 40 Kans.
20 Pac. 197; *Chicago &c. R. Co.*
Mueller, 45 Kans. 85, 25 Pac. 2
Atchison &c. R. Co. v. Wilkinson,
Kans. 83, 39 Pac. 1043; *Cleveland*
R. Co. v. Ball, 5 Ohio St. 568; *P-*
ers v. Hazelton &c. R. Co., 33 O.
St. 429; *Tingley v. City of Pro-*
dence, 8 R. I. 493; *Brown v. Pro-*
dence &c. R. Co., 12 R. I. 238,
some courts have held directly
opposite, but evidently against
great weight of authorities.
Louis &c. R. Co. v. Anderson,
Ark. 167; *Texas &c. R. Co. v. Ed-*
42 Ark. 527; *Whiteley v. China,*
Me. 199; *Snow v. Boston &c. R.*
65 Me. 230; *Shattuck v. Stoneh-*
&c. R. Co., 6 Allen (Mass.) 1

for personal injuries it was held that a husband could not testify as to the value of the wife's services to the family.²²⁶ So, it has been held that a witness cannot give his opinion as to whether or not a proposed public highway or drain would be of public utility,²²⁷ or the amount of benefit or damages that would accrue to any person by reason of the location of either.²²⁸

§ 2007. Proof of damages—Opinions of witnesses—Exceptions.—

The question of opinion and expert evidence has been fully discussed in another part of this work,²²⁹ and the desire is to avoid a repetition here of either the principles or the authorities. The purpose here is to show the exceptions or limitations to the general rules stated in the preceding sections. The first exception or limitation is found in the principle that witnesses properly qualified may give their opinion as to values; hence, the deduction is that where the value of property is the measure of damages, opinion evidence may be taken;²³⁰ and in some jurisdictions, it may be taken directly, as to the amount of damages in such cases. In an action by a farmer for damages for the destruction of a crop, it was held that his opinion

Simons v. St. Paul &c. R. Co., 18 Minn. 184; *Lehmicke v. St. Paul &c. R. Co.*, 19 Minn. 464; *St. Paul &c. R. Co. v. Murphy*, 19 Minn. 500; *Sherman v. St. Paul &c. R. Co.*, 30 Minn. 227, 15 N. W. 239; see § 2007.

²²⁶ *Chicago &c. R. Co. v. Roberts*, 35 Ill. App. 137.

²²⁷ *Yost v. Conroy*, 92 Ind. 464; *Dillman v. Crooks*, 91 Ind. 158; *Indiana &c. R. Co. v. Hale*, 93 Ind. 79; *Thompson v. Deprey*, 96 Ind. 67; *Meranda v. Spurlin*, 100 Ind. 380; *Hughes v. Beggs*, 114 Ind. 427, 16 N. E. 817; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. 732; *Lake Erie &c. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Chicago &c. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026.

²²⁸ *Evansville &c. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Mitchell v. Allison*, 29 Ind. 43; *Kirkpatrick v. Snyder*, 33 Ind. 169; *Bissell v. Wert*, 35 Ind. 54; *City of Logansport v.*

McMillen, 49 Ind. 493; *Baltimore &c. R. Co. v. Johnson*, 59 Ind. 247; *Noah v. Angle*, 63 Ind. 425; *Ohio &c. R. Co. v. Nickless*, 71 Ind. 271; *Yost v. Conroy*, 92 Ind. 464.

²²⁹ See, Vol. I, Ch. XXIX; Vol. II, Ch. XLIX-LIII.

²³⁰ *Sinclair v. Roush*, 14 Ind. 450; *Crouse v. Holman*, 19 Ind. 30; *Ferguson v. Stafford*, 33 Ind. 169; *Johnson v. Thompson*, 72 Ind. 167; *Bowen v. Bowen*, 74 Ind. 470; *Ætna &c. Ins. Co. v. Nexen*, 84 Ind. 347; *Yost v. Conroy*, 92 Ind. 464; *Dwight v. County Commissioners*, 11 Cush. (Mass.) 201; *Shattuck v. Stoneham &c. R. Co.*, 6 Allen (Mass.) 116; *Whitman v. Boston &c. R. Co.*, 7 Allen (Mass.) 313, 316; *Swan v. County of Middlesex*, 101 Mass. 173; *Sherman v. St. Paul &c. R. Co.*, 30 Minn. 227, 15 N. W. 239; *Norton v. Willis*, 73 Me. 580; *Clark v. Baird*, 9 N. Y. 183.

CHAPTER XCVIII.

DEATH.

Sec.	Sec.
2008. Presumption of death—Evidence.	2015. Life expectancy of decedent and of beneficiaries.
2009. Evidence of death.	2016. Health, habits and domestic relations of deceased.
2010. Burden of proof.	2017. Pecuniary condition of beneficiaries and deceased.
2011. Burden of proof as to negligence and contributory negligence.	2018. Pecuniary condition of defendant.
2012. Cause of death.	2019. Release—Mitigation of damages.
2013. Declarations and admissions.	
2014. Threats—Defendant's fear of bodily harm.	

§ 2008. **Presumption of death—Evidence.**—The nature of the presumption of death, when it arises, its effect, and its relation to the presumptions of continuance of life and survivorship, are subjects that have been fully treated elsewhere.¹ But there are certain matters of evidence that deserve consideration in this connection, and questions as to the admissibility of particular evidence to raise or rebut the presumption of death have frequently arisen. The presumption of death does not, ordinarily, arise from mere absence, and evidence is not only admissible, but is also necessary, as a general rule at least, to show that the absentee has been unheard of during the requisite time by relatives or those who, if he had been living, would have been likely to hear of him.² Such testimony usually comes from relatives and close friends, but the testimony of others is not incompetent merely because they were not relatives or immediate friends.³ As to

¹ Vol. I, §§ 112-115.

² *Wentworth v. Wentworth*, 71 Me. 72; *University of North Carolina v. Harrison*, 90 N. Car. 385; *Litchfield v. Keagy*, 78 Ill. App. 398, but evidence that he was exposed to a specific peril when last seen, which

was likely to cause his death, may give rise to the presumption, even though seven years may not have elapsed; Vol. I, § 112, 113.

³ *Burnett v. Costello*, 15 S. D. 89, 87 N. W. 575; *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9; *Burle*

presumption of death from seven years' absence is not conclusive, even where it properly arises from proof of such absence and testimony of proper witnesses that the absentee has not been heard of by them, it may nevertheless be rebutted by evidence of those who have seen the absentee alive within that time.⁴ But the mere fact that a person of the same name is shown to have been living within the time will not overcome the presumption in the absence of some evidence of identity.⁵

§ 2009. **Evidence of death.**—In civil cases, death may be proved by circumstantial as well as direct evidence.⁶ Indeed, as already shown, a presumption of death arises under certain circumstances, although there is no direct evidence whatever of the death. So, at least after a lapse of considerable time, hearsay evidence, or evidence in the nature thereof, such as family reputation, is admissible to prove death.⁷ Letters of administration are *prima facie* evidence, in a proper case,

v. Mullen, 95 Me. 423, 50 Atl. 47, and it may, perhaps be said generally, that any proper evidence is admissible which tends to make the inference of death probable or the continuance of life improbable; *Tisdale v. Connecticut Mut. L. Ins. Co.*, 26 Iowa 171, 96 Am. Dec. 136; *Learned v. Corley*, 43 Miss. 687; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. 634; *Fidelity Mut. L. Asso. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662.

⁴*Thomas v. Thomas*, 19 Neb. 81, 27 N. W. 84; *O'Kelly v. Felker*, 71 Ga. 775, so held where a witness had received a letter from him; *Smith v. Smith*, 49 Ala. 156, so, evidence of facts or circumstances accounting for his absence unheard of or rendering it unlikely that he would be heard from even if alive is generally admissible; *Miller's Est.*, *In re*, 9 N. Y. S. 639; *Schwarzhoff v. Necker*, 1 Posey (Tex.) 325;

Seeds v. Grand Lodge, 93 Iowa 75, 61 N. W. 411.

⁵*Hoyt v. Newbold*, 45 N. J. L. 219, 46 Am. R. 757.

⁶*John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Carpenter v. Supreme Council &c.*, 79 Mo. App. 597; *Boyd v. New England Mut. L. Ins. Co.*, 34 La. Ann. 848; *Reedy v. Milliken*, 155 Ill. 636, 40 N. E. 1028.

⁷*Hurlburt's Est.*, *In re*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794; *Morton v. Barrett*, 19 Me. 109; *Ringhouse v. Keever*, 49 Ill. 470; *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *Stouvenel v. Stephens*, 2 Daly (N. Y.) 319; *Anderson v. Parker*, 6 Cal. 197; *Secrist v. Green*, 3 Wall. (U. S.) 744; *Scott v. Ratcliffe*, 5 Pet. (U. S.) 81; Vol. I, § 113; *Ross v. Loomis*, 64 Iowa 432, 20 N. W. 749; *Fidelity Mut. L. Asso. v. Mettler*, 185 U. S. 308, 22 Sup. Ct. 662, 667; *Davis v. Gillilan*, 71 Mo. App. 498; *Ruoff v. Greenpoint Sav. Bank*, 82 N. Y. S. 881; *Carroll v. Carroll*, 60 N. Y. 121, 19 Am. R. 144.

of the death of the person on whose estate they are granted.⁸ It has also been held that the recital of the ancestor's death in a deed executed by his heirs is evidence of his death,⁹ but other hearsay statements and recitals have been held incompetent in most cases.¹⁰ So, a verdict of a coroner's jury has been held inadmissible to prove survivorship,¹¹ and the report and testimony are inadmissible in the first instance to prove the manner and cause of death.¹² But the contrary has been held as to the verdict itself.¹³ Records of death kept by officers pursuant to statute are competent to prove death,¹⁴ but not to prove the cause of death.¹⁵ And the certificate of a jailer of the death of a prisoner has been held incompetent to prove that fact.¹⁶ Death may also be proved as a fact by oral evidence of those who know it, and this is true, although a registry thereof is required by law.¹⁷

⁸ *Tisdal v. Conn. Mut. L. Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136; *Jeffers v. Radcliff*, 10 N. H. 242; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068; *Hurlburt v. Van Wormer*, 14 Fed. 709; *Northwestern &c. Co. v. Tisdale*, 91 U. S. 238; but see as to collateral proceedings, the last case above cited, and, *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358; see also, on the general subject: *Cunningham v. Smith*, 70 Pa. St. 450; *French v. Frazier*, 7 J. J. Marsh. (Ky.) 425; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *Phillips v. Heraty*, (Mich.) 100 N. W. 186, the grant of letters of administration to an alleged widow is conclusive as to her right to administer on the estate, but is not conclusive as to widowhood; *English v. Murray*, 13 Tex. 366, the letters were held inadmissible to prove the time of death.

⁹ *Postlewaite v. Wise*, 17 W. Va. 1; so, generally as to recitals in ancient documents; *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832.

¹⁰ *Morton v. Barrett*, 19 Me. 109;

Fosgate v. Herkimer &c. Co., 9 Barb. (N. Y.) 287; *Goodwin v. Caton*, 4 Md. Ch. 160.

¹¹ *Hollister v. Cordero*, 76 Cal. 649, 18 Pac. 855, the fact that one on whose estate letters of administration are granted is designated as the surviving wife of another is not good evidence that she did survive the latter; *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741.

¹² *Knights Templar &c. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 623; *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. 215; *National Union v. Thomas*, 10 App. Cas. (D. C.) 277.

¹³ *United States L. Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467; Vol. II, § 1291; *Mut. L. Ins. Co. v. Schmidt*, 6 Ohio Dec. (Reprint) 901, affirmed in 40 Ohio St. 112.

¹⁴ Vol. I, §§ 410, 413; Vol. II, § 1286.

¹⁵ *Buffalo Loan &c. Co. v. Knight Templars Asso.*, 56 Hun 303, 126 N. Y. 450.

¹⁶ *Gill v. Phillips*, 6 Mart. N. S. (La.) 158.

¹⁷ *Holt v. Weld*, 140 Mass. 578, 5 N.

§ 2010. **Burden of proof.**—As a general rule, the party asserting death has the burden of proving it.¹⁸ But when facts raising the presumption of death have been shown, the burden of producing evidence to rebut it is upon the party asserting the continuance of life.¹⁹ So, the burden of proving that one was alive at a particular time has been held to be upon the party claiming contrary to the presumption of death;²⁰ but it has also been held that the burden of proof is upon the party asserting that death occurred at a particular time.²¹ So, the burden of proof to establish survivorship is generally upon the party asserting it.²² In actions to recover damages for injuries wrongfully inflicted by the defendant which result in death, under Lord Campbell's act or similar statutes, the burden is upon the plaintiff to make a case within the statute.²³ As in other cases, the proof must correspond in substance with the issue,²⁴ and the plaintiff must not only show the death and the wrongful act of the defendant, or that of the agent or person for whose act the defendant is responsible, but it must also appear that such wrongful act, generally negligence, was

R. 506; *Commonwealth v. Norcross*, 9 Mass. 492; *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016; *Secrist v. Green*, 3 Wall. (U. S.) 744, but testimony as to the death of an absentee has been held inadmissible when based wholly on letters which are not produced or accounted for; *Martinez v. Vives*, 32 La. Ann. 305.

¹⁸ *Hayes v. Berwick*, 2 Mart. (La.) 138, 5 Am. Dec. 727; *Manley v. Pattison*, 73 Miss. 417, 19 So. 236, 55 Am. St. 543; *Smith v. Combs*, 49 N. J. Eq. 420, 24 Atl. 9.

¹⁹ *Mutual &c. Co. v. Martin*, 21 Ky. L. R. 1465, 55 S. W. 694; *Cowan v. Lindsay*, 30 Wis. 586; *Smith v. Smith*, 5 N. J. Eq. 484.

²⁰ *Benjamin, In re*, (1902) 1 Ch. 723, 71 L. J. Ch. 319.

²¹ *Evans v. Stewart*, 81 Va. 724; see also, *Hancock v. American L. Ins. Co.*, 62 Mo. 26; Vol. I, § 114, and reasons there stated for regarding this as the better rule.

²² *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550; *Newell*

v. Nicholls, 75 N. Y. 78, 31 Am. R. 424; *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132, 6 Am. St. 162; Vol. I, § 115.

²³ Where the action is based on a foreign statute similar to the local statute it must be pleaded and proved in most jurisdictions, *Johnson v. Pittsburgh &c. R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; *Selma &c. R. Co. v. Lacy*, 43 Ga. 461; *Hyde v. Wabash &c. R. Co.*, 61 Iowa 441, 16 N. W. 351, 47 Am. R. 820; *Kahl v. Memphis &c. R. Co.*, 95 Ala. 337, 10 So. 661.

²⁴ *Weekes v. Cottingham*, 58 Ga. 559; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Mobile &c. R. Co. v. George*, 94 Ala. 199, 10 So. 145; *Long v. Doxey*, 50 Ind. 385; *Willson v. Chipewa Valley El. R. Co.*, (Wis.) 98 N. W. 536; *Scheffer v. Washington City &c. R. Co.*, 105 U. S. 249; *St. Louis &c. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *State v. Maine Cent. R. Co.*, 77 Me. 538, 1 Atl. 673.

the proximate cause of the death.²⁵ Where the act complained of is negligent, the burden is also upon the plaintiff, in some jurisdictions, to show that the deceased was free from contributory negligence, and it has been held under some statutes that the burden is also upon the plaintiff to show that the action was brought within the time limit by statute.²⁶ In many jurisdictions, however, the burden is not upon the plaintiff to show that the deceased was free from contributory negligence, and as to wilful, wrongful acts, contributory negligence is not ordinarily a defense.²⁷ So, a presumption may arise from the nature and circumstances of the act that it is wrongful. In a recent case it is said: "Experience and observation have taught that assaults and batteries with deadly weapons which cause death are general violations of the moral and of the statute law, and hence the legal presumption has arisen that they are wrongful; and the burden of pleading and proving facts which show that one of them falls within an exception of the general rule,—that for some extraordinary reason it is justifiable or excusable, and is not governed by the legal presumption,—is rightfully cast upon him who asserts that his assault was rightful."²⁸ The burden is upon the plaintiff in the first instance, in an action under Lord Campbell's act to plead and prove that the act which caused the death of the person injured was wrongful, or was an act of negligence. The legal presumption is that an assault and battery of an individual with a deadly weapon, which caused his death, was wrongful, and the burden is on the defendant to plead and prove that

²⁵ Koch v. Zimmerman, 83 N. Y. S. 339, the question as to the actual cause is usually for the jury; Madisonville v. Pemberton's Admr., (Ky.) 75 S. W. 229, and it may be the proximate cause, although death was hastened by sickness or some other cause; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346, 49 Am. R. 168; Thompson v. Louisville &c. R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146; Daniels v. New York &c. R. Co., 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751; Sullivan v. Tloga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. 793, and numerous authorities cited in these cases.

²⁶ Poff v. New Eng. Tel. &c. Co. 72 N. H. 164, 55 Atl. 891.

²⁷ Kain v. Larkin, 56 Hun (N. Y.) 79; Gray v. McDonald, 104 Mo. 301, 16 S. W. 398; Cleveland &c. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 44.

²⁸ Citing Ward v. Blackwood, Ark. 396, 405, 3 S. W. 624, 627; 8 Louis S. W. R. Co. v. Berger, Ark. 613, 620, 44 S. W. 809, 39 R. A. 784; Conway v. Reed, 66 Mo. 346, 353, 355, 27 Am. R. 354; Cast v. Duryea, 32 Barb. (N. Y.) 48; Darling v. Williams, 35 Ohio St. 563; Brooks v. Haslam, 65 Cal. 42, 4 Pac. 399; Tucker v. State, 89 Mo. 471, 43 Atl. 778, 46 L. R. A. 181.

ter in justification or mitigation of the deed."²⁹ It may be said, in general, that under the statutes modeled on Lord Campbell's act, the plaintiff must make a case which would have entitled the deceased to recover if he had lived, and, in addition he must show that there is some beneficiary for whom he is entitled to recover under the statute. Evidence is also generally required to show the damages, or, rather to enable the jury to determine the amount, but, in many instances substantial damages may be recovered under evidence that does little more in that direction than show the relations of the deceased and the beneficiaries.³⁰

§ 2011. Burden of proof as to negligence and contributory negligence.—The burden of proof is upon the plaintiff to show that the death of the deceased was caused by the negligence or other wrongful act, within the statute, and the declaration or complaint, of the defendant or some one for whose act it is responsible under the circumstances.³¹ Contributory negligence is usually a defense as in other cases where the action is based on the negligence of the defendant.³² In many jurisdictions if the plaintiff, in making out his case, does not disclose contributory negligence on the part of the deceased, the burden of proving it as a defense is upon the defendant;³³ but in some jurisdictions the burden is upon the plaintiff to show freedom from such contributory negligence as well as negligence on the part of the defendant.³⁴

²⁹ *Rutherford v. Foster*, 125 Fed. 187.

³⁰ *Elliott Railroads*, §§ 1369, 1378.

³¹ *St. Louis &c. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *Koch v. Zimmerman*, 83 N. Y. S. 339; *Chase v. Nelson*, 39 Ill. App. 53; *International &c. R. Co. v. Knight*, (Tex. Civ. App.) 52 S. W. 640; *Lee v. De Bardeleben &c. Co.*, 102 Ala. 628, 15 So. 270.

³² *Kimball &c. Co., In re*, 123 Fed. 838; *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509, 22 So. 913; *Cincinnati &c. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37, and authorities cited in next two notes.

³³ *Schneider v. Market St. R. Co.*,

134 Cal. 482, 66 Pac. 734; *Columbus &c. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90; *Dalton v. Chicago &c. R. Co.*, 104 Iowa 26, 73 N. W. 349; *Lexington &c. Min. Co. v. Stephens*, (Ky.) 47 S. W. 321; *McKimble v. Boston &c. R. Co.*, 141 Mass. 463, 5 N. E. 804. But see, under another statute, *Walsh v. Boston &c. R. Co.*, 171 Mass. 52, 50 N. E. 453; *Deisen v. Chicago &c. R. Co.*, 43 Minn. 454, 45 N. W. 864; *Unfried v. Baltimore &c. R. Co.*, 34 W. Va. 260, 12 S. E. 512.

³⁴ *State v. Maine Cent. R. Co.*, 77 Me. 538, 1 Atl. 673; *McDonough v. Grand Trunk R. Co.*, 98 Me. 304, 56 Atl. 913; *Wiwiroski v. Lake Shore &c. R. Co.*, 124 N. Y. 420, 26 N. E.

§ 2012. **Cause of death.**—The facts as to the cause of death may be directly testified to by a witness who saw the deceased killed; and in many instances, experts may give their opinion as to the cause, what might have caused the death; but, in many jurisdictions, they cannot give an opinion as to what actually caused the injury resulting in death where that is the very issue for the jury to decide.³⁵ It has already been shown³⁶ there is some conflict as to whether the verdict of a coroner's jury is admissible to show the cause of death, but the better rule is that the testimony taken before the coroner, if not also the verdict itself, is incompetent for this purpose.³⁷ But, on the other hand, evidence as to the result of a post mortem examination of the deceased has been held admissible on the question of the cause of his death being from injuries received.³⁸ Evidence as to the condition of the body and the injuries received has also been held admissible as throwing light upon the cause of death.³⁹ The cause of death may be shown by circumstantial as well as by direct evidence;⁴⁰ but the evidence should show the necessary connection with the wrongful act complained of, so as to justify the inference that it was a proximate cause.

1023; *Sorenson v. Menasha & Co.*, 56 Wis. 338, 14 N. W. 446. See also, 3 *Elliott Railroads*, § 1374, this was formerly the rule in Indiana, but it has recently been changed by statute; *Baltimore & C. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923; in Illinois it is also the rule, *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; but it is held that where there are no eye-witnesses freedom from contributory negligence may be inferred from circumstances, *Chicago & C. R. Co. v. Keely*, 103 Ill. App. 205.

³⁵ See Vol. I, §§ 1086-1088, where this subject is fully considered.

³⁶ Ante, §§ 1291, 2012.

³⁷ *Memphis & C. R. Co. v. Womack*, 84 Ala. 618, 4 So. 618; *Central R. Co. v. Moore*, 61 Ga. 151; *Cook v. New York Cent. R. Co.*, 5 Lans. (N. Y.) 401.

³⁸ *McClellan v. Ft. Wayne & C. R. Co.*, 105 Mich. 101, 62 N. W. 1025.

³⁹ *St. Louis & C. R. Co. v. Hicks*, 100 Fed. 262; *Gulf & C. R. Co. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 255; *Houston City R. Co. v. Sciack*, 80 Tex. 350, 16 S. W. 31. So, tending to show how the injury was received, *Leahy v. Southern Pac. Co.*, 65 Cal. 150, 3 Pac. 622. Even where it was undisputed that the deceased was killed by the falling of the roof of defendant's mine, and the only question was whether the defendant was negligent with respect thereto, it was held not to be an error to exclude testimony of witnesses showing the condition of the mine when they found the body; *Buckley v. Tennessee Coal & C. Co.*, 1 Ala. 146, 20 So. 606.

⁴⁰ See, for instance, *Wabash Scenic Door Co. v. Black*, 126 Fed. 72; *Choctaw & C. R. Co. v. McDade*, 1 U. S. 64, 24 Sup. Ct. 24; *Suburban El. Co. v. Nugent*, 58 N. J. L. 634 Atl. 1069.

imate cause of the death, and not leave it to mere speculation or conjecture.⁴¹

§ 2013. **Declarations and admissions.**—The subject of dying declarations, in criminal cases, declarations in pedigree cases, and declarations against interest in connection with the hearsay rule have been treated elsewhere, and so have various declarations in negligence cases, especially in connection with the *res gestae* rule. It is proposed in this section to consider only declarations and admissions in actions for damages for wrongful death; but for a discussion of the general principles of the doctrine of *res gestae* and for other illustrative cases, including many of the character now under consideration, reference is made to other sections.⁴² The general rule is that declarations of a person who is fatally injured by the wrongful act of another as to the cause and manner of the injury, and the like, are not admissible against the defendant in a civil action to recover damages for death caused by such act,⁴³ except in certain cases in which they are held admissible as part of the *res gestae*.⁴⁴ But, as elsewhere shown, exclamations and spontaneous declarations of present pain and

"Lee v. Reliance Mills Co., 21 R. I. 549, 45 Atl. 554; James v. Florida &c. R. Co., 115 Ga. 313, 41 S. E. 585; Martinez v. Bernard, 106 La. Ann. 368, 30 So. 901, 55 L. R. A. 671, 87 Am. St. 306; Randall v. New Orleans &c. R. Co., 45 La. Ann. 778, 13 So. 166; McQuade v. Metropolitan St. R. Co., 82 N. Y. S. 720; Kauffman v. Cleveland &c. R. Co., 144 Ind. 456, 43 N. E. 446; Bunt v. Sierra &c. Min. Co., 138 U. S. 483, 11 Sup. Ct. 464; Patton v. Texas &c. R. Co., 179 U. S. 658, 21 Sup. Ct. 275; Providence &c. Co. v. Clare, 127 U. S. 45, 8 Sup. Ct. 1094.

"Vol. I, §§ 557, 559, 565.

"East Tennessee &c. R. Co. v. Malloy, 77 Ga. 237, 2 S. E. 941; Chicago &c. R. Co. v. Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. 144; Armil v. Chicago &c. R. Co., 70 Iowa 130, 30 N. W. 42; Ohio &c. R. Co. v. Hammersley, 28 Ind. 371; Waldele v. New York Cent. &c. R. Co., 95 N. Y. 274,

47 Am. R. 41; Daily v. New York &c. R. Co., 32 Conn. 356, 87 Am. Dec. 176; Johnston v. Oregon &c. R. Co., 23 Ore. 94, 31 Pac. 283; Louisville &c. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. 840; Fitzgerald v. Weston, 52 Wis. 354, 9 N. W. 13.

"Louisville &c. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. 883; Fish v. Illinois Cent. R. Co., 96 Iowa 702, 65 N. W. 995; Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. R. 838; Texas &c. R. Co. v. Hall, 83 Tex. 675, 19 S. W. 121. In Gulf &c. R. Co. v. Brown, (Tex. Civ. App.) 76 S. W. 794, it was also held that in an action for death of a son his father might testify that the deceased had stated to his parents that he intended to remain with them as long as they lived, as bearing on the question of damages.

the like are admissible in a proper case.⁴⁵ In an action by a father to recover damages for the death of his minor son it has been held that the declarations of the son are not binding upon the father as admissions, even if they are so made that they might be considered admissible as part of the *res gestae*.⁴⁶ But such self-disserving declarations, made after the injury, to the effect that it was not caused by the negligent act of the defendant or that the deceased was himself guilty of contributory negligence, are generally held admissible in actions under the statute just as they would be if the deceased had lived and instituted the action to recover damages for the injury.⁴⁷ The claim in such cases is not the loss of service at common law, but is through the deceased himself by virtue of the statute, so that even if such declarations should not be regarded as admissions against the parent, in an action by a parent to recover for the loss of service of his child, there is no reason for such a rule in actions under the statute where a privity exists and the claim depends on the right of the deceased would have had to recover if he had lived. Admissions of the defendant are competent against the defendant as in other cases. And the declarations or admissions of agents and employes are competent against the defendant in a proper case, when made within the scope of their employment or authority, or, according to many authorities when part of the *res gestae*.⁴⁸ But a statement by a railroad conductor, made shortly after the accident, as to what the

* Vol. I, § 420, 523, 525, 528; see also, as to declarations or statement to physicians, § 527.

"Louisville &c. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Louisville &c. R. Co. v. Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; see also, Ohio &c. R. Co. v. Hammersley, 28 Ind. 371; Pennsylvania Co. v. Long, 94 Ind. 250; Bradford City v. Downs, 126 Pa. St. 622, 17 Atl. 884; but compare Stein v. Railway Co., 10 Phila. Super. Ct. (Pa.) 440; Hughes v. Delaware &c. Co., 176 Pa. St. 254, 35 Atl. 190, 191.

"Hughes v. Delaware &c. Co., 176 Pa. St. 254, 35 Atl. 190; Georgia &c. Co. v. Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175; Helman v. Pittsburgh &c. R. Co., 58 Ohio St.

400, 50 N. E. 986, 41 L. R. A. 860; Camden &c. R. Co. v. Williams, 61 N. J. L. 646, 40 Atl. 634; but see Tiffany Death by Wrongful Act, § 194; Disbrow v. Ulster Tp., (Pa.) 8 Atl. 912, declarations of deceased that he was tired of life, that he had been a failure and that his family was a failure, were held admissible on the question of the value of his life to his family; and in Brown v. Southern R. Co., 65 S. Car. 260, 43 S. E. 794; declarations of deceased that his children were trying to get his property from him were held inadmissible in mitigation of damages.

"Vol. I, § 564, 565, and numerous authorities cited.

engineer told him is mere hearsay and not admissible against the company,⁴⁹ although where the engineer has testified that when he first saw the deceased he did not think he was on a bridge where he was killed, and the issue as to his position is material, a witness may state that the day after the accident the engineer stated to him that he saw the deceased on the bridge but thought he would get off.⁵⁰

§ 2014. **Threats—Defendant's fear of bodily harm.**—It is said in a recent case that, as a general rule, evidence of threats previously made by one who is killed by another, but uncommunicated to the latter, are not admissible on the trial of a case involving the question as to whether the slayer was justified in taking the life of the deceased.⁵¹ This is undoubtedly the general rule,⁵² but it is also said in the case referred to,⁵³ that when the evidence tends to show that the deceased began the mortal conflict and that the slayer killed him in self defense, proof of such threats may be received to show the state of mind or feeling on the part of the deceased and thus illustrate his conduct and throw light upon the transaction. Evidence of communicated threats is still more clearly admissible in such a case where self defense is relied on under a well grounded fear of great bodily injury.⁵⁴ But it has been held that the defendant cannot testify that he acted to protect his life and person or in self defense where that is a conclusion and the very question for the jury to decide.⁵⁵

§ 2015. **Life expectancy of deceased and of beneficiaries.**—Evidence of the life expectancy of the deceased is competent in such cases, and for this purpose standard mortality tables are admissible as a guide to the jury, although they do not furnish an exact measure of damages binding upon the jury.⁵⁶ It has also been held that evi-

⁴⁹ *East Tennessee &c. R. v. Maloy*, 77 Ga. 237, 2 S. E. 941.

⁵⁰ *Gulf &c. R. Co. v. Brown*, (Tex. Civ. App.) 76 S. W. 794.

⁵¹ *McKinney v. Carmack*, 119 Ga. 467, 46 S. E. 719.

⁵² *Hollingsworth v. Warnock*, (Ky.) 65 S. W. 163; *Nichols v. Winfrey*, 79 Mo. 544; *White v. Maxey*, 64 Mo. 552.

⁵³ *McKinney v. Carmack*, 119 Ga. 467, 46 S. E. 719; *May v. State*, 90 Ga. 793, 797, 17 S. E. 108, this is ac-

cording to the principle laid down in Vol. I, §§ 163, 165; see also, *Stitt v. State*, 91 Ala. 10, 8 So. 669, 24 Am. St. 853; note in 95 Am. Dec. 62, et seq.

⁵⁴ Vol. I, § 165, and numerous authorities cited.

⁵⁵ *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689, also holding that it was not error to exclude evidence of defendant's general reputation as to peaceable and law-abiding citizen.

⁵⁶ Vol. I, §§ 74, 417, 418; see also,

dence is admissible to show the age and life expectancy of the beneficiaries and that such expectancy is a proper element to be considered in determining the amount of damages.⁵⁷

§ 2016. Health, habits and domestic relations of deceased.—actions to recover damages for death by wrongful act, evidence as to character, habits and domestic relations of the deceased, at least with respect to making provision for the beneficiaries, is usually competent upon the question of damages.⁵⁸ Rather a wide range is permitted in the evidence in order to enable the jury properly to estimate the pecuniary loss of the beneficiaries.⁵⁹ The fact that the deceased was an habitual drunkard, or the like, goes to decrease the value of his life to his beneficiaries and is competent in mitigation of damages.⁶⁰ So, in a recent case it was held that evidence that the deceased would have died in a short time from natural causes was com-

Columbus &c. R. Co. v. Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. 58; San Antonio &c. R. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; Philip v. Heraty, (Mich.) 97 N. W. 963, 100 N. W. 186; Sternfels v. Metropolitan &c. R. Co., 77 N. Y. S. 309, affirmed in 174 N. Y. 512, 66 N. E. 1117; Vicksburg &c. R. Co. v. White, (Miss.) 34 So. 331; Coates v. Burlington &c. R. Co., 62 Iowa 486, 17 N. W. 760; Sweet v. Providence &c. R. Co., 20 R. I. 785, 40 Atl. 237; Coffeyville Min. &c. Co. v. Carter, 65 Kans. 565, 70 Pac. 635.

⁵⁷ Dauntless, The, 121 Fed. 420; Duval v. Hunt, 34 Fla. 85, 15 So. 876; Baltimore &c. R. Co. v. State, 33 Md. 542; Galveston &c. R. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

⁵⁸ Ohio &c. R. Co. v. Voight, 122 Ind. 288, 23 N. E. 774; Elwood v. Addison, 26 Ind. App. 28, 59 N. E. 47; Richmond &c. R. Co. v. Ham-mind, 93 Ala. 181, 9 So. 577; Brom-ley v. Birmingham &c. R. Co., 95 Ala. 397, 11 So. 341; Anthony &c.

Brick Co. v. Ashby, 198 Ill. 562, N. E. 1109; Chicago &c. R. Co. v. Travis, 44 Ill. App. 466; Standlee v. St. Louis &c. R. Co., 25 Tex. Civ. App. 340, 60 S. W. 781; Galveston &c. Co. v. Bonnett, (Tex. Civ. App.) 38 S. W. 813; Wheelan v. Chicago &c. R. Co., 85 Iowa 167, 52 N. E. 119; Clapp v. Minneapolis &c. R. Co., 36 Minn. 6, 29 N. W. 340, 1 A. St. 629; Chilton v. Union Pac. Co., 8 Utah 47, 29 Pac. 963; for full consideration of evidence in regard to domestic relations in such cases, see note in 85 Am. St. 8 and see also, Vol. I, § 178.

⁵⁹ Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Staal v. Grand Rapids &c. R. Co., 57 Mich. 21; Pool v. Southern Pac. &c. R. Co., 30 Utah 303, 26 Pac. 654.

⁶⁰ Wright v. City of Crawfordville, 142 Ind. 636, 42 N. E. 21, holding specific acts of drunkenness inadmissible; Nashville &c. R. Co. v. Prince, 2 Heisk. (Tenn.) 580; also, Nichols v. Winfrey, 90 Mo. 42 S. W. 305.

petent on the question of damages although not on the issue of the defendant's negligence.⁶¹ There are also authorities which hold that evidence of the careful habits and competency of the deceased has been held competent as tending to show that he exercised care at the time of the accident in question, especially where there were no eye-witnesses;⁶² but this doctrine is somewhat questionable, particularly where there are eye-witnesses and there is no apparent necessity for resorting to such evidence.⁶³

§ 2017. **Pecuniary condition of beneficiaries and deceased.**—In a recent case it is said: "It is not proper to admit evidence of the pecuniary condition or resources of the widow or next of kin, or of their unfortunate condition; but it is not error to allow proof of the earnings of the deceased and of the fact that his wife and children were supported by him."⁶⁴ The authorities agree that the earning capacity of the deceased, and the fact that the beneficiaries were dependent upon him for support, may be shown in an action under the statute to recover for wrongful injuries resulting in his death, and many of them also support the proposition that, while this is true, the pecuniary resources and physical condition of the beneficiaries cannot be shown.⁶⁵

⁶¹ *Meekins v. Norfolk &c. R. Co.*, 122 Cal. 563, 55 Pac. 577; *Benton v. Chicago &c. R. Co.*, 55 Iowa 496, (N. Car.) 46 S. E. 493.

⁶² *Missouri Pac. R. Co. v. Moffatt*, 8 N. W. 330; *Cincinnati &c. R. Co. v. Altemeier*, 60 Ohio St. 10, 53 N. E. 300; *Holt v. Spokane &c. R. Co.*, 4 Idaho 443, 35 Pac. 39; *Delphi v. Lowery*, 74 Ind. 520, 527; *Toledo &c. R. Co. v. Bailey*, 145 Ill. 159, 33 N. E. 1089; see also, *State v. Manchester &c. R. Co.*, 52 N. H. 528; *Pittsburgh &c. R. Co. v. Parish*, 28 Ind. App. 189, 62 N. E. 514.

⁶³ Vol. I, §§ 155, 173, 186, and especially authorities cited in note 317; *Louisville &c. R. Co. v. McClish*, 115 Fed. 268, reviewing authorities.

⁶⁴ *Pittsburgh &c. R. Co. v. Kinmare*, 203 Ill. 388, 67 N. E. 826, 827; *Pennsylvania Co. v. Keane*, 143 Ill. 172, 32 N. E. 260; *St. Louis &c. R. Co. v. Dorsey*, 189 Ill. 251, 59 N. E. 593.

⁶⁵ *Green v. Southern Pac. R. Co.*, 86 Va. 494, 10 S. E. 838.

But other authorities hold that the pecuniary and physical condition of the beneficiaries may be shown upon the question of damages. As already stated, evidence showing what the deceased was earning at the time of the injury and his earning capacity, or lack thereof, at the time of his death, is competent;⁶⁷ and it is also held admissible in many jurisdictions, in a proper case, to prove what he had accumulated, as tending to show the reasonable expectation of pecuniary benefit to the beneficiaries from the continuance of his life.⁶⁸ But the facts should be given, rather than a mere opinion or conclusion,⁶⁹ and evidence as to what the deceased earned years before and not at or near the time in question,⁷⁰ or as to profits that he might have

* *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. 737; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. 557; but see *Weller v. Chicago &c. R. Co.*, 120 Mo. 635, 23 S. W. 1061; *Louisville &c. R. Co. v. Jones*, (Fla.) 34 So. 246; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575; *Little Rock &c. R. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. 230; *Louisville &c. R. Co. v. Jones*, 130 Ala. 456, 30 So. 586; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291; *Cooper v. Lake Shore &c. R. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 205; *Fowler v. Buffalo Furnace Co.*, 58 N. Y. S. 231; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576, 57 N. W. 298; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50, evidence of permanent disability of one of the beneficiaries held competent.

"This is held or admitted to be the rule in many of the authorities cited in the last two preceding notes; see also, *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Pool v. Southern Pac. R. Co.*, 7 Utah 303, 26 Pac. 654; *Bessemer Land Co. v. Campbell*, 121 Ala. 50,

25 So. 793, 77 Am. St. 17; *Pittsburgh &c. R. Co. v. Kinnare*, 20 Ill. 388, 67 N. E. 826; *Georgia Cent. R. Co. v. Perkerson*, 112 Ga. 923, 3 S. E. 365, 53 L. R. A. 210; *Fish v. Illinois Cent. R. Co.*, 96 Iowa 70, 65 N. W. 995; *Lowe v. Chicago &c. R. Co.*, 89 Iowa 420, 56 N. W. 519; *Boyle v. Columbian F. P. Co.*, 18 Mass. 93, 64 N. E. 726; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 389; 54 L. R. A. 934, 79 Am. St. 309.

* *Spaulding v. Chicago &c. R. Co.*, 98 Iowa 205, 67 N. W. 227; *Phelps v. Winona &c. R. Co.*, 37 Minn. 48, 35 N. W. 273, 5 Am. St. 867; *Carson v. Oregon &c. R. Co.*, 21 Or. 450, 28 Pac. 497; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352; *Bessemer Land Co. v. Campbell*, 121 Ala. 50, 25 So. 793, 77 Am. St. 17; *Hall v. Galveston &c. R. Co.*, 39 Fed. 18; *Hunn v. Michigan Cent. R. Co.*, 7 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

* *Chicago &c. R. Co. v. Roberts*, 35 Ill. App. 137.

"*Hamman v. Central Coal &c. Co.*, 156 Mo. 232, 56 S. W. 1091; *Burns v. Ashboro &c. R. Co.*, 125 N. Car. 304, 34 S. E. 495; *Wilcox v. Wilmington City R. Co.*, 2 Per. (Del.) 157, 44 Atl. 686.

made from a partnership,⁷¹ has been held incompetent. So has evidence as to a possible or prospective promotion or advance in salary which was merely conjectural,⁷² or as to what he could have earned in other occupations which he had never followed.⁷³

§ 2018. Pecuniary condition of defendant.—Under most of the statutes the measure of damages is the pecuniary loss to the beneficiaries from the death of the deceased caused by the wrongful act of the defendant. This, it is evident, is neither increased nor diminished by the financial condition of the defendant. The general rule, therefore, is that where fair compensation for the pecuniary loss is the sole measure of damages, evidence as to the pecuniary condition or financial standing of the defendant is inadmissible.⁷⁴ But, under a statute providing for exemplary or punitive damages such evidence has been held admissible.⁷⁵

§ 2019. Release—Mitigation of damages.—A valid release and acceptance of satisfaction by the deceased in his lifetime and after the injury, is a bar, under most of the statutes, to an action by his representative or beneficiaries for his death caused by the same injury.⁷⁶

⁷¹ *Dalton v. Chicago &c. R. Co.*, 190; *Brown v. Chicago &c. R. Co.*, 104 Iowa 26, 73 N. W. 349; *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 384, 50 Atl. 832;

Fajardo v. New York Cent. &c. R. Co., 82 N. Y. S. 912; *Read v. Brooklyn &c. R. Co.*, 53 N. Y. S. 209; *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708.

⁷² *Colorado Coal &c. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Fajardo v. New York Cent. &c. R. Co.*, 82 N. Y. S. 912; *Richmond &c. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837; *Galveston &c. R. Co. v. Harris*, (Tex. Civ. App.) 36 S. W. 776;

Gulf &c. R. Co. v. John, 9 Tex. Civ. App. 342, 29 S. W. 558; *Galveston &c. R. Co. v. Ford*, (Tex. Civ. App.) 46 S. W. 77.

⁷³ *Atlanta &c. Ry. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776; *Mansfield Coal &c. Co. v. McEnery*, 91 Pa. St.

190; *Brown v. Chicago &c. R. Co.*, 64 Iowa 652, 21 N. W. 193.

⁷⁴ See ante, Vol. I, § 178; *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 205; *Conant v. Griffin*, 48 Ill. 410; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. R. 508.

⁷⁵ *Morgan v. Durfee*, 69 Mo. 469; 33 Am. R. 508; *Louisville &c. R. Co. v. Mahony*, 7 Bush (Ky.) 235; See ante, Vol. I, § 178.

⁷⁶ *Hill v. Pennsylvania R. Co.*, 178 Pa. St. 223, 35 Atl. 997, 85 L. R. A. 196, 56 Am. St. 754; *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881; *Price v. Richmond &c. R. Co.*, 33 S. Car. 556, 12 S. E. 413, 26 Am. St. 700; *Brown v. Chattanooga &c. R. Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. 666; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555, 558, 37 L. J. Q. B. 278; 3 Elliott Railroads, § 1376; *Donahue v. Drexler*, 82 Ky. 157, 56 Am. R. 866.

But a contract in advance to accept money out of a relief fund to release the defendant, or the like is not a defense,⁷⁷ unless the money is afterwards accepted. And it has been held that a release given by an administrator,⁷⁸ without authority, is not a bar, and that a release by one beneficiary does not bar the others.⁷⁹ If, however, benefits voluntarily accepted from a relief association, after the injury, under an agreement made when the deceased became a member that such acceptance should operate as a release, the acceptance of such benefits and the execution of a release in consideration thereof, operate to release the company.⁸⁰ Whether a recovery by the deceased or one beneficiary bars others is a question upon which there is some conflict, but it is generally held that one recovery merges the cause of action, although much depends upon the construction given to the particular statute.⁸¹ Evidence that the beneficiaries received money

⁷⁷ *Illinois Cent. R. Co. v. Cozby*, 69 Ill. App. 256; *Chicago & C. R. Co. v. Martin*, 59 Kans. 437, 53 Pac. 461; *McKeering v. Pennsylvania R. Co.*, 65 N. J. L. 57, 46 Atl. 715; *Adams v. Northern Pac. R. Co.*, 95 Fed. 938.

⁷⁸ *Pisano v. B. M. Shanley & Co.*, 66 N. J. L. 1, 48 Atl. 618; *Yelton v. Evansville & C. R. Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158; but it is held in *Pittsburgh & C. R. Co. v. Gipe*, 160 Ind. 360, 65 N. E. 1034, that an administrator may compromise and release the claim without any order of court, and the following authorities are cited: *Henchey v. City of Chicago*, 41 Ill. 136; *Parker v. Providence & C. Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. 869, 14 L. R. A. 414; *Foot v. Great Northern R. Co.*, 81 Minn. 493, 84 N. W. 342, 83 Am. St. 395, 52 L. R. A. 354.

⁷⁹ *Chicago & C. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120; *Oyster v. Burlington Relief Dept.*, (Neb.) 91 N. W. 699; *Houston & C. R. Co. v. Bradley*, 45 Tex. 171; *Pisano v. B. M. Shanley & Co.*, 66 N. J. L. 1, 48 Atl. 618; *Pittsburgh & C. R. Co.*

v. Hosea, 152 Ind. 412, 53 N. E. 412; *Pittsburgh & C. R. Co. v. Moore*, Ind. 346, 53 N. E. 290; but where the beneficiary is the party to sue and there is but one; *3 Elliott Railroads*, § 1376.

⁸⁰ *3 Elliott Railroads*, § 1384; *Engle v. Pennsylvania Co.*, 164 Pa. 529, 30 Atl. 492; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423; *Spitze v. Baltimore & C. R. Co.*, 75 Md. 162, 23 Atl. 307; *Otis v. Pennsylvania Co.*, 71 Fed. 1; *Pittsburgh & C. R. Co. v. Moore*, Ind. 345-356, 53 N. E. 290, and authorities cited; *Christie v. Chicago & C. R. Co.*, 104 Iowa 707, 74 N. E. 697; *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672, 7 So. 542.

⁸¹ That it does, see *Hecht v. Oyster & C. R. Co.*, 132 Ind. 507, 32 N. E. 302; *Littlewood v. New York, N. Y. & C. R. Co.*, 42 Am. R. 271; *Hartigan v. Southern Pac. R. Co.*, 86 Cal. 142, 54 Pac. 851; *Louisville & C. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 5; *Fritz v. Western U. Tel. Co.*, 64 Utah 263, 71 Pac. 209; *Legg v. Barton*, 64 Vt. 652, 24 Atl. 1016, even to posthumous child; *Daubert v. Western Meat Co.*, 139 Cal. 480,

from an insurance company on the death of the deceased is incompetent in mitigation of damages.⁵² So is evidence that the widow has remarried.⁵³ But it has been held that in an action to recover damages for the death of a minor the fact that he has been emancipated may be considered in mitigation of damages.⁵⁴

Pac. 297, 73 Pac. 244; Galveston &c. &c. R. Co., 95 Tex. 5, 64 S. W. 923, R. Co. v. Conteras, (Tex. Civ. App.) 55 L. R. A. 869, 93 Am. St. 804; see 72 S. W. 1051; Cole v. Mayne, 122 also, Boulden v. Pennsylvania R. Fed. 836; Clare v. New York &c. R. Co., 205 Pa. St. 264, 54 Atl. 906. Co., 172 Mass. 211, 51 N. E. 1083. ⁵² Chicago &c. R. Co. v. Driscoll, For further consideration of the 107 Ill. App. 615, affirmed in 207 Ill. question, see 3 Elliott Railroads, 9, 69 N. E. 620; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. § 1375. 696; Davis v. Guarneri, 45 Ohio St. ⁵³ Kellogg v. New York Cent. &c. R. Co., 79 N. Y. 72; North Pennsylv- 470, 15 N. E. 350, 4 Am. St. 548; ania R. Co. v. Kirk, 90 Pa. St. 15; Philpott v. Pennsylvania R. Co., 175 Spaulding v. Chicago &c. R. Co., 98 Pa. St. 570, 34 Atl. 856; see also, Iowa 205, 67 N. W. 227; Sherlock v. Georgia &c. Co. v. Garr, 57 Ga. 277, Alling, 44 Ind. 184; Western &c. R. 24 Am. R. 492; Gulf &c. Co. v. Co. v. Meigs, 74 Ga. 857; Carroll v. Younger, 90 Tex. 387, 38 S. W. 1121. Missouri &c. R. Co., 88 Mo. 239, 57 ⁵⁴ St. Joseph &c. R. Co. v. Wheeler, Am. R. 382; Lipscomb v. Houston 35 Kans. 185, 10 Pac. 461.

CHAPTER XCIX.

DEBT.

Sec.	Sec.
2020. Generally.	2025. Debt for statutory penalty.
2021. Presumptions and burden of proof.	2026. Debt on specialty—Breach of covenant—Non est sum.
2022. Nil debet—Evidence under.	2027. Debt on judgment.
2023. Debt on parol contract.	
2024. Statutes of limitations and frauds.	

§ 2020. **Generally.**—The action of debt lies where a party claims the recovery of a debt, that is, a liquidated or certain sum of money alleged to be due him.¹ "The cause of action," says Mr. Andrew, "which is made the basis of the form of action designated debt, is a sum of money due according to the terms of some obligation to pay money, which may be an oral, a written, an implied contract, or an express obligation imposed by a public law, be it custom, statute, or city ordinance."² Distinguishing features are: that it lies only for the recovery of money;³ that it lies as a rule at least, only to recover liquidated damages or those that are capable of being definitely ascertained or fixed by mere calculation;⁴ that, unlike assumpsit, it will

¹ Stephen Pl. (Andrew's), 122, 202; *Tilson v. Warwick Gas Co.* Shipman Com. L. Pl. (2d), 39. B. & C. 962; see also, *State v. M.*

² Stephen Pl. (Andrew's ed.), 122; *Chester & C. R. Co.*, 69 N. H. 35, United States v. Colt, Pet. (U. S.) Atl. 736; *Rockland v. Farnsworth* 145, 25 Fed. Cas. 581; *Stockwell v.* 87 Me. 473, 32 Atl. 1012; *Russell* United States, 13 Wall. (U. S.) 531, *Louisville & C. R. Co.*, 93 Va. 322, 543; see also, to the effect that it S. E. 99.

is the proper remedy to recover for ³ *Cole v. Driskell*, 1 Blackf. (Ind.) 16; *Cassady v. Laughlin*, 3 Blackf. (Ind.) 134; *Larmon v. Carpenter*, Western U. Tel. Co. v. Scircle, 103 Ill. 549.

Ind. 227, 2 N. E. 604; *Rogers v.* ⁴ *Fox River Mfg. Co. v. Reeves*, Brooks, 99 Ala. 31, 11 So. 753; *Blgelow v. Cambridge & C. Corp.*, 7 Mass. Cush. (Mass.) 429.

upon contracts of record or under seal, as well as upon simple contracts, and unlike covenant, it will also lie upon simple contracts; and that it is based upon the theory that there is a debt to be recovered rather than for the recovery of damages, although damages are sometimes awarded for the detention of the debt. As said by one of the courts, "A debt, technically so called, may be evidenced by record, by contract, under seal, or by simple contract only. Its distinguishing feature is that it is for a sum certain, or that may readily be reduced to a certainty; and the action of debt lies for the recovery thereof, eo nomine, without regard to the manner in which the obligation is incurred or is evidenced."⁵

§ 2021. Presumptions and burden of proof.—The burden of proof is generally upon the plaintiff, but this or the extent to which he must go, is determined largely by the issue in the particular case; and, in one sense, it may also be determined in some respects by presumptions. The subject of the burden of proof is specifically considered under the different pleas; and as the general subject of presumptions has been fully treated elsewhere it is unnecessary to treat it with particularity in this connection. It may be remarked, however, that possession of the evidence of indebtedness by the one party or the other may raise a presumption in his favor, which may be rebutted; that payment may sometimes be presumed from lapse of time, and that a receipt is prima facie evidence of payment of the specific debt named, or, if in full, of the payment of all such indebtedness.⁶ So, similar or various other rebuttable presumptions may rise from the general course of business.⁷

§ 2022. Nil debet—Evidence under.—"When this action is brought upon a parol contract, or for an escape, or for a penalty given by statute," says Mr. Greenleaf, "the general issue is nil debet; under which, as it is a traverse of the plaintiff's right to recover, he must prove every material fact alleged in the declaration."⁸ And, on the other hand, as the defendant alleges that he does not owe, this plea enables him to give in evidence any matters tending to deny the existence of any debt, such as a release, satisfaction, arbitrament, non-delivery of goods, and the like. And, generally, when the action is upon a matter

⁵ *Baum v. Tonkins*, 110 Pa. St. 569.

⁶ Vol. 1, § 108.

⁷ *Atl. 534*; see also, *Minnick v. Williams*, 77 Va. 758; 1 Chitty Pl. 121.

⁸ Vol. 1, § 119.

⁸ *Roanoke &c. Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612; *Jewett v. Graham*, 3 Baxt. (Tenn.) 16.

of fact, though the fact be proved by a specialty or by record, the plea of nil debet is good, and will open the whole declaration, as well as permit the defendant to make any defense showing that he is not indebted. But if the specialty is itself the foundation of the action, though extrinsic facts be mixed with it, the rule is otherwise. Thus, in debt for rent, due by indenture, the action is founded on the fact of occupation of the premises, and permanency of the profits by the defendant, the lease being alleged only by way of inducement; and therefore, the plea of nil debet puts the plaintiff upon proof of the whole declaration; and, under it, the defendant may give in evidence a release; payment, or, that possession was withheld by the lessor, or that he was subsequently ousted or evicted by the lessor, or by a stranger having a better title. So, in debt for an escape upon a *vastavit*, the judgment is but inducement, the action being founded on the fact of the escape or of the waste."⁹

§ 2023. **Debt on parol contract.**—In debt on a parol contract, the general issue, as already shown, is nil debet, and the action is founded upon the facts of the transaction, whether the contract be express or implied, the plaintiff, must generally allege, and prove under such plea, all the material facts from which the obligation arises, the proof being generally the same as in similar cases in *assumpsit*, the plea denies the inducement rather than the breach. And, as shown in the last section, the plea is adapted to any defense which goes to show that the debt never existed, so that the defendant may show that the plaintiff never had a cause of action, by evidence of infancy, mental incapacity, coverture, duress, want or illegality of consideration, release, breach, or payment before term of credit expired,¹⁰ or the like, and may also show many matters which go in discharge of his liability, which once existed, such as payment, accord and satisfaction, rele-

⁹ 2 Greenleaf Ev., § 280, citing *N. P.* 197; *Bredon v. Harman*, 1 Stephen Pl. 177; *Chitty Pl.* 423; 701; see also, *Matthews v. Redw.* *Tyndal v. Hutchinson*, 3 Lev. 170; 23 Miss. 233; *King v. Ramsay Bullis v. Giddens*, 8 Johns. (N. Y.) Ill. 619, but it has been held that the defendant cannot prove accord and satisfaction under this plea in an action of debt on a note: *McGowan v. Gadsby*, 3 Call. (Va.) 234; *Creary v. McCreary*, 5 Gill & (Md.) 147.

¹⁰ *Bloomfield v. Smith*, 1 M. & 542.

and, indeed, almost any defense he may have,¹¹ except matters in confession and avoidance or denial of the breach.¹²

§ 2024. Statutes of limitations and frauds.—The statute of limitations cannot be given in evidence under the plea of *nil debet*; it must be specially pleaded,¹³ except in certain instances in debt upon statutory liabilities. Nor is evidence of a former recovery by another person admissible under this plea, when pleaded to an action of debt for a penalty given by statute; “for if it could be so shown, the plaintiff might be deprived of the opportunity of pleading *nul tiel record*, or of proving that the recovery was by fraud.”¹⁴ But in debt upon a parol contract, under the plea of *nil debet*, it has been held that the defendant may take advantage of the statute of frauds, on the ground that the plaintiff, under that issue, is bound to prove his case by such evidence as the statute requires.¹⁵

§ 2025. Debt for statutory penalty.—In debt for a penalty given by statute, and in every other case, where a criminal omission of duty is charged, whether official or otherwise, it is held that necessary allegations, even though negative in character, must generally be proved by the plaintiff.¹⁶ But it is said by Mr. Greenleaf, that if the action is founded on the doing of an act without being duly licensed or qualified, the burden of proving the license or qualification lies on the defendant, because it is a matter lying peculiarly within his own knowledge.¹⁷

¹¹ *Stephen Ev.* 280; *Shipman Com. S.*) 508, 29 Fed. Cas. No. 17409. See also, *Buttemere v. Hayes*, 5 M. & W. 456; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Phoenix Ins. Co. v. Munday*, 5 Coldw. (Tenn.) 547.

¹² *Phelps v. Decker*, 10 Mass. 267, in some states payment cannot be proved unless specially pleaded; *Richmond &c. R. Co. v. Johnson*, 90 Va. 775, 20 S. E. 148.

¹³ *Smart v. Baugh*, 3 J. J. Marsh. (Ky.) 363.

¹⁴ *Buller N. P.* 197; *Bredon v. Harman*, 1 Str. 701; *Eastman v. Curtis*, 1 Conn. 323.

¹⁵ *Welsh v. Lindo*, 1 Cranch (U.

¹⁶ *Whitecraft v. Vanderver*, 12 Ill. 235; *Little v. Thompson*, 2 Me. 228; *Commonwealth v. Samuel*, 2 Pick. (Mass.) 103; *Commonwealth v. Maxwell*, 2 Pick. (Mass.) 139; *Rex v. Rogers*, 2 Campb. 654.

¹⁷ 1 *Greenleaf Ev.*, § 79; 2 *Greenleaf Ev.*, § 283; *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23; *State v. Shelton*, 16 Wash. 590, 48 Pac. 258; *Commonwealth v. Curran*, 119 Mass. 206; *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651. But if the license is to be given by the plaintiff

The plaintiff in such action must also show that the action has been regularly commenced within the limited time, if the statute has made this essential to his right to recover; and in the right county, if it is designated by law.¹⁸ It has also been held that if the time of commencement of the action does not appear on the record, it may be shown by the writ, or aliunde, by any other competent evidence;¹⁹ that if part of the penalty is given to the town or parish where the offense was committed, or to the poor thereof, it must be proved that the offense was committed in that town or parish.²⁰ "The defendant, in a penal action," says Mr. Greenleaf,²¹ "may, under the general issue, avail himself of any statutory provision exempting him from the penalty, whether it be contained in the same statute on which the action is founded, or in any other."²² He may also, under this issue, take advantage of any variance between the allegation and the proof on the part of the plaintiff; for, as we have already seen, the plaintiff is held to the same strictness of proof in a penal action, or in an action founded in tort, where a contract is set forth, as in an action upon a contract itself."²³

§ 2026. Debt on specialty—Breaches of covenant—Non factum.—The plaintiff should be prepared to prove the breaches signed and the amount of damages.²⁴ It is also said that if the condition of the bond declared on, is for the performance of the covenant in some other deed, he must prove the execution of that deed also, as well as the breaches alleged.²⁵ If the condition of the bond is not set out in the pleadings, but is only suggested on the record after a judgment,

himself he must prove that it was is clearly within the statute in every way; *Abney v. Austin*, 6 Ill. App. 49; *Farrow v. Nashville &c. R.*, 109 Ala. 448, 20 So. 303, and authorities in last note, *supra*.

"*Buller N. P.* 194, 195. As to time, see *Moore v. Smith*, 5 Me. 490; *Estill v. Fox*, 7 T. B. Mon. (Ky.) 552, 18 Am. Dec. 213. And see as to the place where the offense was committed: *Scott v. Brest*, 2 Term R. 238; *Butterfield v. Windle*, 4 East 385; *Pope v. Davies*, 2 Campb. 266; *Scurry v. Freeman*, 2 B. & P. 381; *Pearson v. McGowran*, 3 B. & C. 700, and he must show that his action

Johnson v. Smith, 2 Burr. 5; *Granger v. George*, 5 B. & C. 149.

"*Evans v. Stevens*, 4 Term R. 226; *Frederick v. Lookup*, 4 B. & C. 2018.

"2 *Greenleaf Ev.*, § 285.

"*Rex v. St. George*, 3 Campb.

"*Parish v. Burwood*, 5 Esp.

Everett v. Tindall, 5 Esp. 169; *Everidge v. Coates*, 1 Car. & P. 534; *c. Ry. & M.* 153.

"*Roberts v. Mariett*, 2 Sav. 187a, n. (2); 2 *Phillips Ev.*, 169.

"2 *Phillips Ev.*, 169.

ment on demurrer, the plaintiff, it has been held, in proving his damages, must produce the bond, and prove its identity with the bond declared on; but of this fact, slight evidence, it seems, will ordinarily suffice.²⁶ If the specialty is the foundation of the action, the defendant cannot, ordinarily, deny the liability if he executed it, and the proper plea is usually non est factum. Under this plea the defendant may show either that he never executed it in point of fact, or that it is absolutely void;²⁷ but not matters that would make it merely voidable, for these, it seems, must be specially pleaded.²⁸ Under such plea, at least when verified, the plaintiff usually has the burden of proving the execution and delivery of the instrument;²⁹ but the production of the instrument is generally sufficient evidence of its delivery, if it is otherwise properly executed by the defendant. In many jurisdictions, the plea of non est factum, to an action of debt on a bond, puts in issue only the execution of the instrument declared on, and in effect admits every other allegation. The defendant, therefore, under this issue, cannot give in evidence, as a defense, anything arising under the condition of the bond;³⁰ nor can he show that the bond was not taken conformably to the requirements of a statute.³¹ Nor on the other hand, if the action is against one obligor alone, as jointly and severally bound, can the plaintiff, under this plea, at common law give in evidence a joint bond of the defendant and the other persons mentioned, though it agrees in date and amount with the bond described in the declaration.³² So, if the declaration is against one as principal and the other as surety, and the evidence is a bond given by the two, as sureties only, it is a fatal variance.³³

²⁶ *Hodgkinson v. Marsden*, 2 Campb. 121.

²⁷ *Shipman Com. L. Pl.* (2d ed.), 287; *Anthony v. Wilson*, 14 Pick. (Mass.) 308; *Van Valkenburgh v. Rouk*, 12 Johns. (N. Y.) 337; *Yates v. Boen*, 2 Str. 1104; *Pigot's Case*, 11 Coke, 26b; *Mix v. People*, 92 Ill. 549; *Stapleton v. Benson*, 8 Mo. 13; *Newlin v. Beard*, 6 W. Va. 110; *American &c. Co. v. Burlack*, 35 W. Va. 647, 14 S. E. 319; *Lambert v. Atkins*, 2 Campb. 272.

²⁸ *Collins v. Blantern*, 2 Wils. 347; 2 Inst. 482; *Stephen Pl. (Andrew's)*, 280; *Bailey v. Cowles*, 86 Ill. 333; *Stapleton v. Benson*, 8 Mo. 13.

²⁹ *Smith v. Lozano*, 1 Ill. App. 171; *Cully v. People*, 73 Ill. App. 501; *Newlin v. Beard*, 6 W. Va. 110; *Union Bank v. Ridgeley*, 1 Har. & G. (Md.) 324; see also, as to variance in such proof, *Phillips v. Singer Mfg. Co.*, 88 Ill. 305; *Ford v. Van Dyke*, 33 N. Car. 227.

³⁰ *Rice v. Thomson*, 2 Bailey (S. Car.) 339; *Chambers v. Games*, 2 Greene (Iowa) 320.

³¹ *Commissioners v. Hanlon*, 1 Nott & McC. (S. Car.) 554.

³² *Postmaster-General v. Ridgway*, Gilpin (U. S.) 135; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305.

³³ *Bean v. Parker*, 17 Mass. 605;

§ 2027. **Debt on judgment.**—In debt on a judgment, it has been held that satisfaction of the judgment, in a proper case, may be proved by parol.³⁴ And if the judgment was against the debtor by his family name only, and in the action of debt upon it he is sued by both christian name and surname, the plaintiff may prove the identity of the person by parol.³⁵ The proper general issue is *nul tiel record*, and under this plea, the defendant may show that no such judgment exists, or he may take advantage of a fatal variance in stating it;³⁶ matters of release and discharge should be specially pleaded.³⁷ Under the general issue, the burden is upon the plaintiff to prove the record sued on;³⁸ but under a special plea of payment or the like it has been held that the defendant has the burden of producing evidence to establish it.³⁹

Kuykendall v. Ruckman, 2 W. Va. 332.

³⁴ Tarver v. Rankin, 3 Kelley (Ga.) 210; Sewall v. Sparrow, 16 Mass. 24. Under a plea of *nil debet*, to an action upon a judgment recovered in another State, it has been held payment may be proved; and a receipt signed by the plaintiff, acknowledging payment, though it be not under seal, is admissible as *prima facie* evidence on the judgment of a court of another State; Indianapolis &c. R. Co. v. Risley, 50 Ind. 60; Sammis v. Wightman, 31 Fla. 10, but it is not generally a good plea against a judgment of a court of record; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Mills v. Duryee, 7 Cranch (U. S.) 481.

³⁵ Root v. Fellowes, 6 Cush. (Mass.) 29; Barry v. Carothers, 6 Rich. (S. Car.) 331; Ducommun v. Hysinger, 14 Ill. 249.

³⁶ Warren v. Flagg, 2 Pick. (Mass.)

448; Lancaster v. Inhabitants of Richmond, 83 Me. 534, 22 Atl. 3; Bennet v. Morley, 10 Ohio 100; Stevens v. Fisher, 30 Vt. 200, or take advantage of the fact apparent on record, that the judgment is void; Kimball v. Merrick, 20 Ark. 108; Wood v. Agostines, 72 Vt. 51, 47 N. H. 108; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

³⁷ Shipman Com. L. Pl. (2d ed.) 288, the plea of *nul tiel record* generally puts in issue simply the existence of such a record as that declared on. Sammis v. Wightman, 31 Fla. 10.

³⁸ First Nat. Bank v. Hamor, 10 Fed. 36; as to how the record may be proved, see, Allin v. Hiscock Root (Conn.) 88; Wilbur v. Abbott, 59 N. H. 132; Ladd v. Blunt, 4 Me. 402; Hallum v. Dickinson, 47 A. 120, 14 S. W. 477; Janvier v. Vandeveer, 3 Harr. (Del.) 29; Fitch Porter, 30 N. Car. 511.

³⁹ Owens v. Chandler, 16 Ark. 6

CHAPTER C.

DIVORCE.

Sec.

2028. Meaning of term.

2029. Burden of proof.

2030. Presumptions.

2031. Questions of law or fact.

2032. Evidence in general.

2033. Adultery.

Sec.

2034. Cruelty.

2035. Desertion.

2036. Failure to support.

2037. Habitual drunkenness.

2038. Defenses.

§ 2028. **Meaning of term.**—A divorce is the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending it so far as concerns the cohabitation of the parties. A divorce *a mensa et thoro* is a divorce from table and bed, or from bed and board; a partial or qualified divorce, by which the parties are separated and forbidden to live or cohabit together, without affecting the marriage itself. A divorce *a vinculo matrimonii* is a divorce from the bond of marriage; total divorce of husband and wife, dissolving the marriage tie, and releasing the parties wholly from their matrimonial obligations.¹

§ 2029. **Burden of proof.**—The burden is on the complainant to establish the charges made in his bill.² Thus, the complainant in a bill for divorce on the ground of cruelty has the burden of proof, and must sustain the case by something more than equally balanced testimony.³ It is frequently held that the judge is not to decree a divorce unless the evidence be full and satisfactory to his mind;⁴

¹ Black Law Dict.

² Hampton v. Hampton, 87 Va. 148, 12 S. E. 340; Chestnut v. Chestnut, 88 Ill. 548; Smith v. Smith, 5 Ore. 186, 188; Allen v. Allen, 101 N. Y. 653, 5 N. E. 341; Berckman v. Berckman, 17 N. J. Eq. 453, adultery was

required to be proved beyond a reasonable doubt.

³ Fischer v. Fischer, 18 N. J. Eq. 300.

⁴ Moore v. Moore, 22 Tex. 237; Edmond v. Edmond, 57 Pa. St. 232; Bailey v. Bailey, 21 Gratt. (Va.) 48;

and the burden of proof has been held to be on the husband to show that the wife's separation was both wilful and obstinate where he sues for divorce on the ground of desertion.⁵ The burden of proof is generally upon the party relying upon the avoidance of a marriage or upon a divorce. Thus, where the claim in a suit is that the first marriage was avoided within the age of consent, or that a divorce was procured, the one setting up such facts must prove them.⁶ But, as elsewhere shown, there are cases in which a divorce prior to a subsequent marriage is presumed. Where the husband sues for divorce on the ground of adultery, and continues to dwell with the wife in the same house, and she sets up a condonation which he denies, the burden is on the wife to prove the condonation.⁷

§ 2030. **Presumptions.**—Presumptions in favor of applicants for a divorce are not indulged; the applicants must prove a full and complete case.⁸ This is also the rule even in case of a default,⁹ and a divorce cannot be granted by consent and without evidence of the right thereto.¹⁰ The party charged with the offense is presumed innocent until the contrary is shown.¹¹ A presumption of a divorce, it is held, does not arise from a separation, even though it has extended over a period of years.¹² Yet it has been held that after the lapse of over forty years, a divorce will be presumed from the fact that a husband separated from his wife, going to another state, and that, several years later, each married again.¹³ But, it has been held in some jurisdictions that where the records of the counties in which a man and wife have lived show no divorce, there is no presumption of divorce in favor of the woman because she marries another, though the first husband also marries another, with whom, however, it is not shown

Fox v. Fox, 25 Cal. 587; Scott v. Scott, 17 Ind. 309; Moyler v. Moyler, 11 Ala. 620; Williams v. Williams, L. R. 1 P. & D. 29, 31; Evans v. Evans, 1 Sw. & Tr. 328.

⁵ Payne v. Payne, (N. J. Eq.) 28 Atl. 449.

⁶ Donahue v. Donahue, 17 Ill. App. 578.

⁷ Graham v. Graham, 50 N. J. Eq. 701, 25 Atl. 358.

⁸ Linden v. Linden, 36 Barb. (N. Y.) 61, but this does not mean that

presumption may not arise in his favor after proof of certain facts.

⁹ Linden v. Linden, 36 Barb. (N. Y.) 61.

¹⁰ Welch v. Welch, 16 Ark. 527.

¹¹ Stafford v. Stafford, 41 Tex. 111.

¹² Pollock v. Pollock, 71 N. Y. 137.

¹³ Wiseman v. Wiseman, 89 Ind. 479.

¹⁴ Harvey v. Carroll, 5 Tex. Civ. App. 324, 23 S. W. 713.

that he lived.¹⁴ A presumption of divorce through legislative enactment will never arise from mere lapse of time.¹⁵ But, it has been held that a presumption arises that a legislative act granting a divorce was within the provisions of the constitution, in the absence of evidence to the contrary.¹⁶ In an action for divorce on the ground of adultery, a presumption as to the continuation of illicit cohabitation arises where such cohabitation is once shown and the parties continue to live under the same roof.¹⁷ A presumption of innocence arises in favor of the wife upon a charge of infidelity by the husband. Thus, it has been held that where a charge of infidelity is made by the husband, the law presumes that the wife is innocent of the charge, unless the contrary is shown.¹⁸ Guilt of adultery, however, is presumed, or at least may be inferred, in an action for divorce when a criminal desire and opportunity to gratify it has been shown.¹⁹ In an action for divorce on the ground of abandonment, an intent to abandon will be presumed to continue when once established.²⁰ Where the defense is condonation, forgiveness and cohabitation are not presumed. Thus, in an action by a wife for divorce on the ground of cruelty it appeared that plaintiff continued to live at their home after the commencement of the suit, but she slept in a room separate from defendant, and no longer lived with him as wife, and it was held that cohabitation and forgiveness of the alleged acts of cruelty would not be presumed;²¹ and to bar her action these must be proved.²² There are cases where condonation will be presumed. Thus, where a bill for divorce on account of the wife's cruelty is filed ten years after the last act of physical violence, and more than three years after complainant abandoned his wife, his offense will be presumed to have been condoned.²³ There is the presumption that the husband is the father of

¹⁴ *Barnes v. Barnes*, 90 Iowa 282, 57 N. W. 851.

¹⁵ *McCarty v. McCarty*, 2 Strob. (S. Car.) 6, 47 Am. Dec. 585.

¹⁶ *Wright v. Wright, Lessee*, 2 Md. 429, 56 Am. Dec. 723, legislative divorces are now prohibited by most of the constitutions, and the right to grant such divorces was always somewhat questionable in this country.

¹⁷ *Smith v. Smith*, 4 Paige (N. Y.) 432, 27 Am. Dec. 75.

¹⁸ *Williams v. Williams*, 67 Tex. 198, 2 S. W. 823.

¹⁹ *Black v. Black*, 30 N. J. Eq. 215, 228.

²⁰ *Bailey v. Bailey*, 21 Gratt. (Va.) 43.

²¹ *Denison v. Denison*, 4 Wash. 705, 30 Pac. 1100.

²² *Odom v. Odom*, 36 Ga. 286.

²³ *Hitchins v. Hitchins*, 140 Ill. 326, 29 N. E. 888.

the child. Thus, where a husband sues for a divorce because his wife gave birth to a fully developed child three and a half months after marriage, but produces no proof to rebut the presumption that he is the father of the child, his petition should be refused.²⁴ So, the presumption that a husband and wife live together has been held to raise a presumption that they have sexual intercourse.²⁵

§ 2031. **Questions of law and fact.**—As divorce suits are almost universally tried by the court and not the jury there seems no occasion for discussion of the question as to whether certain questions are questions of law or fact. In such cases the court determines all questions. In some jurisdictions it is held that a trial by jury cannot be demanded, and if issues of fact are submitted to a jury the verdict is not binding on the court.²⁶

§ 2032. **Evidence in general.**—The general reputation of either party for good or bad temper cannot be shown in a divorce suit. But, it has been held that in an action by the wife on the ground that her husband was guilty of cruelty in accusing her of adultery she may introduce evidence of her good character, and that she may do this even in chief before her character has been attacked in evidence.²⁸ As a general rule the opinion of a witness is not admissible, where the facts are not capable of adequate description and no better evidence is obtainable, then a witness may give his opinion.²⁹ In many jurisdictions statutes prohibit the introduction in evidence of the admissions and confessions of the parties; or provide that no divorce shall be granted on such admissions or confessions alone. But under statutes prohibiting admissions and confessions of either party in evidence, it is held that they may be admitted if a bona fide part of some transaction between the parties which is to be proved. In other words, it seems that they are held admissible if a part of the *gestae*.³⁰ But it is generally held, under statutes, or settled practice in some jurisdictions, that there must be evidence corroborating

²⁴ *McCulloch v. McCulloch*, 69 Tex. S. W. 605; *Dwyer v. Dwyer*, 268 S. W. 593, 5 Am. St. 96. App. 17.

²⁵ *Burns v. Burns*, 60 Ind. 259.

²⁶ *Graft v. Graft*, 76 Ind. 136.

²⁷ *Morse v. Morse*, 25 Ind. 156;

Musselman v. Musselman, 44 Ind. N. E. 948.

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²⁸ *Bascom v. Bascom*, 17

²⁹ *Evans v. Evans*, 93 Ky. 510, 20 (Ohio) 632.

testimony of either of the parties. That is, a decree will not be granted on the uncorroborated testimony of the parties.³¹ Thus, it has been held that a divorce for desertion or any other cause will not be granted to the plaintiff on his testimony unless it is substantially corroborated.³² Admissions and confessions in some jurisdictions are held competent, especially if corroborated by circumstances and free from suspicion of collusion.³³ The enactment in some jurisdictions that in suits for divorce, "no decree can be rendered on the confessions of the parties," has been held to mean, not that such confessions are inadmissible, but that they are insufficient, when they constitute the only evidence of the alleged cause.³⁴ The state is interested, in a sense, and a divorce will not be granted in most states upon the mere consent or admission of a party; but it is generally held that the marriage may be proved by admissions.³⁵ Although the husband and the wife are not competent to testify as to communications made to each other during marriage the rule does not exclude their testimony as to misconduct and ill treatment, unless the same is prohibited by statutory provision.³⁶ But, at common law, and where not otherwise provided by statute, it seems that public policy forbade the husband or wife to testify against the other in divorce cases as well as in other cases.³⁷ And communications to physicians and attorneys are privileged in divorce suits under the same circumstances as in other suits.³⁸ In divorce proceedings, proof is not required of the legality of the marriage.³⁹ And it is held that general reputation of marriage is sufficient evidence of marriage.⁴⁰ But, where there is not

³¹ *Rie v. Rie*, 34 Ark. 37; *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *True v. True*, 6 Minn. 458; *Cummins v. Cummins*, 15 N. J. Eq. 138; see also, *Hughes v. Hughes*, 44 Ala. 698; *Betts v. Betts*, 1 Johns. Ch. (N. Y.) 199; *Latham v. Latham*, 30 Gratt. (Va.) 307; *Richardson v. Richardson*, 50 Vt. 119; *Williams v. Williams*, L. R. 1 P. & D. 29.

³² *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35.

³³ *Matchin v. Matchin*, 6 Pa. St. 332, 47 Am. Dec. 466.

³⁴ *King v. King*, 28 Ala. 315.

³⁵ *Fox v. Fox*, 25 Cal. 587; *Finn v. Finn*, 12 Hun (N. Y.) 340; *Har-*

man v. Harman, 16 Ill. 85; *Hitchcock v. Hitchcock*, 2 W. Va. 435. Contra, *Schmidt v. Schmidt*, 29 N. J. Eq. 496.

³⁶ *Smith v. Smith*, 77 Ind. 80.

³⁷ *Miller v. Williamson*, 5 Md. 219; *Dwelly v. Dwelly*, 46 Me. 377; *Morse v. Morse*, 25 Ind. 156; see also, *Manchester v. Manchester*, 24 Vt. 649; *Anonymous*, 58 Miss. 15; *Corson v. Corson*, 44 N. H. 587; *Stafford v. Stafford*, 41 Tex. 111.

³⁸ *Briggs v. Briggs*, 20 Mich. 34; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26.

³⁹ *Harman v. Harman*, 16 Ill. 85.

⁴⁰ *Trimble v. Trimble*, 2 Ind. 76.

sion.⁶² It has also been held that the admissions of a plaintiff that he had committed adultery were admissible against himself, when not procured by connivance, fraud, coercion, or other improper means.⁶³ And admissions of a defendant to other persons than his wife, the plaintiff, are admissible against him when the ground is that the defendant had another wife living at the time of his marriage to the plaintiff.⁶⁴ In one case it was held that a divorce on the ground of adultery will not be granted on the uncorroborated testimony of too young children of the parties.⁶⁵ As a general rule, where the ground for divorce is adultery, evidence of improper intimacy with other men and at other times and places than those named in specifications is not admissible.⁶⁶ And evidence of indiscretion of defendant with other men than those with whom adultery is charged in the complaint, is not admissible.⁶⁷ So, evidence of acts of adultery after the commencement of the suit are inadmissible.⁶⁸ Neither is evidence of antenuptial incontinence admissible.⁶⁹ But it has been held that evidence of an adulterous act not in issue, prior to those alleged, is admissible to show a lascivious desire, so that when there was subsequently an opportunity it was probable that adultery was committed.⁷⁰ Salacious verses, in the wife's handwriting, found by her husband, who is applying for the divorce, may be competent. Thus, where the husband found such verses in his wife's writing desk, they were held admissible.⁷¹ And evidence that she requested to be allowed to pay the costs of a criminal prosecution against her alleged paramour is competent, not as a confession of guilt, but as showing interest in and association with him, and as corroborating other evidence as to adulterous intercourse.⁷² The court will refuse to grant a divorce on the ground of

⁶² *Billings v. Billings*, 11 Pick. Adams v. Adams, 20 N. H. 299; (Mass.) 461; *Tewksbury v. Tewksbury*, 5 Miss. 109; *Lyon v. Lyon*, 62 Barb. (N. Y.) 138.

⁶³ *Burke v. Burke*, 44 Kans. 307, 24 Pac. 466; *Vance v. Vance*, 8 Me. 132.

⁶⁴ *Lindsay v. Lindsay*, 42 N. J. Eq. 150, 7 Atl. 666.

⁶⁵ *Crowner v. Crowner*, 44 Mich. 180, 6 N. W. 198, 38 Am. R. 245, or that such evidence is not entitled to much weight; *Kneale v. Kneale*, 28 Mich. 344.

⁶⁶ *Realf v. Realf*, 77 Pa. St. 31; *Miller v. Miller*, 20 N. J. Eq. 216;

Green v. Green, 26 Mich. 437.

⁶⁷ *Stevens v. Stevens*, 54 Hun (N. Y.) 490, 8 N. Y. S. 47, but although several offenses are alleged they need not all be proved; *Richardson v. Richardson*, 1 Hagg. Cons. 63 Eng. Ecc. 13.

⁶⁸ *Foval v. Foval*, 39 Ill. App. 644.

⁶⁹ *Hedden v. Hedden*, 21 N. J. Eq. 61.

⁷⁰ *Roth v. Roth*, 85 N. Y. S. 640.

⁷¹ *Woodrick v. Woodrick*, 141 N. Y. 457, 36 N. E. 395.

⁷² *Toole v. Toole*, 112 N. Car. 152, 16 S. E. 912.

adultery, if it appears that the plaintiff has been guilty of the like crime.⁷³ So, while in adultery cases the interpretation of acts and circumstances is always in favor of innocence, this is not the rule where the testimony cannot be reconciled with the theory of innocence.⁷⁴ The record of a conviction of the defendant of the crime of adultery has been held admissible to prove the adultery,⁷⁵ and a copy of the record of conviction of adultery has been held sufficient proof of the act of adultery to entitle one to a divorce on the ground of adultery.⁷⁶ And evidence of adultery is not incompetent on account of obscenity and vulgar language; but courts may and should always require the examination of witnesses to be conducted in a spirit of due delicacy avoiding, so far as may be, vulgar and obscene language.⁷⁷ The only general rule that can be laid down for determining the sufficiency of evidence of adultery is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.⁷⁸ "It is clearly not necessary that the offense should be proved in time and place. The mind of the court must be satisfied that actual adultery has been committed, but if the circumstances establish the fact of general cohabitation, it is enough, although the court may be unable to decide at what time the offense was committed."⁷⁹

§ 2034. Cruelty.—In an action by a wife for divorce on the ground of cruelty or extreme cruelty the following may be shown: evidence of a systematic course of ill treatment consisting of continual scolding and fault-finding, the use of unkind language, studied contempt, and other petty acts of a malicious nature, is competent,⁸⁰ in a proper case as well as evidence of the infliction of bodily injuries. And where blows are proved, abusive language may be taken into con-

⁷³ *Dismukes v. Dismukes*, 1 Tenn. Ch. 266; see also, *Chambers v. Chambers*, 1 Hagg. Cons. 439, 449, 4 Eng. Ecc. 445.

⁷⁴ *Mosser v. Mosser*, 29 Ala. 313; *Stiles v. Stiles*, 62 Ill. App. 408; *Herberger v. Herberger*, 16 Ore. 327, 14 Pac. 70.

⁷⁵ *Randall v. Randall*, 4 Me. 326.

⁷⁶ *Anderson v. Anderson*, 4 Me. 100.

⁷⁷ *Abernathy v. Abernathy*, 8 Fla. 243; *Melvin v. Melvin*, 58 N. H. 569, 42 Am. R. 605.

⁷⁸ *Inskeep v. Inskeep*, 5 Iowa 204; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169; *Poertner v. Poertner*, 66 Wis. 644, 29 N. W. 386; *Daily v. Daily*, 64 Ill. 329; *Blake v. Blake*, 70 Ill. 618; *Mosser v. Mosser*, 29 Ala. 313.

⁷⁹ *Berckmans v. Berckmans*, 16 N. J. Eq. 122.

⁸⁰ *Marks v. Marks*, 56 Minn. 264, 57 N. W. 651, 45 Am. St. 466, see

sideration as determining their character as constituting cruelty sufficient to warrant a divorce.⁸¹ So, in aggravation of an act of cruelty, abusive language and other unbecoming conduct,⁸² insulting and degrading language used by one,⁸³ and acts not specially pleaded and averring the charges specifically made in the complaint,⁸⁴ may sometimes be received. The record showing a conviction of assault and battery, or other crime against the wife, has been held admissible to prove cruelty.⁸⁵ It may, however, be excluded as a confession or admission of one of the parties.⁸⁶ In an action for separation on the ground of subsequent cruelty, evidence of cruelty, which has been forgiven, may also be admissible as showing the character of the subsequent acts and that they arose from a permanent mode of acting.⁸⁷ So, evidence of defendant's conduct towards plaintiff since the commencement of the suit may be admissible to give character to the specific acts charged.⁸⁸ And in other cases it is held that acts subsequent to the commencement of the action may be shown if the court, in the exercise of its discretion, deems it advisable.⁸⁹ In determining whether there was cruel or barbarous treatment within the meaning of the statute, the whole conduct of one spouse towards the other during the period of the alleged ill treatment, should be considered, and evidence descriptive of it is admissible.⁹⁰ And it is not necessary to prove all the acts alleged if sufficient facts are established to the satisfaction of the court.⁹¹

also, for other acts held sufficient to constitute cruel treatment, although there was no bodily injury; *Goodrich v. Goodrich*, 44 Ala. 670; *Kennedy v. Kennedy*, 73 N. Y. 369; *Powelson v. Powelson*, 22 Cal. 358; *Wheeler v. Wheeler*, 53 Iowa 511, 5 N. W. 689.

⁸¹ *Farnham v. Farnham*, 73 Ill. 497; *Day v. Day*, 56 N. H. 316; *Lockwood v. Lockwood*, 2 Curt. Ecc. 281, 7 Eng. Ecc. 114; *Phillips v. Kelly*, 29 Ala. 628; *Johnson v. Sherwin*, 3 Gray (Mass.) 374; *McGowen v. McGowen*, 52 Tex. 657, as to declarations made at the time being admissible as part of the *res gestae*.

⁸² *Moyler v. Moyler*, 11 Ala. 620.

⁸³ *Folmar v. Folmar*, 69 Ala. 84.

⁸⁴ *Segelbaum v. Segelbaum*, 39

Minn. 258, 39 N. W. 492, where habitual cruelty is charged facts in addition to those specifically alleged may often be shown; *Reese v. Reese*, 23 Ala. 785; *Wallscourt v. Wallscourt*, 11 Jur. 134.

⁸⁵ *Bradley v. Bradley*, 11 Me. 3.

⁸⁶ *Endick v. Endick*, 61 Tex. 559.

⁸⁷ *Doe v. Doe*, 52 Hun 405, 5 N. Y. S. 514.

⁸⁸ *Gardner v. Gardner*, 23 Nev. 245, 45 Pac. 139.

⁸⁹ *Scoland v. Scoland*, 4 Wash. 129, 29 Pac. 930.

⁹⁰ *Barnsdall v. Barnsdall*, 171 Ill. St. 625, 33 Atl. 343.

⁹¹ *Cole v. Cole*, 23 Iowa 433; *Dashback v. Dashback*, 62 Mich. 322, 33 N. W. 812; *David v. David*, 27 Ala. 222.

§ 2035. **Desertion.**—Mere proof that the defendant was absent for the statutory period is not sufficient to entitle the plaintiff to a divorce on the ground of desertion.⁹² Three things must generally appear, namely, cessation of cohabitation during the requisite time, the intention not to resume it, and the absence of consent or justification.⁹³ It is held that proof should be given of the circumstances at the time of the desertion so that the court may determine the cause for the separation and the intent of the defendant.⁹⁴ So, evidence may be given as to the intent, as, in one case where the wife left because she objected to certain members of the family and she intended to return when this difficulty was removed, it was held that an intent to desert would not be inferred from her continued absence.⁹⁵ It has been held, however, that a plaintiff for divorce on the ground of desertion is not required to show negatively that no cause for the desertion existed.⁹⁶ It is usually competent to show the general conduct of the parties at, before, and after, the time of the separation.⁹⁷ The evidence should show which party abandoned the other.⁹⁸ And evidence that one party justifiably left the other, is held not sufficient evidence of abandonment to entitle the other party to a divorce on the ground of abandonment.⁹⁹

§ 2036. **Failure to support.**—Evidence of refusal to provide suitable medicine when needed, is admissible in an action for divorce for failure to support.¹⁰⁰ Evidence of the inability of a husband to provide for his wife, which is caused by physical or mental disease, is not sufficient, in most states, for a divorce on the ground of failure to provide.¹⁰¹ It has been held that the failure of a husband to provide for his family may be proved to support a charge of cruel treatment.¹⁰²

⁹² *Smith v. Smith*, 12 N. H. 80; *Eq.* 38; *Thompson v. Thompson*, 1 *Bodwell v. Bodwell*, 113 *Mass.* 314. *Sw. & Tr.* 231.

⁹³ *Bailey v. Bailey*, 21 *Gratt. (Va.)* *Brinkerhoff v. Brinkerhoff*, 29 N. 43; *Cox v. Cox*, 35 *Mich.* 461; *Ser- J. Eq.* 132; *Warner v. Warner*, 54 *gent v. Sergeant*, 33 N. J. *Eq.* 204; *Mich.* 492, 20 N. W. 557; *Wright v. Fulton v. Fulton*, 36 *Miss.* 517. *Wright*, 80 *Mich.* 572, 45 N. W. 365.

⁹⁴ *Kimball v. Kimball*, 13 N. H. 222; *Rogers v. Rogers*, 18 N. J. *Eq.* 445; *Scott v. Scott*, *Wright (Ohio)* 470.

⁹⁵ *McCoy v. McCoy*, 3 *Ind.* 555.

⁹⁶ *Shores v. Shores*, 23 *Ind.* 546; *Porter v. Caylor*, 146 *Ind.* 448, 45 N. E. 648.

⁹⁷ *McCormick v. McCormick*, 19 *Wis.* 172.

⁹⁸ *Thompson v. Thompson*, 79 *Me.* 286, 9 *Atl.* 888.

⁹⁹ *Morrison v. Morrison*, 20 *Cal.* 431; *Jennings v. Jennings*, 13 N. J.

¹⁰⁰ *Baker v. Baker*, 82 *Ind.* 146; *James v. James*, 58 N. H. 266.

¹⁰² *Eastes v. Eastes*, 79 *Ind.* 363.

But, as a general rule it does not, of itself at least, constitute cause for divorce on the ground of cruel treatment.¹⁰³

§ 2037. **Habitual drunkenness.**—Testimony in general tenor that one is an habitual drunkard is not sufficient. The facts should be given in detail that the court may judge whether or not they amount to habitual drunkenness.¹⁰⁴ And evidence of intemperance since filing of the suit is competent, not to prove a substantive cause, but to show a continuing habit.¹⁰⁵ So, in a divorce suit against a husband for continued drunkenness and acts of violence, evidence of failure or neglect to support his wife has been held admissible to show the general tenor of his conduct towards her, but not as a ground for divorce.¹⁰⁶

§ 2038. **Defenses.**—The usual defenses in divorce cases are denial of the alleged cause, or, as to some of them, justification, or connivance, collusion, condonation or recrimination. In some states these defenses, or some of them, must be negatived by the plaintiff, and in some they are admissible under the general denial, but in others they must be specially pleaded and proved. Connivance and collusion, if pleaded, are disgraceful and must be strictly proved.¹⁰⁷ Condonation, however, may be commendable in some cases, and while knowledge and forgiveness must be shown,¹⁰⁸ the proof required is not so strict.¹⁰⁹ It may often be implied from conduct and circumstances

¹⁰³ Peabody v. Peabody, 104 Mass. 733, 3 Eng. Ecc. 310; Maglathlin v. Maglathlin, 138 Mass. 299. 195; Haskell v. Haskell, 54 Cal. 262, Maglathlin, 138 Mass. 299. nor on the ground of desertion; ¹⁰⁴ Turton v. Turton, 3 Hagg. 1. Mandigo v. Mandigo, 15 Vt. 786. 388, 5 Eng. Ecc. 130; Burns v. Burns, 60 Ind. 259; Maglathlin v. Maglathlin, 138 Mass. 299.

¹⁰⁵ Batchelder v. Batchelder, 14 N. H. 380; Golding v. Golding, 6 Mo. App. 602.

¹⁰⁶ Mack v. Handy, 39 La. Ann. 491, 2 So. 181.

¹⁰⁷ Morrison v. Morrison, 14 Mont. 8, 35 Pac. 1.

¹⁰⁸ Phillips v. Phillips, 1 Rob. Ecc. 144, 156, this is especially true of connivance in cases of adultery; Rogers v. Rogers, 3 Hagg. Ecc. 57.

¹⁰⁹ Durant v. Durant, 1 Hagg. Ecc.

¹⁰³ See authorities in last note, supra; also, Marsh v. Marsh, 13 N. E. 281; Anonymous, 6 Mass. 1. Williamson v. Williamson, 1 Jol. Ch. (N. Y.) 487; Harper v. Harper, 29 Mo. 301; for evidence held sufficient to support a finding that there was no condonation on the wife's part, see, Polson v. Polson, 140 N. E. 310, 39 N. E. 498.

CHAPTER CL.

EJECTMENT.

Sec.	Sec.
2039. Title—Proof.	2054. Trustee's title.
2040. Proof of title—Prima facie case.	2055. Title by adverse possession.
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2046. Order of proof.	2061. Defendant's possession.
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2048. Owner of legal title—Recovery.	2063. Insufficient title—Land certificates and receipts.
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2051. Common source of title—Practice.	2066. Outstanding title—Burden of proof.
2052. Execution sale—Proof of title.	2067. Improvements by person in possession—Compensation.
2053. Tax sale—Proof of title.	

§ 2039. Title—Proof.—In actions in ejectment the general rule is that in order to maintain the action the plaintiff must prove title in himself. And it is usually an indispensable part of the plaintiff's case to show by sufficient proof that he had the right to the immediate possession of the premises, or at least some portion thereof, at the time of the commencement of his action. It is not sufficient to prove a right to the possession either prior or subsequent to the time of the commencement of the action.¹ The rule most broadly stated is that the

¹Goodman v. Winter, 64 Ala. 410; Green v. Jordan, 83 Ala. 220, 3 So. Pollard v. Hanrick, 74 Ala. 334; 513; Louisville &c. R. Co. v. Phil-

plaintiff in ejectment must prove a regular chain of title back to grantor in possession, or to the government.² The exception to the rule, as hereafter seen, is where both parties claim title from a common source. And it has been held that where the plaintiff relies on documentary proof of title, a complete and perfect title must be shown; if a material link in the chain be wanting, he fails.³

- yaw, 88 Ala. 264, 6 So. 837; Cofer v. Schening, 98 Ala. 338, 13 So. 123; Tennessee &c. R. Co. v. Tutwiler, 108 Ala. 483, 18 So. 668; Stanley v. Johnson, 113 Ala. 344, 21 So. 823; Daniel v. Lefevre, 19 Ark. 201; Payne v. Treadwell, 5 Cal. 310; Kile v. Tubbs, 32 Cal. 332; Florida &c. R. Co. v. Burt, 36 Fla. 497, 18 So. 581; McMasters v. Torsen, (Idaho) 51 Pac. 100; Dyer v. Day, 61 Ill. 336; Stehman v. Crull, 26 Ind. 436; Castor v. Jones, 107 Ind. 283, 6 N. E. 823; Cresap v. Hutson, 9 Gill (Md.) 269; Wilson v. Inloes, 11 G. & J. (Md.) 351; Lannay v. Wilson, 30 (Md.) 536; Leonard v. Diamond, 31 Md. 536; Tise v. Shaw, 68 Md. 1, 11 Atl. 363; Richardson v. Baltimore &c. R. Co., 89 Md. 126, 42 Atl. 938; Van Auken v. Monroe, 38 Mich. 725; Torrance v. Betsy, 30 Miss. 129; Kingman v. Slevors, 143 Mo. 519, 45 S. W. 266; Crawford v. Whitmore, 120 Mo. 144, 25 S. W. 365; Nalle v. Thompson, 173 Mo. 595; Herbert v. King, 1 Mont. 475; Dale v. Honneman, 12 Neb. 221, 10 N. W. 711; Malloy v. Malloy, 35 Neb. 224, 52 N. W. 1097; Mulford v. Tunis, 35 N. J. L. 256; Heffner v. Betz, 32 Pa. St. 376; Thompson v. Adams, 55 Pa. St. 479; Bank &c. v. Dowling, 45 S. Car. 677, 23 S. E. 982; Beach v. Beach, 20 Vt. 83; Suttle v. Richmond &c. R. Co., 76 Va. 284; Eaton v. Smith, 19 Wis. 537; Cincinnati v. White, 6 Pet. (U. S.) 431; Dickerson v. Colgrove, 100 U. S. 578; Lansburgh v. Dist. of Columbia, 8 App. Cas. 10; School-
- field v. Rhodes, 82 Fed. 153; A v. Horde, 1 Burr. 119.
- ² Bank &c. v. Jones, 59 Ala. 126; Florence &c. Asso. v. 8 107 Ala. 531, 18 So. 108; Ja Lumber Co. v. McCreary, 13 278; Florida &c. R. Co. v. Bu Fla. 497, 18 So. 581; Brande v. Seigfried, 75 Ind. 568; Stee Downing, 60 Ind. 478; Start v. 83 Ind. 78; Peck v. Louisville Co., 101 Ind. 366; Lafayette Wortman, 107 Ind. 404, 8 277; Adams v. Board &c., (M Atl. 954; Greenleaf v. Brookly R. Co., 141 N. Y. 395, 36 N. E Slauson v. Goodrich &c. Co., 9 20, 74 N. W. 574; Florida &c. Loring, 51 Fed. 932, 2 C. C. A Graham v. Mitchell, 78 Ga. Grayson v. Schlamm, 126 Ind 25 N. E. 810; Bailey v. Tyga Co., (Ky.) 10 S. W. 234; Co Bertram, 86 Mich. 356, 49 N. V Carleton v. Darcy, 90 N. Y. Dunham v. Townshend, 118 281, 23 N. E. 367; Sanger v. M 120 N. Y. 109, 24 N. E. 386; M v. Griffin, 104 N. Car. 114, 10 142; Middleton v. Westeney, 7 C. C. 393; Ablard v. Fitzgerald Wis. 516, 518, 58 N. W. 745; H v. Anderson, 129 N. W. 206.
- ³ Jenkins v. Noel, 3 Stew. (60; Jackson Lumber Co. v. Creary, 137 Ala. 278; Florida & Co. v. Burt, 36 Fla. 497, 18 So. Florida &c. Co. v. Loring, 51 932.

universally held that the plaintiff must recover upon the strength of his own title and will not be permitted to rely on the weakness of the title of his adversary.⁴ The reason for this rule is that the person in possession, or the prima facie owner of the premises, should not be required to give up the possession, however weak his title, until the true owner establishes his title.⁵ The doctrine of the right to set up a subsisting or outstanding title in a stranger rests upon the same foundation.⁶ The rule as to the proof of title as stated by one court is that the plaintiff "must show that he had a better title to the property than the defendant; and where the plaintiff fails to show that he has title, either by written muniment or right of adverse possession, he cannot maintain ejectment against one in possession,

⁴Hawes v. Rucker, 94 Ala. 166, 10 So. 85; Apel v. Kelsey, 47 Ark. 413, 2 S. W. 102; Leonard v. Coleman, (Ark.) 15 S. W. 14; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Ruert v. Mark, 15 Ill. 541; Cobb v. Lavalle, 39 Ill. 331; Stuart v. Dutton, 39 Ill. 91; Silver Creek &c. Corp. v. Union Lime &c. Co., 138 Ind. 297; Hurley v. Street, 29 Iowa 429; Huntington v. Jewett, 25 Iowa 249; Lannay v. Wilson, 30 Md. 536.

⁵Wolfe v. Doe, 13 S. & M. 103, 51 Am. Dec. 147; Gurno v. Janis, 6 Mo. 330; Foster v. Evans, 51 Mo. 39; Marvin v. Elliott, 99 Mo. 616, 12 S. W. 899; West v. Bretelle, 115 Mo. 653, 22 S. W. 705; Parker v. Cassingham, 130 Mo. 348, 32 S. W. 487; Burnham v. Hitt, 143 Mo. 414, 420, 45 S. W. 368; Clarke v. Diggs, 6 Ired. L. (N. Car.) 159, 44 Am. Dec. 73; Gillett v. Stanley, 1 Hill (N. Y.) 121; Schaubert v. Jackson, 2 Wend. (N. Y.) 13; Wallace v. Swinton, 64 N. Y. 188; Swope v. Shafer, (Ky.) 22 S. W. 78; Becker v. Howard, 47 How. Pr. (N. Y.) 423; Raynor v. Timerson, 46 Barb. (N. Y.) 518; Evenson v. Webster, 5 S. Dak. 266; Slocum v. Compton, 93 Va. 374, 25 S. E. 3; Low v. Settle, 32 W. Va. 600, 9 S. E. 922; Holly River Coal Co. v. Howell, 36 W. Va. 429, 509, 15 S. E. 214; Bradley v. Ewart, 18 W. Va. 598; Wentworth v. Abbetts, 78 Wis. 63, 46 N. W. 1044; Slauson v. Goodrich &c. Co., 99 Wis. 20, 74 N. W. 574; Reusens v. Lawson, 91 Va. 226, 254, 21 S. E. 347; Land Grant Co. v. Dawson, 151 U. S. 586, 604; Bear Creek Coal Co. v. Dewart, 95 Pa. St. 72; McCormick v. Skelly, 201 Pa. St. 184, 50 Atl. 765; Stehman v. Crull, 26 Ind. 436; Shipley v. Shook, 72 Ind. 511; Castor v. Jones, 107 Ind. 283, 6 N. E. 823; Kingman v. Sievers, 143 Mo. 519, 45 S. W. 266; Roberts v. Baumgarten, 110 N. Y. 380, 18 N. E. 96; Ablard v. Fitzgerald, 87 Wis. 516, 58 N. W. 745; Goulding v. Clark, 34 N. H. 148; Boylan v. Meeker, 28 N. J. L. 274; Butler v. Davis, 5 Neb. 521; Tracy v. Norwich &c. R. Co., 39 Conn. 382; Stanford v. Mangin, 30 Ga. 355; Fletcher v. Perry, 97 Ga. 368, 23 S. E. 824.

⁶Holly River Coal Co. v. Howell, 36 W. Va. 489, 509, 15 S. E. 214; Geiges v. Greiner, 68 Mich. 153, 36 N. W. 48; Greve v. Coffin, 14 Minn. 345; Bonaffon v. Peters, 134 Pa. St. 180, 19 Atl. 499.

whether the latter's title be valid or not.⁷ So, a legal title will prevail over an equitable one.⁸ Where plaintiff avers in his complaint that he owns and holds the legal title and right of possession, it is not supported by proof of an equitable title.⁹ The plaintiff is required to show an ouster by the defendant.¹⁰ In actions in ejectment it is sufficient to state the plaintiff's title without giving its source; but if such title is specifically described and its source stated, the plaintiff must then recover upon the title pleaded; his recovery must be based upon the title as laid.¹¹ The plaintiff is entitled to a judgment if he can show that the defendant is wrongfully in the possession of any part of the premises claimed in his complaint.¹² Where the plaintiff shows that the plaintiff's title is subsequent to the date of the defendant's possession, the plaintiff in such case cannot recover without showing a perfect title.¹³

§ 2040. **Proof of title—Prima facie case.**—It is not necessary, however, in order to entitle a plaintiff to recover in every case that he be required to prove a perfect title. It is sufficient when he has shown such proof as will entitle him to recover if no further testimony is offered. A sufficient prima facie case is made when the plaintiff traces his title back to an immediate or remote grantor who was in possession of the land, claiming it in fee at the time of the conveyance. It is also the rule that where the plaintiff shows such facts and

⁷ *Stephens v. Moore*, 116 Ala. 397, 270; *Stout v. McPheeters*, 84 Ala. 22 So. 542. 585; *McNutt v. McNutt*, 116 Ala. 545, 19 N. E. 115; *Freedom v. Freedom*, 128 Ind. 377, 27 N. E. 869.

⁸ *Fleming v. Carter*, 70 Ill. 286; *Wales v. Bogue*, 31 Ill. 464; *Esch-erick v. Traver*, 65 Ill. 379; *Franklin v. Palmer*, 50 Ill. 202; *Herrell v. Sizeland*, 81 Ill. 457; *Aholtz v. Zellar*, 88 Ill. 24; *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863; *Hayden v. McCloskey*, 161 Ill. 351, 43 N. E. 1091; *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71; *Eastin v. Rucker*, 1 J. Marsh. (Ky.) 232.

⁹ *Rowe v. Beckett*, 30 Ind. 154; *Groves v. Marks*, 32 Ind. 319; *Brown v. Freed*, 43 Ind. 253; *Burt v. Bowles*, 69 Ind. 1; *Hunt v. Campbell*, 83 Ind. 48; *Johnson v. Pontious*, 118 Ind. 270; *Stout v. McPheeters*, 84 Ala. 22 So. 542. 585; *McNutt v. McNutt*, 116 Ala. 545, 19 N. E. 115; *Freedom v. Freedom*, 128 Ind. 377, 27 N. E. 869.

¹⁰ *McMasters v. Torsen*, (1881) 51 Pac. 100.

¹¹ *McManus v. Smith*, 53 Ind. 274; *Ragsdale v. Mitchell*, 97 Ind. 296; *Grissom v. Moore*, 106 Ind. 296; *Johnson v. Pontious*, 118 Ind. 270; *Pittsburgh &c. R. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 280.

¹² *Gilliam v. Bird*, 8 Ired. L. Car. 280.

¹³ *Patterson v. Litton*, 23 La. 274.

¹⁴ *Anderson v. McCormick*, 118 Ind. 308, 21 N. E. 803; *Middleton v. Teney*, 7 Ohio C. C. 393.

duces such evidence of title as will establish his right to recover, if no further testimony were offered, and that this prima facie case may be made by either of the following methods: (1) proof of a connected chain of title, or a grant direct from the government to himself; (2) by proof of open, notorious, continuous, adverse, and unequivocal possession of the land in controversy, under color of title, for the statutory period of limitations next before the bringing of the action; (3) by proof of title out of the state by offering a grant to a stranger, without connecting himself with it, and then by proof of adverse possession under color of title for seven years, the statutory period next before the beginning of the action; (4) as against the state by proof of possession under known and visible boundaries for thirty years, or, as against individuals for twenty years next before the action was brought; (5) by proof of title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant at the time of the commencement of the action; (6) by proof of common source of title and then by proof of a better title from such source.¹⁵ A prima facie title is all that is required, at least until a better outstanding title is shown.¹⁶ Where it was made to appear that a certain person was the common source of title, and the plaintiff then proved a conveyance from such person to himself, this was held to be a sufficient prima facie case to entitle him to recover.¹⁷ When the right of plaintiff's possession is put in issue by a general denial or a plea of not guilty, the plaintiff to make out his case must prove three things: (1) The title to the premises as alleged in his complaint; (2) his right to possession at the time of the com-

¹⁵ Blair v. Miller, 2 Dev. (N. Car.) 497; Graham v. Houston, 4 Dev. (N. Car.) 232; Love v. Gates, 4 Dev. & B. (N. Car.) 363; Osborne v. Johnston, 65 N. Car. 22; Melvin v. Waddell, 75 N. Car. 361; Whissenhunt v. Jones, 78 N. Car. 361; Spivey v. Jones, 82 N. Car. 179; Isler v. Dewey, 84 N. Car. 345; Christenbury v. King, 85 N. Car. 229; Conwell v. Mann, 100 N. Car. 234, 6 S. E. 782; Mobley v. Griffin, 104 N. Car. 112, 10 S. E. 142.

¹⁶ McArthur v. Matthewson, 67 Ga. 134.

¹⁷ Rosevelt v. Hungate, 110 Ill.

595; Wilson v. Peelle, 78 Ind. 384; Bennett v. Goddits, 79 Ind. 347; Elwood v. Lannon, 27 Md. 200; Jay v. Michael, 87 Md. 1; Merchants' Bank v. Harrison, 39 Mo. 433; Brown v. Brown, 45 Mo. 412; Fellows v. Wise, 49 Mo. 350; Smith v. Lindsey, 89 Mo. 76, 1 S. W. 88; Union Bank v. Maynard, 51 Mo. 548; Barton v. Erickson, 14 Neb. 164, 15 N. W. 206; Low v. Settle, 32 W. Va. 600, 9 S. E. 922; Laidley v. Land Co., 30 W. Va. 505, 4 S. E. 705; Carrell v. Mitchell, 37 W. Va. 130, 16 S. E. 453; Anderson v. Reid, 10 App. Cas. (D. C.) 426.

mencement of the action; (3) that the defendant was in possession the time the action was begun.¹⁸ It is held to be sufficient when evidence raises a presumption of title in the plaintiff. And it is held that where the plaintiff shows a possession of the land with a claim of title, that this is a sufficient prima facie case and entitles him to recover, at least as against a mere intruder or trespasser,¹⁹ unless the defendant shows either a personal right in himself or an outstanding title in another.²⁰ And the introduction in evidence of a government patent under which the plaintiff claimed, was held sufficient prima facie proof of title to the land.²¹ And a patent conclusively establishes a right to possession as against an intruder.²² And a conveyance from one in possession for many years was held sufficient to establish a prima facie title.²³ But as against a mere intruder who fails to show any title in himself, the plaintiff need prove only prima facie title sufficient to raise a presumption of ownership.²⁴ In New York it was held that where a title was established either as a matter of law or where such title is admitted, possession of the grantor was to be presumed, for the reason that such proof of title was prima facie sufficient, and cast upon him who resisted a claim under such title the burden of proving any adverse possession. It will be observed that this rule obtains only where title is found as a matter of law or where

¹⁸ *Jones v. Lofton*, 16 Fla. 189; *Barco v. Fennell*, 24 Fla. 378, 385.

¹⁹ *Gamble v. Horr*, 40 Mich. 561; *Bennett v. Horr*, 47 Mich. 221, 10 N. W. 347; *Morton v. Folger*, 15 Cal. 275; *Leonard v. Flynn*, 39 Cal. 543, 26 Pac. 1099; *McGovern v. Mowry*, 91 Cal. 383, 27 Pac. 746; *Zillmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65; *Dills v. Hubbard*, 21 Ill. 328; *Bowman v. Wettig*, 39 Ill. 416; *Zillch v. Young*, 184 Ill. 333, 56 N. E. 318; *American &c. Co. v. Chicago &c. R. Co.*, 75 Ill. App. 420, 434; *Gilmore v. Norton*, 10 Kans. 491; *Pacific R. Co. v. Walker*, 12 Kans. 601; *Gildehaus v. Whiting*, 39 Kans. 706, 18 Pac. 916; *Hoffman v. Woods*, 40 Kans. 382, 19 Pac. 805; *Shaw v. Hill*, 83 Mich. 322, 47 N. W. 247; *Gonder*

v. Miller, 21 Nev. 180, 27 Pac. 3; *Carleton v. Darcy*, 90 N. Y. 5; *Mayor &c. v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Smith v. Lorilla*, 10 Johns. (N. Y.) 338; *Hammer v. Hammer*, 39 Wis. 182; *Hacker v. Horlemus*, 74 Wis. 21, 41 N. W. 9; *Cummings v. Friedman*, 65 Vt. 183, 26 N. W. 575.

²⁰ *Van Auken v. Monroe*, 38 Mich. 725; *Covert v. Morrison*, 49 Mich. 183, 13 N. W. 390; *Warner v. Parker*, 4 Vt. 291.

²¹ *Cook v. Bertram*, 86 Mich. 349, 49 N. W. 42; *Holloran v. Meisel*, 10 Va. 398, 13 S. E. 83.

²² *Hull v. Campbell*, 56 Pa. St. 1; ²³ *Hoban v. Cable*, 102 Mich. 260, 60 N. W. 466.

²⁴ *Coombs v. Hertig*, 162 Ill. 144, 44 N. E. 392.

it is admitted.²⁵ But where the defendant admits in his answer that he has possession of the premises, it is only necessary for the plaintiff to establish his right to the possession.²⁶ In Florida it has been held that a deed from the trustees of the internal improvement fund was prima facie evidence of title, the character of the title, while not original, being of such public nature that the deed of the trustees was regarded as prima facie evidence of title subject to be overthrown by proof of a better title.²⁷ Where the defendant answers by way of confession and avoidance, and admits the plaintiff's prima facie case and seeks to avoid it by affirmative matter following the general rule, the burden is upon the defendant to prove the matters thus alleged.²⁸

§ 2041. **Recovery on strength of title—Meaning.**—Universal as the rule may be that the plaintiff must recover on the strength of his own title, it requires proof that is neither unnecessary nor absurd. The proof required on the part of the plaintiff is sometimes modified by the nature of the defendant's right or claim. Thus, the rule does not require the production and proof of a perfect chain of title from the government, as against one wrongfully in possession. Where the defendant is a mere intruder or is wrongfully in possession of the premises, a plaintiff may recover on proof of a possession that is actual and prior to that of the defendant, or on proof of a conveyance to himself from a grantor who was in actual possession prior to that of the defendant.²⁹ In Nebraska the rule is recognized that the plaintiff must recover on the strength of his own title, but it is held that "this does not mean that the plaintiff is required to prove a title to the real estate as against the whole world. It is sufficient if he prove a title good as against the defendant."³⁰ The rule declared in Kansas is that a plaintiff may recover if his right is paramount to any right possessed by the defendant, notwithstanding some other person not a party to the action may have a better right to the prop-

²⁵ *Stevens v. Hauser*, 39 N. Y. 302; ²⁶ *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698.
²⁷ *McRoberts v. Bergman*, 132 N. Y. 73, 30 N. E. 261; *Arents v. Long Island R. Co.*, 89 Hun (N. Y.) 126, 34 N. Y. S. 1085.

²⁸ *Arents v. Long Island R. Co.*, 89 Hun 126, 34 N. Y. S. 1085. ²⁹ *Ashmead v. Wilson*, 22 Fla. 255; *Engle v. Reed*, 27 Fla. 345, 9 So. 213; *Florida &c. R. Co. v. Burt*, 36 Fla. 497, 18 So. 581; *Goodwin v. Markwell*, 37 Fla. 464, 19 So. 885.

³⁰ *Groover v. Coffee*, 19 Fla. 61; ³¹ *Carson v. Dundas*, 39 Neb. 503, 58 N. W. 141; *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494.

erty than the plaintiff. And in the same case it was declared that between parties claiming title, mere priority of possession gives precedence, where no better title can be shown as belonging to either. Blackstone lays down the following rule: "In order to maintain an action, the plaintiff must, in the case of any defense, make out three points before the court, viz.: Title, lease, entry and ouster. (1) that the plaintiff must show a good title in his lessor, which brings the matter of right entirely before the court; (2) that the lessor being seised or possessed by virtue of such title, did make him the lease for the present term; (3) that he, the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, [(4)] that the defendant was ousted or ejected him."³²

§ 2042. **Legal title—Proof and presumption.**—In this class of cases the proof of legal title makes a sufficient prima facie case to entitle the plaintiff to recover possession of the premises described in the complaint, however, this is upon the theory that the right of possession follows the ownership of the fee, as the right to possession must appear either by proof or presumption. The complainant can make a prima facie case by showing a conveyance to him of the premises described in the complaint, by some one who was then in the occupancy and possession of such premises. If he is unable to show such possession in himself, grantor, or some grantor in the chain of title, in order to make a prima facie case he must run his title by deed, or some necessary proof back to some one shown or admitted to be the common source of title to him and his adversary, and failing in this he must trace his title back to the government.³³

§ 2043. **Presumption of possession under legal title—Exceptions.**—To the rule that a presumption of right of possession arises from proof of legal title, there are certain exceptions. If the entire or

³² Duffey v. Rafferty, 15 Kans. 9; Simpson v. Boring, 16 Kans. 248; Mooney v. Olsen, 21 Kans. 691; Hollenback v. Ess, 31 Kans. 87, 1 Pac. 275; Douglass v. Ruffin, 38 Kans. 530, 16 Pac. 783; Christy v. Richolson, 48 Kans. 177, 29 Pac. 398; Redden v. Tefft, 48 Kans. 302; 29 Pac. 157; Jones v. Hollister, 51 Kans. 310, 32 Pac. 1115.

³³ Blackstone Comm. 202; Dalrymple v. Hunneman, 12 Neb. 221, 10 N. E. 711.

³⁴ Blake v. Davis, 20 Ohio 231, 23 Pac. 711; Williams v. Burnett, Wright (O.) 53; Middleton v. Westerney, 7 O. C. C. 393; McKinney v. Daniel, Va. 702, 19 N. E. 880.

disputed evidence shows that the plaintiff is not entitled to the immediate possession of the premises described, then he must fail even where the proof shows that he has the legal title. Familiar instances of this exception are found in such actions where it appears from the evidence that there is an outstanding lease.³⁴ "In an action of ejectment, title in the lessor of the plaintiff, and possession in the defendant, at the commencement of the suit, are two things which must be established to justify a recovery."³⁵ In an action of ejectment the proof must show the plaintiff to have a right to the possession of the land at the time of the commencement of the suit.³⁶ It is held that a plaintiff in ejectment may recover the premises described on the strength of his prior possession alone, as against one who subsequently acquires possession by a trespass without any lawful right. And this is true even though the plaintiff himself show no title to the premises.³⁷ Where the land in controversy is unoccupied, it is sufficient if the plaintiff prove title only.³⁸ And where the defendant offers no proof of title beyond a mere naked possession it is not necessary for the plaintiff to show an unbroken chain of title from the government to himself.³⁹ In emphasizing the rule as to the right of possession being necessary to a recovery in ejectment, the Supreme Court of Michigan says this rule accords with the maxim, "that no one can recover in ejectment who would not be entitled to enter without action."⁴⁰

§ 2044. **Burden of proof.**—In this class of actions, as in others, the burden of proof is upon the plaintiff to maintain the allegations of his complaint and to entitle him to recover. As a general rule this burden is upon him to prove his title and his right to the immediate possession of the premises in dispute.⁴¹ On this rule on the burden

³⁴ *Cobb v. Lavalle*, 89 Ill. 331; *City of Lafayette v. Wortman*, 107 Ind. 404, 8 N. E. 277; 2 *Greenleaf Ev.*, § 613; 6 *Wait Actions & Defenses* 64.

³⁵ *Eastin v. Rucker*, 1 J. J. Marsh. (Ky.) 232.

³⁶ *Jackson v. Haisley*, 35 Fla. 587, 17 So. 631.

³⁷ *Hurst v. Sawyer*, 2 Okla. 470.

³⁸ *Jones v. Easley*, 53 Ga. 454; *Hadley v. Bean*, 53 Ga. 685; *McArthur v. Matthewson*, 67 Ga. 134.

³⁹ *Bay Co. v. Bradley*, 39 Mich. 163.

⁴⁰ *Evans v. Board &c.*, 15 Ind. 319; *Broker v. Scobey*, 56 Ind. 588; *Bristol &c. Co. v. Boyer*, 67 Ind. 236;

⁴¹ *Cobb v. Lavalle*, 89 Ill. 331; *Mull v. Orme*, 67 Ind. 95; *Deputy v. Moon-ey*, 97 Ind. 463; *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698; *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528;

of proof in ejectment and of the recovery by plaintiff on the strength of his own title the Supreme Court of Florida has said: "A familiar rule in ejectment is, that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's title. It must be observed, however, that this rule does not require a plaintiff to exhibit a perfect chain of title from the original source, as against one wrongfully in possession. If it did, one without a shadow of title or right might take possession of, and successfully hold, the estate of his neighbor, whose title has a defective link in it. The application of this principle is not to be understood as requiring that a plaintiff in making out his title shall be compelled in the first instance to trace the chain back to the first grantor, but only that he shall exhibit so much as will put the defendant to the support of his possession by a title superior to one of a mere naked possession."⁴² Under this rule the plaintiff is not only required to make proof of title and the consequent right of possession, but he must prove title and right of possession up to the boundaries claimed by him, and it is held that he can only recover within the boundaries established by his predecessor. Thus, where a stream had formerly been the boundary, and it was shown that it was suddenly and sensibly changed, it was held that the burden was upon the plaintiff to show where the old bed of the stream was; as the stream ceased to be the boundary the burden was on the plaintiff to establish the old landmark.⁴³ This burden of the plaintiff has been stated thus: "The plaintiff in ejectment can only recover upon the strength of his own title, as being good against the world or as being good against the defendant by estoppel."⁴⁴ Or, as stated by some courts, "the burden of proof is upon the plaintiff to establish the title which he asserts, by a preponderance of the evidence."⁴⁵ C

Pittsburgh &c. R. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528.

⁴² *L. Engle v. Reed*, 27 Fla. 345, 9 So. 213; *Jackson v. Haisley*, 35 Fla. 587, 17 So. 631; *Hartley v. Ferrell*, 9 Fla. 374.

⁴³ *Maddux v. West*, 9 Am. L. Rec. 484; *Silver Creek &c. Corp. v. Union Lime &c. Co.*, 138 Ind. 297, 35 N. E. 125.

⁴⁴ *Doe v. Pritchard*, 11 Sm. & M. (Miss.) 327; *Wolfe v. Doe*, 13 Sm. & M. (Miss.) 103; *Duncan v. Duncan*, 3 Ired. L. (N. Car.) 317; *Taylor v.*

Gooch, 3 Jones L. (N. Car.) 46; *Kitchen v. Wilson*, 80 N. Car. 19.

Ionwell v. Mann, N. Car. 234; *Miley v. Griffin*, 104 N. Car. 112, 10 E. 142; *Font v. McConnell*, 46 I. 215, 14 So. 522.

⁴⁵ *Stephens v. Moore*, 116 Ala. 322 So. 542; *Richner v. Brisbane*, Colo. 385, 35 Pac. 740; *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736; *Eddy v. Gage*, 147 Ill. 162, N. E. 347; *Huneycutt v. Brooks*, 1 N. Car. 788, 21 S. E. 558; *Howard Lock*, (Ky.) 22 S. W. 332; *Weaver*

as held by other courts, the plaintiff must show a better title than that of defendant.⁴⁶ And it has been held that a defendant has the right to require the plaintiff to show a better title than his own, and also to show a title as good as any that the defendant could possibly show, whether vested in him or not. But any outstanding title must be a legal, subsisting, and better, title than the plaintiff's.⁴⁷ And where the plaintiff sought to avoid the effect of an outstanding title as set up by the defendant on the ground of abandonment by a former owner, it was held that the burden of proving such abandonment was on the plaintiff, and that it was not incumbent upon the person having the record title to prove that he had not abandoned the title or the premises.⁴⁸

§ 2045. **General issue—Proof under.**—The rule of proof under the general issue, as stated by Mr. Adams and approved by Mr. Greenleaf, is as follows: "When the title of the real plaintiff in ejectment is controverted under the general issue, he must prove, (1) that he had the legal estate in the premises, at the time of the demise laid in the declaration; (2) that he also had the right of entry; and (3) that the defendant, or those claiming under him, were in possession of the premises at the time when the declaration in ejectment was served."⁴⁹

§ 2046. **Order of proof.**—In ejectment, as in most other classes of cases, the plaintiff is at liberty to introduce his evidence in any order he may see proper, or which is convenient to him; this is a matter entirely within the discretion of the trial court.⁵⁰ In one case where the title was the only matter in question, it was held that the onus of establishing the title was upon the plaintiff, and that he could begin with any part of his evidence, and that he was not compelled to pursue any particular order of proof in tracing his title.⁵¹ The only limitation on this rule is that the proof as offered must appear to be pertinent to the matter in controversy, or that if not, it must be ac-

v. Whilden, 33 S. Car. 190; Wilson " Woods v. Bonner, 89 Tenn. 411,
v. Johnson, 145 Ind. 40, 38 N. E. 38; 18 S. W. 67.

Lewis v. Miles, (Ky.) 44 S. W. 120. " 2 Greenleaf Ev., § 304.

" Martin v. Kelley, (Ky.) 30 S. W. " McKee v. Lineberger, 87 N. Car.
612. 181.

" Font v. McConnell, 46 La. Ann. " Laugley v. Jones, 26 Md. 462.
215, 14 So. 522.

accompanied by an offer to show its relevancy in the progress of the cause.⁵²

§ 2047. **Right to open and close.**—A text writer states the rule as to the right to open and close as follows: "In ejectment the plaintiff is generally entitled to begin, because the onus lies on him to prove his title. But the defendant will be allowed to begin upon admitting the whole of the plaintiff's case, and relying upon a totally distinct title. The admission must not stop short of this point. Thus when plaintiff claims under a will and the defendant under a will of a later date, the plaintiff is still entitled to begin, because an admission of the will under which the plaintiff claims, without admitting it to be the last will, is insufficient."⁵³

§ 2048. **Owner of legal title—Recovery.**—It is conceded to be the universal rule that in actions in ejectment the owner of the legal title must prevail. This rule was fully and aptly stated by the United States Supreme Court in an early case as follows: "It is undoubted and true, that upon common law principles, the legal title should prevail in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law. It is so held in those states in which the principles of the common law are carried into full effect, and the course of proceeding in the action of ejectment is according to those principles. In the states where these principles prevail, it is held, that in a trial at law, the courts will not look behind, or beyond a grant, to the rights upon which it is founded; nor examine the progressive stages of the title, antecedent to the grant. But in other states, the courts of law proceed upon other principles. In the action of ejectment, they look beyond the grant, and examine the progressive stages of the title, from its incipient state, whether by warrant, survey, entry, or certificate, until its final consummation by grant; and if found regular and according to law, in the progressive stage, the grant is held to relate back to the inception of the right, and to have dignity accordingly. This latter course seems to be the one adopted and pursued by the courts of Mississippi. It is enough for us to say that in so doing, and in applying their peculiar mode of proceeding

⁵² Goodhand v. Benton, 6 G. & J. (Md.) 481; Stewart v. Spedden, 5 Md. 433; Warner v. Hardy, 6 Md. C. B. 655. ⁵³ Sedgwick & Wait Trial of Title, § 801; Doe d. Bather v. Brayne, 10 G. & J. (Md.) 481.

to titles derived through and under the laws of the United States, they violate no provisions of any statute of the United States.”⁸⁴

§ 2049. Excepted tracts—Burden of proof.—Some controversy has arisen as to the burden of proof and the right of the plaintiff in cases where the conveyance either to the plaintiff or under which he claimed, contained certain excepted tracts. But the rule seems to be settled that the burden of locating the excepted tracts rests upon the plaintiff in order to make out the *prima facie* case for the recovery, and he must show that the particular lands in controversy are not within the excepted tracts. This rule has been stated by a Virginia court as follows: “It would seem, therefore, both upon principle and upon authority, that where the exterior boundaries of a survey upon which a grant or deed is founded include lands which have been excepted from the operation of the grant, or lands which have been aliened since the grant was issued, and which have been excepted from the operation of the deed, and the plaintiff’s title papers disclose such exception or such alienation, it is not sufficient for such plaintiff, in an action of ejectment, to connect himself with the Commonwealth, and show the exterior boundaries of his grant, but he must also prove that the lands in controversy are not within the excepted or aliened lands in order to make out a case which will entitle him to recover in an action of ejectment.”⁸⁵

§ 2050. Proof of title—Common source.—An exception exists to the rule requiring a plaintiff in ejectment to trace his title to the government or to some person in possession claiming title. Where it is made to appear either from the pleadings or proofs that the plaintiff and defendant derived their title from a common source, the law

⁸⁴Ross v. Barland, 1 Pet. (U. S.) 457; Maxwell Land &c. Co. v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458; Gwynne v. Niswanger, 20 Ohio 556; Corrinne Mill &c. Co. v. Johnson,

⁸⁵Reusens v. Lawson, 91 Va. 226, 156 U. S. 574, 15 Sup. Ct. 409; 257, 21 S. E. 347; Harman v. Gudger v. Hensley, 82 N. Car. 481; Stearns, 95 Va. 58, 27 S. E. 601; Roan Mt. &c. Co. v. Edwards, 110 N. Virginia Coal &c. Co. v. Keystone Car. 353, 14 S. E. 861; Guthrie v. Coal &c. Co., 101 Va. 723; Bryant v. Lewis, 1 T. B. Mon. (Ky.) 142; Taylor v. Taylor, 3 A. K. Marsh. (Ky.) 18; Madison v. Owens, 6 Litt. 281, Morris, 39 W. Va. 432, 19 S. E. 531; Scott v. Ratliffe, 5 Pet. (U. S.) 81; (Ky.) Litt. Sel. Cas. 281. Hawkins v. Barney, 5 Pet. (U. S.)

very wisely provides that the plaintiff need not prove his title by of such common source in order to maintain the action.⁵⁶ The r

*Pollard v. Cocke, 19 Ala. 188; Gantt v. Doe, 27 Ala. 582; Bishop v. Truett, 85 Ala. 376, 5 So. 154; Feagin v. Jones, 94 Ala. 597, 10 So. 537; Florence &c. Asso. v. Schall, 107 Ala. 531, 18 So. 108; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Hightower v. Williams, 38 Ga. 597; Blalock v. Newhill, 78 Ga. 245, 1 S. E. 383; Roosevelt v. Hungate, 110 Ill. 595; Chicago &c. R. Co. v. Hardt, 138 Ill. 120, 27 N. E. 910; Lake Erie &c. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014; Burns v. Edwards, 163 Ill. 494, 45 N. E. 113; Stalford v. Goldring, 197 Ill. 156, 64 N. E. 395; Wilson v. Peelle, 78 Ind. 384; Bennett v. Gaddis, 79 Ind. 347; Boyce v. Graham, 91 Ind. 420; Stockwell v. State, 101 Ind. 1; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853; Nitche v. Earle, 117 Ind. 270, 19 N. E. 749; McWhorter v. Heltzell, 124 Ind. 129, 24 N. E. 743; Elwood v. Lannon, 27 Md. 200; Jay v. Michael, 87 Md. 1; Barnett v. Minnix, (Ky.) 17 S. W. 334; Cronin v. Gove, 38 Mich. 381; Eames v. McGregor, 43 Mich. 313, 5 N. W. 408; Van Den Brooks v. Correon, 48 Mich. 283, 12 N. W. 206; Drake v. Happ, 92 Mich. 580, 52 N. W. 1023; Conger v. Converse, 9 Iowa 554; Cooley v. Brayton, 16 Iowa 10; Byers v. Rodabaugh, 17 Iowa 53; Luen v. Wilson, 85 Ky. 504; Horning v. Sweet, 27 Minn. 277, 6 N. W. 782; Gordon v. Sizer, 39 Miss. 805; Wade v. Thompson, 52 Miss. 367; Gillum v. Case, 67 Miss. 588, 7 So. 551; Morgan v. Hazlehurst Lodge, 53 Miss. 665; Merchants' Bank v. Harrison, 39 Mo. 433; Brown v. Brown, 45 Mo. 412; Fellows v. Wise, 49 Mo. 350; Miller v. Hardin, 64 Mo. 545; Smith v. Lindsey, 89 Mo. 76, 1 S. W. 88; Grant v. Casey, 93 Mo. 595, 6 S. W. 3; Ebersole v. Rankin, 102 Mo. 488, 1 S. W. 422; McKee v. Spiro, 107 Mo. 452, 17 S. W. 1013; Worley v. Hightower, 161 Mo. 340; Barton v. Erickson, Neb. 164, 15 N. W. 206; Carson v. Dundas, 39 Neb. 503, 58 N. W. 1; Zahn v. Dopp, 19 N. Y. S. 863; Latham v. Gates, 4 Dev. & B. (N. Car.) 3; Gilliam v. Bird, 30 N. Car. 280; Brown v. Wood, 48 N. Car. 306; Wicksen v. Jones, 78 N. Car. 3; Ryan v. Martin, 91 N. Car. 464; Cunningham v. Harper, Wright (Oh.) 366; Riddle v. Murphy, 7 S. & B. (Pa.) 230; Clark v. Trindle, 52 Pa. St. 492; Grubb v. Grubb, 74 Pa. 25, 34; Page v. Simpson, 172 Pa. 288, 33 Atl. 556; Pyles v. Reeve, Rich. L. (S. Car.) 555; Geiger v. Kaigler, 15 S. Car. 263; Smythe v. Tolbert, 22 S. Car. 133; Izlar v. Hattley, 24 S. Car. 382; Rhett v. Jenkins, 25 S. Car. 453; Johnson v. Cobb, 29 S. Car. 372, 7 S. E. 60; Scates v. Henderson, 44 S. Car. 5; 22 S. E. 724; Wortham v. Cherry Head (Tenn.) 468; Kerbough v. Vance, 6 Baxt. (Tenn.) 110; Moss v. Union Bank, 7 Baxt. (Tenn.) 21; Bleidorn v. Oakdale &c. Co., (Tenn.) 43 S. W. 360; Keys v. Mason, Tex. 140; Pearson v. Flanagan, Tex. 266; Stegall v. Huff, 54 Tex. 193; Sellman v. Hardin, 58 Tex. 8; Crabtree v. Whiteselle, 65 Tex. 11; Calder v. Ramsey, 66 Tex. 218, 1 S. W. 502; Garner v. Lasker, 71 Tex. 431, 9 S. W. 332; Howard v. Masterson, 77 Tex. 41, 13 S. W. 635; Latham v. Van Hook, 77 Tex. 650, 14 S. W. 270; Burns v. Goff, 79 Tex. 23; 14 S. W. 1009; Ames v. Beckley, Vt. 395; Bolling v. Teel, 76 Va. 48.

on this subject is thus stated by the Mississippi Supreme Court: "When both parties derive title from the same person it is not competent for either, as a general rule, to dispute that title. That principle, when it applies, is an exception to the general rule that the plaintiff must prove a complete title in himself. Ordinarily, the defendant may rest on his possession merely, or he may show an outstanding title in a stranger. In either case he will succeed, unless the plaintiff has shown such right of possession as is good against all the world. This rule has no application where both parties trace title to a common source. In that case the defendant cannot protect his possession by setting up a paramount title in another person with which he has no connection."⁵⁷ The reason of this rule is based on the fact that the claim of title from a common source may be treated, for the purpose of a trial, as an admission of the title of the common grantor, and therefore dispenses proof of such title on the part of the plaintiff.⁵⁸ And in this class of cases, neither party is required to prove either the nature or the quality of the title held by the common grantor. This rule is thus stated: "Where both parties claim under purchases at sheriff's sale against the same defendant, it is not necessary that the plaintiff should make out his title to be good against the world; if the defendant set up no title, except that of the judgment debtor, the plaintiff is not required to prove the nature or the quality of the judgment debtor's title. He is entitled to recover, if he can establish that title in himself."⁵⁹ Under this rule it is not necessary to show that the title of the person constituting the common source was a legal one.⁶⁰ And it has been held that such common source of title may be established by parol proof.⁶¹ Where both parties to an action in ejectment claim under purchases at sales for delinquent taxes assessed against the same owner, they can neither dis-

- Laidley v. Land Co., 30 W. Va. 505, 232; Eames v. McGregor, 43 Mich. 4 S. E. 705; Low v. Settle, 32 W. Va. 313; Gillum v. Case, 67 Miss. 588; 600, 9 S. E. 922; Carrell v. Mitchell, Crabtree v. Whiteselle, 65 Tex. 111. 37 W. Va. 130, 16 S. E. 453; Sexton v. Rhames, 13 Wis. 99, 110; Orton 327; Pollard v. Cocke, 19 Ala. 188; v. Noonan, 19 Wis. 350, 370; Bishop v. Truett, 85 Ala. 376, 5 So. Schwallback v. Chicago & C. R. Co., 154. 69 Wis. 299; Beale v. Brown, 6 Finch v. Ullman, 105 Mo. 255, Mack. (U. S.) 574; Anderson v. 16 S. W. 863. Reid, 10 App. Cas. (D. C.) 426. Smith v. Lindsey, 89 Mo. 76, 1 Wade v. Thompson, 52 Miss. 367. S. W. 88; Finch v. Ullman, 105 Mo. Johnstone v. Scott, 11 Mich. 255, 16 S. W. 863.

pute the title of such person, but either may test the validity of the sale on which the title of the other is founded.⁶² So where both parties claim to a deed which referred to a plat as having been recorded it was held that this amounted to an admission of the plat and of its being recorded, if a record was necessary.⁶³ So where one deed from the common grantor refers for boundaries to that made to the other party, title need not be proved back of the common grantor.⁶⁴ The same rule applies in an action in ejectment by remaindermen against the grantee of a life tenant, as both parties derived title from the same source.⁶⁵

§ 2051. **Common source of title—Practice.**—In some jurisdictions it is provided by statute that when the complainant, or some one in his behalf, makes an affidavit wherein it is shown that the plaintiff and defendant obtained their title from a common source, the defendant, or some one in his behalf, must deny the allegations in the affidavit, in order to compel the plaintiff to make proof of title from any other than such common source; and in the absence of such denial the plaintiff makes a sufficient prima facie case by tracing his title to such common source.⁶⁶ But, when plaintiff's affidavit is denied under oath by the defendant, the burden is then upon the plaintiff of proving his title back of such common source to the government or to some prior grantee who was in possession and claiming title.⁶⁷

§ 2052. **Execution sale—Proof of title.**—Actions of ejectment frequently arise where the premises are purchased on execution sale. Under this state of facts two classes of actions may arise; the first is where the purchaser at the judicial sale institutes an action in ejectment against the original defendant, the person against whom the judgment was rendered under which the sale was made; the second is where the action is against a stranger or a person other than

⁶² Feagin v. Jones, 94 Ala. 597, 10 So. 537; Burns v. Edwards, 163 Ill. 494, 45 N. E. 113.

⁶³ Johnstone v. Scott, 11 Mich. 232. 494, 45 N. E. 113; Stalford v. Goring, 197 Ill. 156, 64 N. E. 395.

⁶⁴ Cronin v. Gove, 38 Mich. 381. ⁶⁵ Smith v. Bradley, (Ky.) 11 S. W. 370. ⁶⁶ Chicago & C. R. Co. v. Hardt, 1 Ill. 120, 27 N. E. 910; Burns v. Edwards, 163 Ill. 494, 45 N. E. 113.

⁶⁷ Rosevelt v. Hungate, 110 Ill. 595; Chicago & C. R. Co. v. Hardt, 138 Ill.

the original defendant. In actions of the first class in order to entitle the plaintiff to recover it is sufficient to show only the execution and the proceedings under it as shown by the sheriff's return and the deed to the plaintiff; it is not necessary to produce the record of the judgment. The reason given for this rule is that the sheriff's return is conclusive between the parties and those in privity with them as to all of the material facts stated in such return, and in an action to recover the land it will be presumed that the judgment is valid.⁶⁸ This rule is held to apply not only to the defendant, but to all persons claiming under or through him.⁶⁹ And in such a case the defendant cannot controvert the title by showing it defective, or by setting up an outstanding title in a third person.⁷⁰ While, as appears from the authorities cited in making proof of the chain of title, it is necessary to introduce in evidence the sheriff's deed, neither the deed, nor the recitals in the deed, are proof of the authority to make the sale.⁷¹ The sheriff's deed is said to be a link in the title, but it does not prove title.⁷² In making proof of the judgment it has been held sufficient to introduce in evidence the entry of the judgment.⁷³ In

* *Carpenter v. Doe*, 2 Ind. 465; *Shipley v. Shook*, 72 Ind. 511; *Leary v. New*, 90 Ind. 502; *Woolen v. Rockefeller*, 81 Ind. 208; *Turner v. First Nat. Bank*, 78 Ind. 19; *Rucker v. Steelman*, 73 Ind. 396; *Langsdale v. Woollen*, 120 Ind. 16, 21 N. E. 659; *Fenwick v. Floyd*, 1 H. & G. (Md.) 172; *Miles v. Knott*, 12 G. & J. (Md.) 442, 454; *Bott v. Burnell*, 11 Mass. 163; *Lawrence v. Pond*, 17 Mass. 433; *Whitaker v. Sumner*, 7 Pick. (Mass.) 551; *Campbell v. Webster*, 15 Gray (Mass.) 28; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Den v. Morse*, 12 N. J. L. 331 (379); *Indianapolis &c. R. Co. v. Center Tp.*, 143 Ind. 63, 40 N. E. 134; *Ware v. Bradford*, 2 Ala. 676; *Cauly v. Blue*, 62 Ala. 77; *Carpenter v. Sherfy*, 71 Ill. 427; *McEntire v. Durham*, 7 Ired. L. (N. Car.) 151; *Newell Ejectment*, 323-326, 496; *Tyler Ejectment*, 528, 529.

* *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Jackson v. Bush*, 10 Johns. (N. Y.) 223; *Green v. Watrous*, 17 S. & R. (Pa.) 393, 398.

⁷⁰ *McDonald v. Badger*, 23 Cal. 393; *Blood v. Light*, 38 Cal. 649; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Den v. Winans*, 14 N. J. L. 6; *Jackson v. Graham*, 3 Cal. (N. Y.) 188; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Turner v. Nat. Bank*, 78 Ind. 19.

⁷¹ *Teal v. Langsdale*, 78 Ind. 339; *LaPlante v. Lee*, 83 Ind. 155; *Milburn v. Phillips*, 136 Ind. 680, 34 N. E. 983; *Burt v. Hasselman*, 139 Ind. 196, 38 N. E. 598; *Indianapolis &c. R. Co. v. Center Tp.*, 143 Ind. 63, 40 N. E. 134; *Morse v. Bellows*, 7 N. H. 549; *Bolton v. Johns*, 5 Pa. St. 145; *Lloyd v. Lynch*, 28 Pa. St. 419.

⁷² *Teal v. Langsdale*, 78 Ind. 339.

the second class of cases, where the action is against a stranger, there is no presumption in favor of the validity of the judgment, and the plaintiff is required to prove a valid judgment and all successful steps thereunder,⁷⁴ and that the defendant had title to the premises. The Indiana Supreme Court stated the rule thus: "It is also well settled that, in an action by a purchaser at a sheriff's sale against an execution defendant, it is sufficient to show the judgment, the execution, the sale, and the sheriff's deed; but, where the action is against a party other than the execution defendant, it must be shown, in addition, that the execution defendant had title in the premises in which the judgment lien attached."⁷⁵ As stated by the same court in a later case, "title under a judicial sale cannot be maintained without an affirmative showing that the sale was made upon a writ authorized by the judgment." The reason for the rule as given by the court is that a valid sale must be supported by power and authority to make it out.⁷⁶ In such a case the plaintiff must show a judgment, execution, sale, and deed, in order to support his title.⁷⁷

§ 2053. **Tax sale—Proof of title.**—Title derived from tax sale may be sufficient on which to base an action in ejectment. But as a general rule the recitals in tax deeds are not evidence against the owner of the property, and when the deed is relied on as a basis for an action, such matters must be established by proofs from other sources.⁷⁸ The burden of proof is upon the party claiming under the tax deed to establish the regularity of the entire proceedings leading up to the sale; he must affirmatively show that every step has been complied with, from the listing of the land to the consummation of the title, as required by the statute, and that all of the officers of

⁷⁴ *Turner v. First Nat. Bank*, 78 Ind. 19.

⁷⁵ *Cauly v. Blue*, 62 Ala. 77; *Wilmoth v. Bordes*, (Ky.) 11 S. W. 86; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Newell Ejectment*, 323-326, 496; *Tyler Ejectment*, 530; *2 Greenleaf Ev.*, § 316.

⁷⁶ *Shipley v. Shook*, 72 Ind. 511.

⁷⁷ *Burt v. Hasselman*, 139 Ind. 196, 38 N. E. 598.

⁷⁸ *Shipley v. Shook*, 72 Ind. 511; *Leary v. New*, 90 Ind. 502.

⁷⁹ *Smith v. Corcoran*, 7 La. Dupre v. Thompson, 25 La. A. 503; *Sutton v. Calhoun*, 14 La. A. 209; *Mussey v. White*, 3 Greenl. (Me.) 290 (303); *Jackson v. Sherrard*, 7 Cow. (N. Y.) 88; *Jackson v. Esty*, 7 Wend. (N. Y.) 148; *Brooks v. Goodwin*, 75 N. Y. 409; *Sharp v. Spier*, 4 Hill (N. Y.) 76; *Adams v. Saratoga &c. R. Co.*, 10 N. Y. 3; *Merritt v. Port Chester*, 71 N. Y. 309; *Hilton v. Bender*, 69 N. Y. Guest v. City of Brooklyn, 79 N. Y. 624; *Hall v. Collins*, 4 Vt. 3.

law have performed their several duties.⁷⁹ It is generally held that the deed does not furnish prima facie proof that all the requirements of the law have been complied with;⁸⁰ except where it is expressly provided by statute.⁸¹ The Supreme Court of Indiana has held that in the absence of a statute making the tax deed prima facie evidence, or where the deed itself fails to state the fact, that the burden of proof is upon the party holding such deed to show that the person against whom the taxes were assessed had no personal property out of which such taxes could be made.⁸²

§ 2054. **Trustees's title.**—In ejectment by a trustee who is executor, administrator, or guardian, the rule of proof is thus stated by Mr. Greenleaf: "If the plaintiff claims a chattel real as executor, or administrator, he must prove the grant of the letters of administration, or the probate of the will, in addition to the evidence of the testator's or intestate's title. And where no formal record of the grant of letters of administration or letters testamentary is drawn up, they may be proved by the book of acts, or other brief official memorial of the fact. If the plaintiff claims as guardian, he must in like manner prove, not only the title of the ward, and the ward's minority at the time of the demise laid in the declaration, but also the

Brown v. Wright, 17 Vt. 97; *Preston v. Preston*, 5 Gratt. (Va.) 120.

⁷⁹ *Williams v. Peyton*, 4 Wheat. (U. S.) 78; *Keane v. Cannovan*, 21 Cal. 291; *Gavin v. Shuman*, 23 Ind. 22; *Wilson v. Lemon*, 23 Ind. 433; *Ellis v. Kenyon*, 25 Ind. 134; *Steeple v. Downing*, 60 Ind. 478; *Millikan v. Patterson*, 91 Ind. 515; *Bowen v. Swander*, 121 Ind. 161, 22 N. E. 725; *Shedd v. Disney*, 139 Ind. 240, 38 N. E. 594; *Mattox v. Stevens*, 140 Ind. 282, 39 N. E. 460; *Matthews v. Light*, 32 Me. 305; *Brown v. Veazie*, 25 Me. 359; *Stevens v. McNamara*, 36 Me. 177; *United Copper &c. Co. v. Franks*, 85 Me. 321, 27 Atl. 185; *Latimer v. Lovett*, 2 Doug. (Mich.) 204; *Thompson v. Gotham*, 9 Ohio 170; *Holt v. Hemphill*, 3 Ohio 232; *Walton v. Tuttle*, 3 N. H. 340; *Cass v. Bellows*, 31 N. H. 501; *Harvey v.*

Mitchell, 31 N. H. 575; *Annan v. Baker*, 49 N. H. 161; *Emery v. Harrison*, 13 Pa. St. 317; *Jesse v. Preston*, 5 Gratt. (Va.) 120.

⁸⁰ *Hilton v. Bender*, 69 N. Y. 75; *Brown v. Goodwin*, 75 N. Y. 409; *Guest v. Brooklyn*, 79 N. Y. 624; *Adams v. Saratoga &c. R. Co.*, 10 N. Y. 328; *Preston v. Preston*, 5 Gratt. (Va.) 120; *Emery v. Harrison*, 13 Pa. St. 317.

⁸¹ *Keane v. Cannovan*, 21 Cal. 291; *Hannah v. Collins*, 94 Ind. 201; *Richard v. Carrie*, 145 Ind. 49, 43 N. E. 949; *Wilson v. Carrico*, 155 Ind. 570, 58 N. E. 847.

⁸² *Ellis v. Kenyon*, 25 Ind. 134; *Ward v. Montgomery*, 57 Ind. 276; *Woolen v. Rockafeller*, 81 Ind. 208; *Earle v. Simons*, 94 Ind. 573; *Cole v. Gray*, 139 Ind. 396, 38 N. E. 856.

due execution of the deed or will, appointing him guardian, if such was the source of his authority; or the due issue of letters of guardianship, if he was appointed by the tribunal having jurisdiction of that subject."⁸³

§ 2055. Title by adverse possession.—A plaintiff in ejectment is not always required to prove a perfect paper title or a legal title evidenced by a conveyance to himself or any prior grantor; but a title gained by adverse possession is sufficient. Proof of a title gained by possession which is adverse, open, and notorious, and accompanied by acts of ownership is sufficient to bar an action for the recovery of lands so held regardless of the bona fides or color of title under which such adverse holder claims ownership.⁸⁴ As stated in an early Alabama case: "When the statute of limitations has completed a bar, it gives to the party in whose favor it has run a right of entry, upon which he may prosecute ejectment, or, if sued, defend himself." Or, as stated in a later case: "A right to lands, acquired by ten years' adverse holding, with the exceptions the statutes provide, arms such holder with all the powers of offense and defense which an unbroken chain of title confers."⁸⁶ To constitute title by adverse possession

⁸³ 2 Greenleaf Ev. 315; Spaulding v. Baldwin, 31 Ind. 376; Hammann v. Mink, 99 Ind. 279; Newell Ejectment, 529.

⁸⁴ Smith v. Roberts, 62 Ala. 83; Wilson v. Glenn, 68 Ala. 383; Hall v. Caperton, 87 Ala. 285, 6 So. 388; Murray v. Hoyle, 92 Ala. 559, 9 So. 368; Riverside Co. v. Townshend, 120 Ill. 9, 9 N. E. 65; Jones v. Spradling, (Ky.) 7 S. W. 31; Morgan v. Higgins, (Ky.) 40 S. W. 928; Sutton v. Pollard, 96 Ky. 640, 29 S. W. 637; Winter v. White, 70 Md. 305, 17 Atl. 84; McDonald v. Schneider, 27 Mo. 405; Tayon v. Ladew, 33 Mo. 205; Goltermann v. Schiermeyer, 125 Mo. 291, 28 S. W. 616; Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494; Mayor &c. v. Carleton, 113 N. Y. 284, 21 N. E. 55; Bauman v. Grubbs, 26 Ind. 419; Sims v. Frankfort, 79 Ind. 446; Brown v. Anderson, 90 Ind. 93; State v. Portsmouth Sav. Bank,

106 Ind. 435, 7 N. E. 379; Rice v. Beck, 109 Ind. 472, 9 N. E. 6; Moore v. Hinkle, 151 Ind. 343, 1 N. E. 822; Burr v. Smith, 152 Ind. 469, 53 N. E. 469; Harrelson v. Smith, 39 S. Car. 14, 17 S. E. 368; L. Kersburg Indust. Co. v. Schultz, W. Va. 470, 27 S. E. 255.

⁸⁵ Doe d. Farmer v. Eslava, 11 Ala. 1028; Barclay v. Smith, 66 Ala. 2.

⁸⁶ Barclay v. Smith, 66 Ala. 2; Eddy v. Gage, 147 Ill. 162, 35 N. E. 347; Donahue v. Illinois &c. R. Co. v. Townshend, 120 Ill. 9, 9 N. E. 65; Falloon v. Simshauser, 130 Ill. 649, 22 N. E. 835; Kepley v. Schulz, 185 Ill. 52, 57 N. E. 187; Sheldon v. Atkinson, 38 Kans. 14, 16 Pac. Gildehaus v. Whiting, 39 Kans. 18 Pac. 916; Anderson v. Burnhams, 52 Kans. 454, 34 Pac. 1056; Guinn v. Spillman, 52 Kans. 496, 35 Pac. 1.

must show actual, notorious and continuous possession accompanied by a claim of ownership for the length of time required by the given statute.⁸⁷ To sustain a title by adverse possession the proof must show that such possession was adverse, uninterrupted and exclusive.⁸⁸ Where a party claims title by adverse possession, the burden of proof is upon him to show such actual adverse possession and extent.⁸⁹ The land held by adverse possession is limited to the amount shown to be in the actual possession of the person claiming it. The rule is that "where two persons possess adjoining tracts and their possession conflicts or interferes the one with the other, the actual possession is adjudged to be in him who has the better title—as both cannot be seised, the possession follows the title—yet if one who has the inferior title enters upon the interference and occupies it adversely to him who has the better title for a sufficient length of time, he will acquire a title against the true owner by limitation to the portion actually occupied, although the true owner may not be in the actual possession of that portion of his tract which is not disturbed by the interference."⁹⁰ Where a complaint in ejectment alleges title in fee in the plaintiff and the proof shows a title by adverse possession, it was held sufficient proof of the allegation, as title acquired by possession is as high as any known to the law.⁹¹

2056. Equitable title.—In some jurisdictions it is provided by statute and has been held by the highest courts that a plaintiff in ejectment may recover on proof of either legal or equitable title. The pleading in such action need not state how the plaintiff's title or ownership is derived; it is held sufficient if the complaint state that

- Murray v. Hoyle*, 97 Ala. 588, 11 N. E. 347; *Barr v. Gratz*, 4 Wheat. (U. S.) 456; *Eddy v. Gage*, 147 Ill. 162, 213; *Vintroux v. Simms*, 45 W. Va. 548, 31 S. E. 941.
- Winter v. White*, 70 Md. 305, 17 N. E. 84; ^a *Sims v. City of Frankfort*, 79 Ind. 446; *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743; *Singleton v. School Dist. No. 34*, (Ky.) 10 S. E. 793; *Lantry v. Wolff*, 49 Neb. 374, 68 N. W. 494; *Parkersburg Indust. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239; *Bennett v. Pierce*, 50 W. Va. 604.
- McDonald v. Schneider*, 27 Mo. 84; *Crispen v. Hannavan*, 50 Mo. 400; *Long v. Higginbotham*, 56 Mo. 400; *Leeper v. Baker*, 68 Mo. 400; *Howan v. Crooks*, 5 Dana (Ky.) 27; *Burns v. Swift*, 2 S. & R. (Pa.) 44; *Hall v. Powell*, 4 S. & R. (Pa.) 44.

he has a legal or equitable estate.⁹² It is the rule in such jurisdictions that the plaintiff may recover on proof of any right to the property that is paramount to any right held by the defendant, although the legal title may be in a third person and such third person has a better right than the plaintiff.⁹³ The Supreme Court of Kansas states the rule as follows: "It is not essential that the plaintiff should have a title perfect beyond all question and paramount to the title of every other person. It is enough if he have a right to the property, and that that right is paramount to the right of the defendant."⁹⁴ And in this state it was held that a plaintiff may recover in such action on proof that he has a claim to the property by color of title as against a defendant in possession without color or claim of title.⁹⁵ And it was said in a later case: "If the title of a plaintiff is better than that of a defendant, the plaintiff may recover however weak his title may be."⁹⁶ In North Carolina it was held that the equitable owner of an estate could maintain an action in ejectment although the legal title was in his trustee.⁹⁷ In Pennsylvania it was held that the holders of legal and equitable estates might join in an action of ejectment even where their interests were in unequal proportions.⁹⁸

§ 2057. **Plaintiff's possessory right—Prima facie case.**—The Supreme Court of Michigan stated the rule in that state as follows: "Ejectment in this state is a possessory action and does not necessarily involve title. The party having the right to present possession is always entitled to recover, and it is quite unnecessary for him

⁹² *Kansas &c. R. Co. v. McBratney*, 12 Kans. 9; *Jones v. Hollister*, 51 Kans. 310, 32 Pac. 1115; *Murray v. Blackledge*, 71 N. Car. 492; *Hawn v. Norris*, 4 Bin. (Pa.) 77; *Willing v. Brown*, 7 S. & R. (Pa.) 467; *Peebles v. Reading*, 8 S. & R. (Pa.) 484; *Pennock v. Freeman*, 1 Watts (Pa.) 401; *Henderson v. Hays*, 2 Watts (Pa.) 148; *Schuylkill &c. Co. v. Farr*, 4 W. & S. (Pa.) 362, 374; *Hamburger v. Root*, 5 Pa. St. 108; *Deitzler v. Mishler*, 37 Pa. St. 82; *Reno v. Moss*, 120 Pa. St. 49, 13 Atl. 716; *Henderson v. Kissam*, 8 Tex. 46; *Smith v. McGaughey*, 13 Tex. 464; *Walker v. Howard*, 34 Tex. 478, 508.

⁹³ *Duffey v. Rafferty*, 15 Kans. 1; *O'Brien v. Wetherell*, 14 Kans. 1; *Simpson v. Boring*, 16 Kans. 248.

⁹⁴ *Hollenback v. Ess*, 31 Kans. 1 Pac. 275.

⁹⁵ *Douglass v. Ruffin*, 38 Kans. 16 Pac. 783; *Gilmore v. Norton*, 40 Kans. 491; *Mooney v. Olsen*, 41 Kans. 691; *Redden v. Tefft*, 48 Kans. 302, 29 Pac. 157.

⁹⁶ *Jones v. Hollister*, 51 Kans. 32 Pac. 1115.

⁹⁷ *Murray v. Blackledge*, 71 N. Car. 492.

⁹⁸ *Schuylkill &c. Co. v. Farr*, 4 W. & S. (Pa.) 362, 374.

show more, unless some question of damages or value of improvements made by the defendant shall require it. If the plaintiff has been in possession of the land claiming title, he may stop with that showing, as a *prima facie* case; and he is entitled to judgment upon it unless the defendant shows either a present right in himself or an outstanding title in some third party upon which he is at liberty to rely."⁹⁹ On this rule that proof of possession makes a *prima facie* case the Supreme Court of Illinois said: "And it is perfectly well settled, both upon common law authority and by decision of this court, that in an action of ejectment, proof of prior possession by the plaintiff, claiming to be the owner in fee, is *prima facie* evidence of ownership and seisin, and is sufficient to authorize a recovery, unless the defendant shall show a better title."¹⁰⁰ The same rule prevails in other jurisdictions.¹⁰¹ But these authorities evidently apply where the de-

* *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390; *Gamble v. Horr*, 40 Mich. 561; *Van Auken v. Monroe*, 38 Mich. 725; *Dale v. Falvre*, 43 Mo. 556; *Douglass v. Ruffin*, 38 Kans. 30, 16 Pac. 783.
⁹⁹ *Davis v. Easley*, 13 Ill. 192; *Brooks v. Bruin*, 18 Ill. 539; *Barger v. Hobbs*, 67 Ill. 592; *Keith v. Keith*, 104 Ill. 397; *Harland v. Eastman*, 119 Ill. 22, 8 N. E. 810; *Anderson v. McCormick*, 129 Ill. 308, 21 N. E. 103; *Benefield v. Albert*, 132 Ill. 665, 4 N. E. 634; *Casey v. Kimmel*, 181 Ill. 154, 54 N. E. 905; *Harrel v. Enterprize &c. Bank*, 183 Ill. 538, 56 N. E. 63; *Percival v. Chase*, 182 Mass. 171, 65 N. E. 800; *Lund v. Parker*, 10 N. H. 50; *Coombs v. Hertig*, 162 Ill. 171, 44 N. E. 392.
¹⁰⁰ *Newhall v. Wheeler*, 7 Mass. 39; *First Parish &c. v. Smith*, 14 Mich. (Mass.) 297; *Jackson v. Boston &c. R. Corp.*, 1 Cush. (Mass.) 575; *Hubbard v. Little*, 9 Cush. (Mass.) 75; *Commonwealth v. Bourke*, 10 Cush. (Mass.) 397; *Adams v. Nickerson*, 1 Allen (Mass.) 427; *Currier v. Gale*, 9 Allen (Mass.) 522; *Perry v. Weeks*, 137 Mass. 584; *Wishart v. McKnight*, 178 Mass. 356, 59 N. E. 1028; *Hoag v. Wallace*, 28 N. H. 547; *Gage v. Gage*, 30 N. H. 420; *Tappan v. Tappan*, 31 N. H. 41; *Farrar v. Fessenden*, 39 N. H. 268; *Newell v. Horn*, 47 N. H. 379; *Jackson v. Hazen*, 2 Johns. (N. Y.) 22; *Jackson v. Harder*, 4 Johns. (N. Y.) 202; *Thompson v. Burhans*, 61 N. Y. 52; *Green v. Jordan*, 83 Ala. 220, 3 So. 513; *Lafayette v. Wortman*, 107 Ind. 404, 8 N. E. 277; *Slocum v. Compton*, 93 Va. 374; *Carleton v. Darcy*, 90 N. Y. 566; *Doe d. Mills v. Clayton*, 73 Ala. 359; *Strange v. King*, 84 Ala. 212, 4 So. 600; *Louisville &c. R. Co. v. Phillyaw*, 88 Ala. 264, 6 So. 837; *Payne v. Crawford*, 102 Ala. 387, 14 So. 854; *Dothard v. Denson*, 72 Ala. 541; *Eakin v. Brewer*, 60 Ala. 579; *Morton v. Folger*, 15 Cal. 275; *Keane v. Cannovan*, 21 Cal. 291; *Garner v. Wright*, 77 Cal. 85, 19 Pac. 184; *Leonard v. Flynn*, 89 Cal. 543, 26 Pac. 1099; *Zillmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117; *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18; *Stephens v. Hambleton*, (Cal.) 47 Pac. 51;

fendant was simply an intruder or a wrongdoer. It will be observed that this right of possession, which is sufficient to maintain an action

- Ashmead v. Wilson, 22 Fla. 255; Levy v. Cox, 22 Fla. 546; L'Engle v. Reed, 27 Fla. 345, 9 So. 213; Jackson v. Haisley, 35 Fla. 587, 17 So. 631; Goodwin v. Markwell, 37 Fla. 464; 19 So. 885; Fletcher v. Perry, 97 Ga. 368, 23 S. E. 824; Thorpe v. Atwood, 100 Ga. 597, 28 S. E. 287; Feirbaugh v. Masterson, 1 Idaho 135; Barger v. Hobbs, 67 Ill. 592; Riverside Co. v. Townshend, 120 Ill. 9, 9 N. E. 65; Bennefield v. Albert, 132 Ill. 665, 24 N. E. 634; Eddy v. Gage, 147 Ill. 162, 35 N. E. 347; Gage v. Eddy, 179 Ill. 492, 35 N. E. 347; Keith v. Keith, 104 Ill. 397; Doe v. West, 1 Blackf. (Ind.) 133, 135; Robinoe v. Doe, 6 Blackf. (Ind.) 85; Morss v. Doe, 2 Ind. 65; Holten v. Board &c., 55 Ind. 194; Brandenburg v. Seigfried, 75 Ind. 569; Gilmore v. Norton, 10 Kans. 491; Duffey v. Rafferty, 15 Kans. 9; Simpson v. Boring, 16 Kans. 248; Mooney v. Olsen, 21 Kans. 691; Douglass v. Ruffin, 38 Kans. 530, 16 Pac. 783; Redden v. Tefft, 48 Kans. 302, 29 Pac. 157; Gildehaus v. Whiting, 39 Kans. 706, 18 Pac. 916; Christy v. Richolson, 48 Kans. 177, 29 Pac. 398; Redden v. Tefft, 48 Kans. 302, 29 Pac. 157; Landry v. Landry, 45 La. Ann. 1113, 13 So. 672; Shaw v. Hill, 83 Mich. 322, 21 Am. St. 607, 47 N. W. 247; Bledsoe v. Simms, 53 Mo. 305; White v. Keller, 114 Mo. 479, 21 S. W. 860; Bains v. Bullock, 129 Mo. 117, 31 S. W. 342; Hall v. Gallemore, 138 Mo. 638, 40 S. W. 891; Brown v. Killabrew, 21 Nev. 437; Gonder v. Miller, 21 Nev. 180; Denn v. Sinnickson, 9 N. J. L. 188; Carleton v. Darcy, 90 N. Y. 566; Mayor &c. v. Carleton, 113 N. Y. 284, 21 N. E. 55; McRoberts v. Bergman, 132 N. Y. 73, 30 N. 261; Jackson v. Harder, 4 Johns. (N. Y.) 202; McFarlane v. Ray, Mich. 465; Gamble v. Horr, 40 Mich. 561; Bennett v. Horr, 47 Mich. 23, 10 N. W. 347; Covert v. Morrisson, 49 Mich. 133, 13 N. W. 390; Johnson v. Johnson, 70 Mich. 65, 37 W. 712; Shaw v. Hill, 79 Mich. 8, 44 N. W. 422; Cook v. Bertram, Mich. 356, 49 N. W. 42; Hoban Cable, 102 Mich. 206, 60 N. W. 46; Dawson v. Falls City &c. Club, 1 Mich. 433; Jackson v. Harder, Johns. (N. Y.) 203; Day v. Alverson, 9 Wend. (N. Y.) 223; Holm v. Seely, 17 Wend. (N. Y.) 75; Kellogg v. Kellogg, 6 Barb. (N. Y.) 116; Parmelee v. Oswego &c. R. Co., 7 Barb. (N. Y.) 599; Smith v. Lord, 10 Johns. (N. Y.) 338; Jackson v. Rightmyre, 16 Johns. (N. Y.) 314; Day v. Alverson, 9 Wend. (N. Y.) 223; Whitney v. Wright, Wend. (N. Y.) 172; Jackson v. Denn, 5 Cow. (N. Y.) 200; Missler &c. v. Cronin, 14 Misc. (N. Y.) 37; Shunway v. Phillips, 22 Pa. St. 15; Turner v. Reynolds, 23 Pa. St. 19; Jones v. Bland, 112 Pa. St. 176, Atl. 541; Bates v. Campbell, 25 W. Va. 613; Swift v. Agnes, 33 Wis. 22; Hammer v. Hammer, 39 Wis. 18; Winchester v. City of Stevens Point, 58 Wis. 350; Cummings v. Friedman, 65 Wis. 183, 26 N. W. 57; Baier v. Ziegelbauer, 66 Wis. 52, 29 N. W. 277; Hacker v. Horlemund, 74 Wis. 21, 41 N. W. 965; Elofrs v. Lindsay, 90 Wis. 203, 63 N. W. 89; Atherton v. Fowler, 96 U. S. 513; Campbell v. Rankin, 99 U. S. 261; Belk v. Meagher, 104 U. S. 27; Glacier Mining Co. v. Willis, 104 U. S. 471, 8 Sup. Ct. 1214; Haws

ejectment, must be under a claim of right or title. As stated by the Missouri court: "As the action of ejectment is a possessory action, where no title appears on either side, a prior possession, though of twenty years, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession be under a claim of right and not voluntarily abandoned."¹⁰² The same court has emphasized the rule: "It will be found in all cases where the question has been raised, that the prior possession which will overcome one subsequently acquired by a mere intruder, must have been accompanied with a claim of title, otherwise the parties will be left where they are found."¹⁰³ In some states the rule is that proof of a perfect equitable title and possession thereunder is sufficient in ejectment against a stranger who has dispossessed the owner of such equitable title. However, this rule seems to be limited to cases where the disseisor can show no right or title, or where he can show no better title than the complainant.¹⁰⁴ In other jurisdictions it has been held that an equitable owner who is entitled to the immediate possession of the premises could maintain an action in ejectment against a stranger or one unlawfully claiming the right to possession.¹⁰⁵ The Supreme Court of Indiana expressly held that a plaintiff could recover upon proof of an equitable title, on proof also that he had the right of possession.¹⁰⁶ And it has been held that the plaintiff could recover where he shows a clear right to the possession whether the party in possession had ousted him or not.¹⁰⁷ It has been suggested, but not held, by one court, that where a person who is in peaceable possession of land is ousted by a stranger without title, he may recover by an action of ejectment upon the strength of his mere previous possession. The reason given for this rule is that "actual seisin is

Victoria &c. Co., 160 U. S. 303, 16 S. Ct. 282. 223; but see, *Ludlow v. Barr*, 3 Ohio 388, 407.

* *Crockett v. Morrison*, 11 Mo. 860. ¹⁰² *Pierce v. Felter*, 53 Cal. 18; *Glover v. Stamps*, 73 Ga. 209; *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390; *Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 N. Y. 107; *Sheehan v. Hamilton*, 4 Abb. Dec. 211; *Murphy v. Loomis*, 26 Hun (N. Y.) 659.

* *White v. Keller*, 114 Mo. 479, 21 W. 860; *Dale v. Faivre*, 43 Mo. 176; *Norfleet v. Russell*, 64 Mo. 176; *Dec. 211*; *Murphy v. Loomis*, 26 Hun (N. Y.) 659.

* *Alexander v. Campbell*, 74 Mo. 142; *Hun (N. Y.) 659*.

* *nn v. Miller*, 75 Mo. 272; *Mul-¹⁰⁶ Burt v. Bowles*, 69 Ind. 1.

* *in v. Simpson*, 124 Mo. 610, 28 W. 86. ¹⁰⁷ *Dale v. Honneman*, 12 Neb. 221, 10 N. W. 711.

* *Newman v. Cincinnati*, 18 Ohio 10 N. W. 711.

; *Boal v. King*, *Wright (Ohio)*

evidence of title against all the world, except the true owner, the law will not permit that seisin to be wantonly invaded by who himself has no title."¹⁰⁸ The possession sufficient to support ejectment under this rule does not mean such adverse possession is equivalent to legal title. The rule is thus stated: "The possession required by a plaintiff, in order to recover in ejectment, where documentary evidence is lacking, does not go to the extent demanded in order to ripen an adverse possession into legal title."¹⁰⁹ On the question of the method of proving title the Supreme Court of Kansas say: "But title, without reference to whether it be by deed, coveantee, devise, descent, equitable estoppel, prescription, limitation otherwise, or whether it be a legal or an equitable title, may be proved prima facie by showing actual possession."¹¹⁰

§ 2058. Plaintiff's possessory right—Limitations.—The rule that proof of possession is sufficient in ejectment has its limitations. In deed, the limitations are parts of the rule itself, and the only cases of cases to which this rule applies is that where the defendant is an intruder or a wrongdoer. The rule is thus stated in a United States Supreme Court case: "A mere intruder cannot enter on a person actually seised and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff may recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual, prior, possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title."¹¹¹ The same court also states the limitations referred to, as follows: "This rule is founded upon the presumption that every possession peaceably acquired is lawful and is sustained by the policy of protecting the public peace against

¹⁰⁸ Lee v. Tapscott, 2 Wash. (Va.) 276; Suttle v. Richmond &c. R. Co., 76 Va. 284; Anderson v. Gray, 134 Ill. 550, 25 N. E. 843.

¹⁰⁹ Leonard v. Flynn, 89 Cal. 543, 26 N. E. 1097.

¹¹⁰ Gilmore v. Norton, 10 Kans. 491; Long v. Kasebeer, 28 Kans. 226, 241.

¹¹¹ Christy v. Scott, 14 How. (U. S.) 282; White v. Keller, 114 Mo.

479, 21 S. W. 860; Sabariego v. Merick, 124 U. S. 261, 8 Sup. Ct. 7; Haws v. Victoria &c. Co., 160 U. S. 303, 16 Sup. Ct. 282; Bledsoe v. Simms, 53 Mo. 315; Wilson v. Felt, 14 Sawy. 38, 38 Fed. 789; Turner v. Aldridge, 1 McAll. (U. S.) 229; Rora Hill &c. Co. v. 85 Min. Co. 1, Fed. 515; American &c. Co. v. 1, Fed. 47; Campbell v. S. Bow &c. Co., 49 Fed. 47.

peace and order. But, as it is intended to prevent and redress trespass and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title."¹¹² It thus appears that proof of mere naked possession itself is not sufficient where the defendant has acquired his possession peaceably or under color of title. On this proposition the Supreme Court of Ohio said: "But it is certainly well settled that where the defendant has acquired the possession honestly, and peaceably, under color of title, he may show such outstanding estate in a stranger; and it will be a valid defense except in those cases where the plaintiff is entitled to recover on proof of right to possession, although the naked legal title may be in another, as frequently happens in cases of trust."¹¹³ This limitation on the right to recover on proof of right to possession was recognized by the New York Court of Appeals, where it said: "The defendant was not a trespasser, but went into possession having title, and the plaintiff was not therefore entitled to recover, upon proof of any prior possession, other than an adverse possession for a period which would bar his entry; and no such possession was shown."¹¹⁴

2059. Proof of possession—Sufficiency.—In actions of ejectment it becomes important to consider what acts constitute possession, and this is a potent factor in either maintaining or defending the action. As a general proposition, proof of possession cannot be made by the statements or opinions of witnesses, as it may often be a matter of mere opinion. The general rule is that to prove possession a witness must state facts which in law constitute possession. This rule was announced by the Court of Appeals of New York is as follows: "It is also extremely doubtful whether testimony *in haec verba* that the party was in possession of lands, is of any weight. Possession may often be a matter of opinion. In proving possession of land, the fact to be shown which in law constitutes possession."¹¹⁵ It is for the

Sabariego v. Maverick, 124 U. S. 61, 297, 8 Sup. Ct. 461; *Wilson v. Fowler*, 18 Tex. 592; *Fowler v. Whiteman*, 2 Ohio St. 270; *Norfleet v. Russell*, 64 Mo. 176; *Dunn v. Miller*, 75 Mo. 260. ¹¹² *Drew v. Swift*, 46 N. Y. 204. ¹¹³ *Miller v. Long Island R. Co.*, 71 N. Y. 380; *Florida So. R. Co. v. ...*, 5 Cow. (N. Y.) 200.

jury to determine whether or not the proofs offered are sufficient to show that the premises in question were actually appropriated whether or not the acts of dominion were sufficient notice to public, and to impart to the claim of appropriation the character of notoriety and indicia of ownership.¹¹⁶ Actual possession of real estate was defined by the Supreme Court of California to be "a subject to the will and dominion of the claimant, and it is usually evidenced by occupation—by a substantial enclosure—by cultivation, or by appropriate use, according to the particular locality and quality of property."¹¹⁷ And the same court in another case said: "There must be an actual bona fide occupation and *possessio pedis*, a subjection to the will and control as contra-distinguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording a deed, paying taxes, etc."¹¹⁸ The possession which subjects the property to the will and dominion of the claimant must be evidenced by occupation, cultivation or other appropriate use according to the location and character of the particular premises. The proof must show such possession to be actual, notorious, uninterrupted and exclusive.¹¹⁹ It has been held, however, that actual or personal residence on the land is not essential to constitute such possession as the law requires.¹²⁰ And it has been held that a good and substantial fence or enclosure is not necessary to the actual possession of land as there may be actual possession without fences or enclosure of

Burt, 36 Fla. 497, 18 So. 581; Arents v. Long Island R. Co., 156 N. Y. 1, 50 N. E. 422; Thistle v. Frostburg &c. Co., 10 Md. 129.

¹¹⁶ Brumagim v. Bradshaw, 39 Cal. 25; Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Ellis v. Prevost, 19 La. (10) 251; Davis v. Dale, 2 La. Ann. 205.

¹¹⁷ Coryell v. Cain, 16 Cal. 567, 573; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Giles v. Ortman, 11 Kans. 59; Cartwright v. McFadden, 24 Kans. 662; Stockton v. Geissler, 43 Kans. 612, 23 Pac. 619; Sankey v. Noyes, 1 Nev. 68; Staininger v. Andrews, 4 Nev. 59; Eureka &c. Co. v. Way, 11 Nev. 171.

¹¹⁸ Plume v. Seward, 4 Cal. 96;

Sheldon v. Mull, 67 Cal. 300, 7710; Howell v. Rodgers, 47 Cal. 710; Spotts v. Hanley, 85 Cal. 155, 156 Pac. 738; Sankey v. Noyes, 1 Nev. 68.

¹¹⁹ Wolf v. Baldwin, 19 Cal. 68; Brumagim v. Bradshaw, 39 Cal. 25; Davis v. Spring Valley &c. Water Co., 57 Cal. 543; McFarland v. Cullen, 2 Nev. 282; Courtney v. Turner, 12 Nev. 345.

¹²⁰ Barstow v. Newman, 34 Cal. 90; Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Goodrich v. Van Lanham, 46 Cal. 601; Kelly v. Mack, 11 Cal. 524; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Eddy v. Gage, 111 Ill. 162, 35 N. E. 347.

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 and.¹²¹ And the same court has held that proof of a sufficient enclosure is, of itself, proof of actual possession of land, without proof of residence upon it, cultivation, or other acts of dominion: that such proof amounts to visible and open appropriation of the premises, and indicates exclusive use and dominion and protects such use and dominion against all intrusion.¹²² So, it has been held in the case of grazing land in a grazing country, that herding sheep upon it, and pasturing cattle within an enclosure, or by herding cattle without an enclosure, are acts which indicate such appropriate use of the premises as indicate possession and dominion, according to the particular locality and quality of the property.¹²³ The Supreme Court of Illinois held that "possession of land may be had in different modes,—by enclosure, by cultivation, by the erection of buildings or other improvements, or, in fact, any use that clearly indicates an appropriation to the use of the person claiming to hold the property."¹²⁴ The same court held that proof of any class of improvements or acts of dominion that indicate to persons residing in the immediate neighborhood who has the exclusive control of the land, will be deemed to be sufficient proof of possession.¹²⁵ It is held as a rule of law that natural barriers will serve as a portion of an inclosure and render proof of

¹²¹ *Walsh v. Hill*, 38 Cal. 481; *Mc-
 Every v. Everding*, 44 Cal. 246; *Mc-
 Drieh v. Van Landigham*, 46
 Cal. 601; *Sheldon v. Mull*, 67 Cal.
 7 Pac. 710; *Reay v. Butler*, 95
 Cal. 206, 30 Pac. 208; *Daubenbliss v.
 White*, (Cal.) 31 Pac. 360; *Hicks v.
 Egan*, 25 Cal. 122, 132; *Webber
 v. Clarke*, 74 Cal. 11, 15 Pac. 431;
McLean v. Farden, 61 Ill. 106; *Eddy
 v. Gage*, 147 Ill. 162, 35 N. E. 347;
Stalford v. Goldring, 197 Ill. 156, 64
 N. E. 395; *McFarland v. Culbert-
 son*, 2 Nev. 282; *Courtney v.
 Turner*, 12 Nev. 345.
¹²² *Conroy v. Duane*, 45 Cal. 597;
Bullock v. Rouse, 81 Cal. 590, 22
 Cal. 919; *McFarland v. Culbertson*,
 2 Nev. 280, but under what is
 known as the Van Ness ordinance
 of California proof of mere inclos-
 ure was held insufficient; *Davis v.*

Spring Valley &c. Works, 57 Cal.
 543.
¹²³ *Southmayd v. Henley*, 45 Cal.
 102; *Pierce v. Stuart*, 45 Cal. 280;
Sheldon v. Mull, 67 Cal. 300, 7 Pac.
 710; *Webber v. Clarke*, 74 Cal. 11,
 15 Pac. 431; *Bullock v. Rouse*, 81
 Cal. 590, 22 Pac. 919.
¹²⁴ *Truesdale v. Ford*, 37 Ill. 210;
McLean v. Farden, 61 Ill. 106; *Rus-
 sell v. Mandell*, 73 Ill. 136; *Hub-
 bard v. Kiddo*, 87 Ill. 578; *Eddy v.
 Gage*, 147 Ill. 162, 35 N. E. 347.
¹²⁵ *McLean v. Farden*, 61 Ill. 106;
Eddy v. Gage, 147 Ill. 162, 35 N. E.
 347; *Wahl v. Laubersheimer*, 174
 Ill. 338, 51 N. E. 860; *Stalford v.
 Goldring*, 197 Ill. 156, 64 N. E. 395;
Travers v. McElvain, 181 Ill. 382,
 55 N. E. 135; *Scott v. Bassett*, 186
 Ill. 98, 57 N. E. 835; *White v. Har-
 ris*, 206 Ill. 584, 69 N. E. 519.

fencing or other obstructions unnecessary.¹²⁶ And where a person entered upon land under a claim of title and with a view of taking possession and marked the lines by spotting the trees around the tract, this was held to be sufficient proof of prior possession.¹²⁷

§ 2060. **Proof of possession—Insufficiency.**—The taking from the premises in controversy a portion of the herbage growing thereon was held to be insufficient proof of the right of possession,¹²⁸ and where timber land was enclosed with a fence insufficient to keep out cattle, and the land was not cultivated in any manner, the possession was held insufficient to maintain ejectment.¹²⁹ So, the erection of small wooden shanties¹³⁰ or hunting shacks¹³¹ where it appeared that they were torn down before completed, was held insufficient evidence of possession. And it is the general rule that proof of payment of taxes is insufficient proof of possession; and where it was shown in addition to the payment of the taxes that the plaintiff drove to the premises on an average of twice a year and plucked flowers, it was held that these were not such acts of ownership as to amount to possession.¹³² So, the general rule is that the mere survey of unenclosed land and the placing of stones at the boundary corner is not proof of possession.¹³³ Proof that plaintiff cut timber in the absence of proof of residence, cultivation or improvement of any kind upon the land in dispute, was held not sufficient of itself to show actual and peaceable possession.¹³⁴ It has been held that claim of title and assertions of ownership made even upon the land, do not show sufficient possession; that mere words, however emphatic, will not raise the presumption of title sufficient to maintain ejectment.¹³⁵

¹²⁶ *Brummagin v. Bradshaw*, 39 Cal. 24; *Conroy v. Duane*, 45 Cal. 597; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705.

¹²⁷ *Woods v. Banks*, 14 N. H. 101; *Thompson v. Burhans*, 15 Hun (N. Y.) 580; *Miller v. Long Island & R. Co.*, 71 N. Y. 380.

¹²⁸ *Steinback v. Fitzpatrick*, 12 Cal. 295.

¹²⁹ *Baldwin v. Simpson*, 12 Cal. 560.

¹³⁰ *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208.

¹³¹ *White v. Harris*, 206 Ill. 58, 69 N. E. 519.

¹³² *Stalford v. Goldring*, 197 Ill. 156, 64 N. E. 395; *White v. Harris*, 206 Ill. 584, 69 N. E. 519; *Greenleaf v. Brooklyn & C. R. Co.*, 141 N. Y. 395, 36 N. E. 393; *Lakin v. Doll*, 53 Fed. 333.

¹³³ *White v. Harris*, 206 Ill. 58, 69 N. E. 519; *Sankey v. Noyes*, Nev. 69.

¹³⁴ *Holloway v. Jones*, 143 Va. 56, 22 Atl. 710.

¹³⁵ *Greenleaf v. Brooklyn & C. R. Co.*, 141 N. Y. 395, 36 N. E. 393.

§ 2061. **Defendant's possession.**—The plaintiff is not only required to prove his superior title and his right to immediate possession, but it must be shown by the proof that the defendant was in possession of the premises described, or at least some portion thereof, at the time of the commencement of the action.¹³⁶ But it was held by the Vermont court in an early case that it was not necessary to prove that the defendant himself was in actual possession of the premises, but that it was sufficient for the plaintiff to prove that the person in possession was placed there by the defendant who had been in the actual occupation of the premises.¹³⁷ And the Mississippi Supreme Court held that proof of possession by the tenant of the defendant was sufficient.¹³⁸

§ 2062. **Defendant's possession—Proof of ouster.**—In order to entitle a plaintiff to recover, he must prove that the defendant had and held possession of the premises, or a material part thereof, at the time of the beginning of the action. This proof is regarded as important and necessary as the proof of plaintiff's right to the possession; and on failure to establish either proposition he cannot recover.¹³⁹ It has been held that the plaintiff must show not only that the defendant was in possession, but that the plaintiff himself had

¹³⁶ *Garner v. Marshall*, 9 Cal. 268; *King*, 4 Dana (Ky.) 67; *Eastin v. Brown v. Brackett*, 45 Cal. 167; *Doe v. Roe*, 30 Ga. 553; *Williamson v. Doe*, 7 Blackf. (Ind.) 12; *Flanniken v. Lee*, 1 Ired. L. (N. Car.) 293; *Ward v. Parks*, 72 N. Car. 452.

¹³⁷ *Hurd v. Tuttle*, 2 Chip. (Vt.) 43.

¹³⁸ *Wallis v. Doe*, 2 Sm. & M. (Miss.) 220; *Pickett v. Doe*, 5 Sm. & M. (Miss.) 470; *Smith v. Doe*, 10 Sm. & M. (Miss.) 584.

¹³⁹ *Morris v. Bebee*, 54 Ala. 301; *Owen v. Fowler*, 24 Cal. 193; *Hawkins v. Reichart*, 28 Cal. 534; *Garner v. Marshall*, 9 Cal. 268; *Dimick v. Derringer*, 32 Cal. 488; *Mayne v. Jones*, 34 Cal. 483; *Mahoney v. Middleton*, 41 Cal. 41; *Barry v. Sonoma Co.*, 43 Cal. 217; *Frazier v. Lynch*, 97 Cal. 370; *McMasters v. Torsen*, (Idaho) 51 Pac. 100; *McDowell v. King*, 4 Dana (Ky.) 67; *Eastin v. Rucker*, 1 J. J. Marsh. 232; *Wallis v. Doe*, 10 Miss. 220; *Mordecai v. Oliver*, 10 N. Car. 479; *Albertson v. Reding*, 2 Murph. (N. Car.) 283; *Atwell v. McLure*, 4 Jones L. (N. Car.) 371; *Gilliam v. Bird*, 8 Ired. L. (N. Car.) 280; *Flanniken v. Lee*, 1 Ired. L. (N. Car.) 293; *Ward v. Parks*, 72 N. Car. 452; *Hurst v. Sawyer*, 2 Okla. 470, 37 Pac. 817; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; *Lowenstein v. Ecker*, 155 Pa. St. 304, 26 Atl. 448; *Grundy v. Hadfield*, 16 R. I. 579; *Stevens v. Griffith*, 3 Vt. 448; *Skinner v. McDaniel*, 4 Vt. 418; *Arbuckle v. Walker*, 63 Vt. 23, 22 Atl. 458; *Roach v. Hefferman*, 65 Vt. 485, 27 Atl. 71; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. 1015; *Catholic Bishop &c. v. Gibbon*, 1 Wash. 592, 21 Pac. 315.

been ousted.¹⁴⁰ It is held by some courts that ejectment is a possessory action, and that it determines no rights but those of possession at the time, and that it is wholly immaterial as to who has or claims to have the title to the premises; that the action must be brought against the person in possession at the time of its commencement. It has also been held that the action will only lie against the party out of possession claiming title when the premises are unoccupied and the claim of the party is accompanied with the exercise of acts of ownership such as enclosure, cultivation and the like.¹⁴¹ It is also held that it must be shown that the defendant keeps the plaintiff out of possession unlawfully.¹⁴² Where the evidence shows that the defendant was in possession of the land a year before the action was brought, and also after the suit was brought, it was held to be sufficient evidence of the possession of the premises at the time of the beginning of the action.¹⁴³ The plaintiff is entitled to recover if he can show a wrongful possession by the defendant of any part, no matter how small, of the premises claimed by him.¹⁴⁴ Where the defendant admits the possession and appears to the action for the purpose of trying the title, no further proof of possession is necessary.¹⁴⁵

§ 2063. **Insufficient title—Land certificates and receipts.**—It is now the well established rule that an action in ejectment cannot be maintained on a title resting solely on a certificate of the register of the land office. It is the established rule in the Federal courts that actions in ejectment cannot be maintained by the holder of certificates or receipts from the land office or of registers and receivers before a patent is issued. The reason given by these courts is that the plaintiff in such cases must prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not justify recovery. The rule is more fully stated in a fairly recent United States Supreme Court

¹⁴⁰ Board of Regents &c. v. Charlebois, (Ariz.) 36 Pac. 32.

¹⁴¹ Garner v. Marshall, 9 Cal. 268; Frazier v. Lynch, 97 Cal. 370, 32 Pac. 319; Lowenstein v. Ecker, 155 Pa. St. 304, 26 Atl. 448.

¹⁴² Lotz v. Briggs, 50 Ind. 346; Middleton v. Westerney, 7 Ohio C. C. 393; Hurst v. Sawyer, 2 Okla.

470, 37 Pac. 817; Deuchatell v. Robinson, 24 La. Ann. 176; Flanniken v. Lee, 23 N. Car. 293.

¹⁴³ Doe v. Roe, 30 Ga. 553.

¹⁴⁴ Huggins v. Ketchum, 4 Dev. B. (N. Car.) 415; Gilliam v. Bird, Ired. L. (N. Car.) 280.

¹⁴⁵ Morris v. Bebee, 54 Ala. 300; Mordecai v. Oliver, 10 N. Car. 479.

case is as follows: "It has been repeatedly decided by this court, that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment. The ground of these decisions is, that in these courts, a recovery in ejectment can only be had upon the strict legal title; that this class of certificates presupposes the existence of the title in the United States at the time they were given; and that something more is necessary to show that this legal title was ever divested from the United States by a patent or otherwise. The decisions on this subject are quite numerous, and the principle on which they rest has been frequently asserted, and maintained with uniformity."¹⁴⁶ It is also held to be the rule that no action of ejectment can be maintained on such a title, notwithstanding the fact that a state legislature may have provided otherwise by statute. Such a law can only bind the courts of the state of its passage, and can have no effect on the Federal courts.¹⁴⁷

§ 2064. **Proof of deed without possession—Effect.**—The mere introduction in evidence of a deed to the plaintiff is not sufficient; there must, in addition to this, be proof of prior possession by such grantor or some prior grantor, together with proof of plaintiff's right of possession; the unity of possession must be shown. Or, as otherwise stated, a deed from one who is not shown to have either right, title, or interest in, or the possession of the land is not sufficient to

¹⁴⁶ *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87; *Wilson v. Fine*, 38 Fed. 789; *Sweet v. Burton*, 42 Fed. 285; *Carter v. Muddy*, 56 Fed. 542; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *State of Mississippi v. Johnson*, 4 Wall. (U. S.) 475; *Litchfield v. Regester & Co.*, 1 Wool. (U. S.) 308; *Ken- nedy v. United States*, 12 Pet. (U. S.) 7, 608; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Fenn v. Holmes*, 1 How. (U. S.) 481; *Hooper v. Scheimer*, 23 How. (U. S.) 235; *Balsz v. Liebenow*, (Ariz.) 36 Pac. 209; *Brewer v. Kidd*, 23 Mich. 440; *Morton v. Green*, 2 Neb. 441; *Headley v. Coffman*, 38 Neb. 68, 56 N. W. 701; *Adams v. Couch*, 1 Okla. 17; but see, *Pierce v. Frace*, 2 Wash. 81. ¹⁴⁷ *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *Wilson v. Fine*, 38 Fed. 789; *Foster v. Mora*, 98 U. S. 425; *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429; *Morton v. Green*, 2 Neb. 441.

entitle a plaintiff to recover.¹⁴⁸ Courts have gone so far as to hold that a deed by one person to land which is in the adverse possession of another is void as against the person in such possession.¹⁴⁹ The rule stated by the Supreme Court of Florida is: "It is established in this state that a deed without any evidence of the possession by the grantor of the premises conveyed, is not sufficient evidence of title to warrant a recovery in an action of ejectment, and that the giving of a deed to the premises is no evidence of title in the grantor."¹⁵⁰ The New York Court of Appeals declared the rule to be that "where a party is under necessity of proving title, it is not enough simply to produce a deed; he must show possession in the grantor, or possession accompanying the deed; without this he proves no title."¹⁵¹

§ 2065. Outstanding title.—The rule is that the defendant may defeat the plaintiff's action or the plaintiff's title by showing either title or right of possession in himself,¹⁵² or by showing an outstanding title in a third person.¹⁵³ But the outstanding title, to be sufficient to defeat a recovery by the plaintiff, must be a present, subsisting and operative legal title, upon which the owner could recover if asserting it by action.¹⁵⁴ While the defendant is required

¹⁴⁸ *Dubois v. Holmes*, 20 Fla. 834; *Schrack v. Zubler*, 34 Pa. St. 38; *Bonaillon v. Peters*, 134 Pa. St. 180, 19 Atl. 499; *Florida &c. R. Co. v. Loring*, 51 Fed. 932; *McClellan v. Zwingli*, 70 Hun (N. Y.) 600, 24 N. Y. S. 371; *Bolster v. Cushman*, 34 Me. 428; *Smith v. Lawrence*, 12 Mich. 431; *Farmers' &c. Bank v. Bronson*, 14 Mich. 361; *Crawford v. Corey*, 99 Mich. 415, 58 N. W. 332; *Dominy v. Miller*, 33 Barb. (N. Y.) 386; *Illinois &c. Co. v. Budzisz*, 106 Wis. 499; *Ablard v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745; *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 78.

¹⁴⁹ *Nelson v. Brush*, 22 Fla. 374.

¹⁵⁰ *Dubois v. Holmes*, 20 Fla. 834; *L'Engle v. Reed*, 27 Fla. 345, 9 So. 213; *Florida &c. R. Co. v. Burt*, 36 Fla. 497, 18 So. 581; *Lake v. Hancock*, 38 Fla. 53, 20 So. 811; *Burt v. Florida &c. R. Co.*, 43 Fla. 339;

Start v. Clegg, 83 Ind. 78; *Peck Louisville &c. R. Co.*, 101 Ind. 366.

¹⁵¹ *Stevens v. Hauser*, 39 N. Y. 30.

¹⁵² *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Hall v. Gittings*, 2 H. & J. (Md.) 112, 122; *Schoolfield Rhodes*, 82 Fed. 153.

¹⁵³ *Stephenson v. Reeves*, 92 Ala. 582, 8 So. 695; *Colston v. McVay*, A. K. Marsh. (Ky.) 251; *Jackson Hudson*, 3 Johns. (N. Y.) 375; *Punnam v. Tyler*, 117 Pa. St. 584, 1 Atl. 43; *McCormick v. Skelly*, 20 Pa. St. 184, 50 Atl. 765; *McKinney Daniel*, 90 Va. 702; *Preston v. Bowman*, 6 Wheat. (U. S.) 582; *Rican v. Williams*, 7 Wheat. (U. S.) 105.

Hall v. Gittings, 2 H. & J. (Md.) 112; *Lannay v. Wilson*, 30 Md. 53.

¹⁵⁴ *Wilcher v. Robertson*, 78 Vt. 602, 620; *Reusens v. Lawson*, 91 Vt. 226, 243, 21 S. E. 347; *Peck v. Camichael*, 9 Yerg. (Tenn.) 328; *Dick*

in order to defeat the action, to prove title in himself or in another, if he shows a valid subsisting title in another he is not required in any way to connect himself with such outstanding title.¹⁵⁵ But such title must be shown to be out of the plaintiff at the time the action was begun.¹⁵⁶ While it is seen that where both parties claim under the same person, neither of them can deny his right; even this rule, it is held, does not apply where the defendant can show that he has acquired a superior outstanding title; it is in this instance only that the defendant is required to connect himself with the outstanding title.¹⁵⁷ The rule is more fully and aptly stated as follows: "But the exception is almost as ancient as the rule, that when the plaintiff in ejectment shows that both parties derive their title from the same common source, and that he has the older and better title from that source, it is not competent for the defendant after such acknowledgment of the title of the common source, to protect himself in possession by proving an outstanding title in a third person, with which he shows no connection. However, in such case, the law will presume from such acknowledgment on his part, that such title is vested in the common source, and inures to the benefit and support of the plaintiff's title."¹⁵⁸ But if he has obtained that title he may set it

Inson v. Collins, 1 Swan (Tenn.) 515; *Humble v. Spears*, 8 Baxt. (Tenn.) 156; *Walker v. Fox*, 85 Tenn. 154; *McDonald v. Schneider*, 27 Mo. 405; *Totten v. James*, 55 Mo. 494; *Lanier v. McIntosh*, 117 Mo. 509, 23 S. W. 787; *Parkersburg Indust. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Wilson v. Braden*, 48 W. Va. 196; *Jackson v. Hudson*, 3 Johns. (N. Y.) 375.

¹⁵⁵ *Russell v. Erwin*, 38 Ala. 44; *Roe v. Baxter*, 33 Ga. 81; *Stuart v. Dutton*, 39 Ill. 91; *Nixon v. Porter*, 38 Miss. 401; *Tolson v. Mainor*, 85 N. Car. 235; *Thomas v. Hunsucker*, 108 N. Car. 720; *Lannay v. Wilson*, 30 Md. 536; *Bleidorn v. Pilot Mt. &c. Co.*, 89 Tenn. 166; *McKinney v. Daniel*, 90 Va. 702, 19 S. E. 880; *Colston v. McKay*, 1 A. K. Marsh (Ky.) 251; *Love v. Simms*, 9 Wheat. (U. S.) 515; *Henderson v. Tennessee*, 10 How. (U. S.) 311.

¹⁵⁶ *Raynor v. Timerson*, 46 Barb. (N. Y.) 518.

¹⁵⁷ *Christenbury v. King*, 85 N. Car. 229; *Ryan v. Martin*, 91 N. Car. 464; *Ives v. Sawyer*, 4 Dev. & B. (N. Car.) 51, 52; *Barwick v. Wood*, 3 Jones (N. Car.) 306; *Whissenhunt v. Jones*, 78 N. Car. 362; *Caldwell v. Neely*, 81 N. Car. 114; *Bonds v. Smith*, 106 N. Car. 553, 11 S. E. 322; *Barwick v. Wood*, 48 N. Car. 306; *Bolling v. Teel*, 76 Va. 487, 493.

¹⁵⁸ *Griffin v. Sheffield*, 38 Miss. 359, 391; *Copeland v. Sauls*, 1 Jones L. (N. Car.) 70; *Johnson v. Watts*, 1 Jones L. (N. Car.) 228; *Thomas v. Kelly*, 1 Jones L. (N. Car.) 375; *Paul v. Ward*, 4 Dev. & B. (N. Car.) 247; *Love v. Gates*, 4 Dev. & B. (N. Car.) 363; *Norwood v. Morrow*, 4 Dev. & B. (N. Car.) 442; *Ives v. Sawyer*, 4 Dev. & B. (N. Car.) 51; *Burgess v. Wilson*, 2 Dev. L. (N. Car.) 306; *Lucas v. Cobb*, 1 Dev. &

by their cost, but by the increased value of the premises, that is, proving the value of the premises without and with the improvement.

- Shaw v. Hill, 46 Ark. 333; Beard v. Dansby, 48 Ark. 183; Shepherd v. Jermigan, 51 Ark. 275; Jefferson v. Edrington, 53 Ark. 545; Gibson v. Herriott, 55 Ark. 85; Love v. Shartzer, 31 Cal. 487; Griswold v. Bragg, 48 Conn. 577; Duncan v. Jackson, 16 Fla. 338; Asia v. Hiser, 22 Fla. 378, 283; Dean v. Feely, 69 Ga. 804; McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; Tripp v. Fausett, 94 Ga. 330, 21 S. E. 572; Ross v. Irving, 14 Ill. 171; Montag v. Linn, 27 Ill. 328; McGill v. Kennedy, 11 Ind. 20; Westerfield v. Williams, 59 Ind. 221; Fish v. Blasser, 146 Ind. 186, 45 N. E. 63; Doren v. Lupton, 154 Ind. 396, 56 N. E. 849; Craton v. Wright, 16 Iowa 133; Parsons v. Moses, 16 Iowa 440; Childs v. Shower, 18 Iowa 261; Welles v. Newsom, 76 Iowa 81, 40 N. W. 105; Snell v. Mecham, 80 Iowa 53, 45 N. W. 398; Krause v. Means, 12 Kans. 335; Larkin v. Wilson, 28 Kans. 513; Lemert v. Barnes, 18 Kans. 9; Maynes v. Veale, 20 Kans. 374; Bauder v. Bryan, 20 Kans. 367; Coonradt v. Myers, 31 Kans. 30, 2 Pac. 858; Hazen v. Rounsaville, 35 Kans. 405, 11 Pac. 150; Hentig v. Redden, 38 Kans. 496, 16 Pac. 820; Fowler v. Halbert, 4 Bibb. (Ky.) 52; Parker v. Stephens, 3 A. K. Marsh. (Ky.) 197, 202; Howe v. Logwood, 3 A. K. Marsh. (Ky.) 388; Singleton v. Jackson, 2 Litt. (Ky.) 208; Ewing v. Handley, 4 Litt. (Ky.) 346, 371; Clark v. Gale, 5 J. J. Marsh. (Ky.) 314; Counts v. Kitchen, 87 Ky. 47, 7 S. W. 538; Eldridge v. Tibbetts, 5 La. Ann. 380; Litton v. Litton, 36 La. Ann. 348; Jones v. Carter, 12 Mass. 314; Plimpton v. Plimpton, 12 Cush. (Mass.) 458; Wales v. Coffin, 100 Mass. 177; O'Brien v. Joyce, Mass. 360; Fisk v. Briggs, 12 Mass. 373; Burkle v. Ingham Civ. Ju. 42 Mich. 513, 4 N. W. 192; Lemer v. Flint &c. R. Co., 117 Mich. 309, N. W. 763; Cleland v. Clark, Mich. 179; Hall v. Torrens, 32 Mich. 527, 21 N. W. 717; Wheeler v. Mirman, 30 Minn. 372, 15 N. W. 6; Pfefferle v. Welland, 55 Minn. 56 N. W. 824; Gaines v. Kennen, 53 Miss. 103; Miller v. Ingram, Miss. 510; Citizens' Bank v. Connera, 62 Miss. 825; Hicks v. Bliman, 74 Miss. 459, 21 So. 7; Doth v. Stuart, 35 Mo. 251; Stump v. Hornback, 109 Mo. 272, 18 S. W. Brown v. Baldwin, 121 Mo. 106, S. W. 858; Cox v. McDivitt, 125 Mo. 358, 28 S. W. 597; Tice v. Fleming, 173 Mo. 49; Devine v. Charles, Mo. App. 210; Marlow v. Liter, Mo. App. 584; Page v. Davis, 26 Mo. 670, 42 N. W. 875; Fletcher Brown, 35 Neb. 660, 53 N. W. 5; Carter v. Brown, 35 Neb. 670; Bett v. Norcross, 20 N. H. 366; lows v. Copp, 20 N. H. 492; Bell v. McCartee, 20 N. H. 515; Wen v. Moulton, 26 N. H. 41; Locke Whitney, 63 N. H. 597; Woodhul Rosenthal, 61 N. Y. 382; Wood Wood, 83 N. Y. 575; Jackson Chapman, 8 Cow. (N. Y.) 390; C v. Kraft, 3 Lans. (N. Y.) 512; J tice v. Baxter, 93 N. Car. 4; Barker v. Owen, 93 N. Car. 1; Carolina &c. R. Co. v. McCaskill, N. Car. 526, 4 S. E. 468; Browne Davis, 109 N. Car. 23, 13 S. E. 7; Hunt v. McMahan, 5 Ohio 1; Longworth v. Wolfington, 6 Ohio Davis v. Powell, 13 Ohio 3; Beardsley v. Chapman, 1 Ohio 118; McCoy v. Grandy, 3 Ohio

and some of the cases hold that the proof must show the value of such improvements at the time of the trial.¹⁷⁰ In recovering the value of the improvements, the occupants are not confined to those made by themselves, but they may recover for improvements made by their predecessors or the persons under whom they claim.¹⁷¹ In the absence of a statute providing for the payment of such improvements, it is held to be the general policy of the law to permit the value of improvements to be set off against, or in mitigation of, damages for the loss of the land; but in such case the value of the improvements cannot exceed the amount of damages claimed.¹⁷²

- ; *Harrison v. Castner*, 11 Ohio 339; *Morrison v. Robinson*, 31 St. 456; *Walker v. Humbert*, 55 St. 407; *Logan v. Gardner*, 136 St. 588, 20 Atl. 625; *Wood v. Harad*, 2 S. Dak. 334; *Templeton Lowry*, 22 S. Car. 389; *Graeme Cullen*, 23 Gratt. (Va.) 266; *Wilson v. Jones*, 43 W. Va. 562, 27 E. 411; *Haymond v. Camden*, 48 Va. 463; *Pacquette v. Pickness*, Wis. 219; *Blodgett v. Hitt*, 29 Wis. 169; *Huebschmann v. McHenry*, 29 Wis. 655, 663; *Falck v. Marsh*, 88 Wis. 680, 61 N. W. 287; *Stewart v. Stewart*, 90 Wis. 516, 63 W. 886; *Bright v. Boyd*, 2 Story S.) 607; *Stark v. Starr*, 1 Sawy. Griswold v. Bragg, 18 Blatch. S.) 202; *Litchfield v. Johnson*, Dillon (U. S.) 551; *Chapman v. Diller*, 4 Dillon (U. S.) 557; *Hamil Bank v. Dudley*, 2 Pet. (U. S.) 330; *Cleland v. Clark*, 123 Mich. 179; *Wendell v. Moulton*, 26 N. H. 41; *Van Bibber v. Williamson*, 37 Fed. 756; *Young v. Mahoming Co.*, 53 Fed. 895; *Haskins v. Spiller*, 3 Dana (Ky.) 573; *Proctor v. Smith*, 71 Ky. 81; *Fletcher v. Brown*, 35 Neb. 660, 53 N. W. 577; *Lothrop v. Michaelson*, 44 Neb. 633, 63 N. W. 28; *Wendell v. Moulton*, 26 N. H. 41; *Noble v. Biddle*, 81½ Pa. St. 430; *Gadsden v. Desportes*, 39 S. Car. 131; *Childs v. Shower*, 18 Iowa 261; *Gleiser v. McGregor*, 85 Iowa 489, 52 N. W. 366.
- ¹⁷¹ *Dean v. Feely*, 69 Ga. 804; *Wright v. Stevens*, 3 Green (Iowa) 63; *Craton v. Wright*, 16 Iowa 133; *Parsons v. Moses*, 16 Iowa 440; *Flanders v. Davis*, 19 N. H. 139; *Shaler v. Magin*, 2 Ohio 235; *Davis v. Powell*, 13 Ohio 308.
- ¹⁷² *Putnam v. Tyler*, 117 Pa. St. 570, 12 Atl. 43.

CHAPTER CII.

ESTOPPEL.

Sec. 2068. Generally. 2069. Equitable estoppel generally. 2070. Fraudulent intention not essential. 2071. Estoppel by conduct—Misrepresentation and concealment. 2072. Estoppel by silence—Standing by.	Sec. 2073. Other instances of estoppel. 2074. Persons affected—Extent of estoppel—Dedication. 2075. Pleading—When evidence admissible. 2076. Burden of proof. 2077. Evidence to establish. 2078. Questions of law and fact.
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§ 2068. **Generally.**—Estoppel was once regarded as a rule branch of the law of evidence, but the better opinion, and that which now prevails, is that it is more properly a branch of the substantive law,¹ although in some respects it might be regarded as within the field of procedure. In any event, however, it is customary to treat the subject to some extent in works on evidence, and it is clearly within the scope of our plan to treat it so far as questions of evidence are concerned when estoppel is involved as a particular issue in a case. Estoppel has been defined in a general way as the "preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which he has, by an act in pais, induced another to believe and act upon to his prejudice."² As appears from this definition, estoppels are of three general classes: (1) estoppels by record; (2) estoppels by deed; (3) estoppels in pais, or, as they are sometimes called, equitable estoppel. The latter, and, indeed, all of these are sometimes treated under the head of conclusive admissions. Estoppel of the first and second classes have been sufficiently treated elsewhere,³ and this chapter will be confined to the subject of estoppel in pais.

¹ *Martin v. Maine Cent. R. Co.*, 83 Me. 104, 21 Atl. 740; 2 *Pomeroy Eq. Jur.*, § 801. ² 11 *Am. & Eng. Ency. of Law* (2d ed.) 387. ³ See Vol. II, Ch. LXXXIII.

§ 2069. **Equitable estoppel generally.**—Equitable estoppel has been defined as follows: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who in his part acquires some corresponding right either of property, of contract, or of remedy."⁴ As a general rule, where one voluntarily, by his words or conduct, represents a certain state of facts to exist, causes another to believe in the existence of such a state of facts, and induces him to act on such belief so as to alter his position for the worse, the former is precluded from denying the existence of such a state of facts and asserting against the latter a different and contrary state of facts as existing at the same time.⁵ The vital principle of such an estoppel, it is said, is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted.⁶ As hereafter shown, there may, perhaps, be an estoppel in pais in cases other than those indicated by the proposition above stated, but they apply in general to estoppel by conduct, including misrepresentation, concealment, silence under duty to speak, and the like. Although the facts from which equitable estoppels arise are all matters in pais as distinguished from records and deeds, yet there has been a great expansion of or addition to the original doctrine of estoppels in pais, since the time of Lord Coke. "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, in his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to

⁴ 2 Pomeroy Eq. Jur., § 804.

⁵ *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. 587, and note; *Freeman v. Cooke*, 2 Exch. 654; *Fetter Eq.* 45, 46.

⁶ *Dickerson v. Colgrove*, 100 U. S. 578, 580, and in the same case it is

said that the doctrine is always applied to promote the ends of justice and that it is available only for protection and not as a weapon of assault; see also, *Shipley v. Fox*, 69 Md. 572, 16 Atl. 275; *Seton v. Leone*, L. R. 19 Q. B. 68, 70.

create and vest opposing rights in the party who obtains the benefit of the estoppel. The doctrine of equitable estoppel is preëminently a creature of equity. It has, however, been incorporated into the law and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles, it is administered in the same manner, and in conformity with the same rules, by the courts both of law and of equity, so that the decisions of either class of tribunals may be quoted as authorities in the subsequent discussion."⁷

§ 2070. Fraudulent intention not essential.—It has been said that there can be no estoppel where declarations or representations are made in good faith through ignorance or mistake, and that fraud or an intention to mislead, is essential to an estoppel.⁸ But, in common sense, this statement is not strictly correct, or, at least, it is apt to mislead. There need be no actual fraud or intention to mislead. It is sufficient, in most cases, if the declarations or representations were negligently and recklessly made, even if the person making them had no knowledge of their falsity, especially where he makes them while having knowledge, and the intention to mislead may be inferred. Indeed, it is sufficient, in many instances, that the act or representation is calculated to mislead and does mislead the other party to his disadvantage while acting in good faith and with reasonable care and diligence.¹⁰ The fraud in such cases may consist in the denial of what

⁷ 2 Pomeroy's Eq. Jur., § 802; see also, for history and explanation of the doctrine, *Horn v. Cole*, 51 N. H. 287; *Bernard v. German-American Seminary*, 49 Mich. 444, 13 N. W. 811.

⁸ *Boggs v. Merced Min. Co.*, 14 Cal. 279, 368; *Martin v. Zellerbach*, 38 Cal. 300; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255; *Brent v. Virginia Coal Co.*, 92 U. S. 327; *Danforth v. Adams*, 29 Conn. 109; *Brewer v. Boston & W. R. Co.*, 5 Metc. (Mass.) 478, 39 Am. Dec. 694; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Thrall v. Lanthrop*, 30 Vt. 307, 73 Am. Dec. 306.

⁹ *Leather Mfg. Bank v. Morgan*, 117 U. S. 96; *Kingman v. Graham*,

51 Wis. 232, 8 N. W. 181; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Pence v. Arbuckle*, 22 Minn. 41; *Weinstein v. National Bank*, 69 Tex. 38; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Madison Co. v. Paxton*, 57 Miss. 701; *Mutual Ins. Co. v. Norris*, 31 N. J. Eq. 585; *Davenport R. Co. v. Davenport Gas Co.*, 43 Iowa 301; *Wright v. Newton*, 1 Mass. 552; *Green v. Smith*, 57 Vt. 268; *Freeman v. Cooke*, 2 Exch. 65; see also, *Smith v. Newton*, 38 Ill. 230; *Raley v. Williams*, 73 Mo. 31; *Sullivan v. Colby*, 71 Fed. 460, 465.

¹⁰ *Blair v. Wait*, 69 N. Y. 11; *Manufacturers' Bank v. Hazard*, N. Y. 226; *Coleman v. Pearce*, Minn. 123, 1 N. W. 846; *Wampol*

has previously been affirmed.¹¹ And, it is said by Mr. Pomeroy, that the doctrine of equitable estoppel rests upon the following general principle: "When one of two innocent persons, that is, persons each guiltless of an intentional, moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct, acts or omissions, has rendered the injury possible. This is confessedly the foundation of the rules concerning the implied authority of agents, which are declared by judges of the highest ability to be applications of the doctrine of equitable estoppel."¹² This most righteous principle is sufficient, and alone sufficient to explain all instances of such estoppel, and although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its true legal meaning."¹³

§ 2071. Estoppels by conduct—Misrepresentation and concealment.—The most common application of the doctrine of estoppel in pais is where the party against whom the estoppel is asserted has by misrepresentation or concealment of some material fact which he knows, or at least ought to know, or in effect represents himself as knowing, has induced another to alter his position for the worse in ignorance of the true state of the facts and in right reliance upon the representations or conduct of the former.¹⁴ Familiar examples or

Kountz, 14 S. Dak. 334, 85 N. W. 395, 86 Am. St. 765.

"Ward v. Berkshire L. Ins. Co., 108 Ind. 301, 9 N. E. 361; Anderson v. Hubble, 93 Ind. 570, 576, 578, 17 Am. R. 394; Continental Nat. Bank v. Nat. Bank, 50 N. Y. 575; Stevens v. Dennett, 51 N. H. 324; East Greenwich Sav. Inst. v. Kenyon, (R. I.) 37 Atl. 632; Galbraith v. Lumsford, 87 Tenn. 89, 9 S. W. 365; 2 Pomeroy Eq. Jur., § 803. Fraudulent conduct may, however, be present and even essential in some cases where the effect is to divest the title to land, as where the owner is precluded from asserting false representations or concealment by which another has been induced to deal with it: 2 Pomeroy Eq. Jur., §§ 805, 806.

"North River Bank v. Aymar, 3 Hill (N. Y.) 262; Farmers' &c. Bank v. Butchers' &c. Bank, 16 N. Y. 125; Griswold v. Haven, 25 Idaho 595; Exchange Bank v. Monteath, 26 Idaho 505; see also, Scanlon-Gipson Lumber Co. v. Germania Bank, (Minn.) 97 N. W. 380; Multz v. Price, 91 App. Div. (N. Y.) 116, 86 N. Y. S. 480; Rimmer v. Webster, (1902) 2 Ch. 163, 71 L. J. Ch. 561.

"2 Pomeroy Eq. Jur., § 803; see also, Parrish v. Stephens, 1 Ore. 59; Quick v. Milligan, 108 Ind. 419, 58 Am. R. 49; Tayler v. Great India Penn. R. Co., 4 D. & J. 559; Elliott Roads & Streets, §§ 131, 132; Stephen Dig. Ev., art. 102.

"Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Preston v. Mann, 25 Conn. 118; Irving Nat. Bank v.

illustrations are where an indorser has stated to the indorsee of a note that his signature is genuine. In such a case the indorser is estopped to deny his obligation after the plaintiff, the indorsee, has relied on such statement and lost his remedy against the maker by reason of his insolvency;¹⁵ and where one adopts a signature, knowing it to be forged, he is estopped from denying its genuineness.¹⁶ Where a third person buys a note, or mortgage, or other claim, relying on the assurance of the maker or debtor that the claim is valid, or that there is no defense, the person making such representation is generally estopped.¹⁷ But there is no estoppel where the statement is made after the purchaser has become the owner, although the purchaser repeats the statement to one who buys of him.¹⁸ There is, however, where the owner of a chattel mortgage, knowing that the mortgagor is endeavoring to obtain a loan, conceals the existence of his mortgage to aid him in such purpose.¹⁹ One who holds himself out as a partner and thereby induces others to act on the faith of such act or representation, will not be heard to prove that no such partnership in fact existed;²⁰ and where a retiring partner gives no notice to persons who continue to give credit supposing him to be a member of the firm, it has been

Alley, 79 N. Y. 536; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771; *Norman v. Eckern*, 60 Minn. 531, 63 N. W. 170; *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. 94; *Washington Home v. Chicago*, 157 Ill. 414, 41 N. E. 893; *New York Rubber Co. v. Rotherly*, 107 N. Y. 310, 1 Am. St. 822; *Carr v. London & C. R. Co.*, L. R. 10 C. P. 307, 316; see also, *Shedd v. Webb*, 157 Ind. 585, 61 N. E. 233.

¹⁵ *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498.

¹⁶ *Casco Bank v. Keene*, 53 Me. 103; *Rudd v. Matthews*, 79 Ky. 479, 42 Am. R. 231; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. R. 702, and note.

¹⁷ *Petrie v. Feeter*, 21 Wend. (N. Y.) 172; *Cloud v. Whiting*, 38 Ala. 57; *Preston v. Mann*, 25 Conn. 118; *Vanderpool v. Brake*, 28 Ind. 130; *Plummer v. Farmer's Bank*, 90 Ind. 386; *Smith v. Stone*, 17 B. Mon. (Ky.) 168; *Crout v. De Wolf*, 1 R.

I. 393; *Libbey v. Pierce*, 47 N. Y. 309; *Hamer v. Johnston*, 6 Mich. 698; *Foster v. Newland*, 21 Wend. (N. Y.) 94; *Cary v. Wheeler*, 13 Wis. 281; *Marr v. Howland*, 20 W. Va. 282; *Gill v. Rice*, 13 Wis. 549; *Libbey v. Johnson*, 41 Barb. (N. Y.) 359; *Weyh v. Boylan*, 85 N. Y. 339 Am. R. 669; see also, *Dodge v. Pope*, 93 Ind. 480.

¹⁸ *Ray v. McMurtry*, 20 Ind. 308, 83 Am. Dec. 322, and note; *Wind v. Canaday*, 21 Ind. 248, 83 Am. Dec. 348, and long note.

¹⁹ *McLean v. Dow*, 42 Wis. 61; *Chapman v. Hamilton*, 19 Ala. 12.

²⁰ *Pickard v. Sears*, 6 Ad. & E. 469; *Freeman v. Cooke*, 2 Exch. 65; *Carr v. London & N. W. R. Co.*, L. R. 10 C. P. 316; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. R. 60; *Beecher v. Bush*, 45 Mich. 188, 4 Am. R. 465, 7 N. W. 785; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, Sup. Ct. 1278.

ld that he cannot deny that he is a partner as far as their interests e thereby affected.²¹ So, where a man cohabits with a woman or by her conduct leads the public to suppose that they are married, he ll not be heard to prove against those who have given credit on the th of such representations or acts, that they are not in fact mar- d.²² Many other illustrative cases are cited below.²³ But a party o knows all the facts cannot, as a rule at least, avail himself y alleged estoppel in pais from the acts, conduct or declarations of other, for if he knows the true state of the facts, or even if the cir- cumstances are such that he ought to know and is charged with knowl- ge of them, he cannot justly claim that he was misled in such a nner as to entitle him to assert an estoppel.²⁴

§ 2072. **Estoppel by silence—Standing by.**—There may be an estoppel by standing by, and remaining silent, when there is a duty to speak as well as by affirmative misrepresentations or concealment.²⁵

Lovejoy v. Spafford, 93 U. S. 413; *Freeman v. Cooke*, 2 Exch. 661; *Stanton v. Holland*, 69 N. Y. 571, 25 N. D. R. 246.

Watson v. Threlkeld, 2 Esp. 637; *Binson v. Nahon*, 1 Campb. 245; *Enro v. De Chemant*, 4 Campb. 245; *Ryan v. Sams*, L. R. 12 Q. B. 245; *Blades v. Free*, 9 B. & C. 167; *Stoddard v. Farebrother*, 2 M. & P. 245; *Ponder v. Graham*, 4 Fla. 23; *Lang v. Foster*, 14 N. H. 114; *Gath- ings v. Williams*, 5 Ired. (N. Car.) 245; *Johnston v. Allen*, 39 How. Pr. 245 (N. Y.) 506, so a woman may be estopped, in some instances, to deny that she is married; *Mace v. Cadell*, 10 Cowp. 232; 2 Pomeroy Eq., § 814; *Strode v. Strode*, 3 Bush (Ky.) 227, 96 Am. Dec. 214, note; *Pierce v. Hower*, 142 Ind. 42 N. E. 223.

Krathwohl v. Dawson, 140 Ind. 48 N. E. 467; *Pritchett v. Ahrens*, 10 Ind. App. 56, 59 N. E. 42; *Walker v. Walker*, 42 Ill. 311, 39 Am. Dec. 245; *Pool v. Lewis*, 41 Ga. 162, 5 N. D. R. 526; *McMurray v. Hughes*,

82 Iowa 47, 47 N. W. 883; *Stanton v. Estey Mfg. Co.*, 90 Mich. 12, 51 N. W. 101; *Towles v. Tanner*, 21 App. Dec. 530; *Wright v. Williams*, (Ky.) 77 S. W. 1128; *Beugnot v. Tremoulet*, (La.) 35 So. 362, so, as elsewhere shown, a corporation dealing with others as such, or others dealing with it as such, may be estopped from denying the corporate existence; see Ch. XCV.

**Brant v. Virginia Coal Co.*, 93 U. S. 326; *Smith v. Cremer*, 71 Ill. 185; *Logansport v. La Rose*, 99 Ind. 117; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865; *Stoddard v. Johnson*, 75 Ind. 20; *Robbins v. Potter*, 98 Mass. 532; *Hutchins v. Hebbard*, 34 N. Y. 24; *Kingman v. Graham*, 51 Wis. 232, 8 N. W. 181; *Brian v. Bonvillian*, 111 La. Ann. 441, 35 So. 632; see also, *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592.

**Kuriger v. Joest*, 22 Ind. App. 633, 645, 52 N. E. 764; *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448; *Vreeland v. Ellsworth*, 71 Iowa 347, 32 N. W. 374; *Cairncross v.*

Silence in such cases is equivalent to concealment.²⁶ And the "standing by" does not necessarily mean actual presence or participation in the transaction, but merely implies knowledge or silence where there is knowledge and a duty to speak.²⁷ Examples or illustrations of the application of the doctrine are numerous. Thus, where a property owner acquiesces in the sale of his property as that of another and by his conduct leads innocent purchasers to buy, or stands by and sees a third person sell the property as that of such third person without giving any notice of his own title or claim or speaking when it is his duty to speak, he is estopped from afterwards asserting his claim as against the purchaser.²⁸ So, where one owning land knowingly stands by and without speaking sees another make valuable improvements thereon, believing it to be his own.²⁹ So, the maker of a note may be estopped to deny his obligation where he stands by in silence and sees it transferred for a consideration.³⁰ But there is, ordinarily,

Lorimer, 7 Jur. (N. S.) 149; Gregg v. Wells, 10 A. & E. 90; Swayze's Exr's v. Carter, 41 N. J. Eq. 231, 3 Atl. 706; State v. Wertzell, 62 Wis. 188, 22 N. W. 150; Kirk v. Hamilton, 102 U. S. 68, 78, 79, and authorities cited in following notes to this section. As to what must appear to sustain an estoppel to be silence, see, Viele v. Judson, 82 N. Y. 32; Hamilton v. Sears, 82 N. Y. 327; Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624; note in 10 Am. St. 22.

²⁶ Studdard v. Lemond, 48 Ga. 100; Markland v. Kimmel, 87 Ind. 560; Cady v. Owen, 34 Vt. 598; Jeneson v. Jeneson, 66 Ill. 259; Griffin v. Nichols, 51 Mich. 575, 17 N. W. 63; Wheeler v. New Brunswick R. Co., 115 U. S. 29, 5 Sup. Ct. 1061.

²⁷ Anderson v. Hubble, 93 Ind. 570, 47 Am. R. 394; Gatling v. Rodman, 6 Ind. 289; Richardson v. Chickering, 41 N. H. 380.

²⁸ Pickard v. Sears, 6 Ad. & El. 469; Mason v. Williams, 8 Jones L. (N. Car.) 478; Guthrie v. Quinn, 43 Ala. 561; Vilas v. Mason, 25 Wis. 310; Guffey v. O'Reilly, 88 Mo. 418, 57 Am. R. 424, and note; Pool v.

Lewis, 41 Ga. 162, 5 Am. R. 500; Rice v. Bunce, 49 Mo. 231, 8 Am. R. 129; Markham v. O'Connor, 52 N. Y. 183, 21 Am. R. 249; Storrs v. Barlow, 6 Johns. Ch. (N. Y.) 166, 10 A. Dec. 316; Niven v. Belknap, 2 Johns. (N. Y.) 573; Stephens v. Baird, 1 Cow. (N. Y.) 274; Hope v. Lawrence, 50 Barb. (N. Y.) 258; Ennis v. Burns, 5 Call (Va.) 463, 2 A. Dec. 593; Henderson v. Overton, 1 Yerg. (Tenn.) 394, 24 Am. Dec. 49; Kid v. Mitchell, 1 Nott & McC. (Car.) 334, 9 Am. Dec. 702; Martin v. Goblet, 31 S. Car. 153, 17 Am. St. 22, and note; Power's Appeal, 1 Pa. St. 175, 11 Am. St. 882, and note; Lowther Oil Co. v. Miller & Co., 53 W. Va. 501, 44 S. E. 43; Bigelow Estop., 492-504.

²⁹ Lydick v. Gill, (Neb.) 94 N. W. 109; Steel v. Smelting Co., 106 S. 456; Beaupland v. McKeen, Pa. St. 124, 70 Am. Dec. 115; Hevly v. Wilson, 76 Cal. 477; Forbes v. McCoy, 24 Neb. 702, 11 Am. St. 400, note.

³⁰ Watson v. McLaren, 19 W. Va. (N. Y.) 557.

no estoppel, even though a property owner stands by and sees the property sold as another's or sees improvements made on the land by another, if the purchaser or the person making such improvements knew the facts and true state of the title.³¹ If, however, a property owner stands by without objection and sees a street or sewer improvement made which benefits his property, he is usually estopped to question the power of the city and the legality of the proceedings where they are not absolutely void.³² And it has been held that a party who by his conduct has affirmed that such proceedings are valid and permitted money to be expended for the benefit of his property is estopped to say that they were void even though they were absolutely void.³³

§ 2073. *Other instances of estoppel.*—One may also be precluded in many instances from taking an inconsistent position to the prejudice of another,³⁴ or after he has once made an election;³⁵ and a waiver³⁶ is also sometimes based upon the doctrine of estoppel in pais.

³¹ *Brewer v. Boston R. Co.*, 5 Metc. (Mass.) 478, 39 Am. Dec. 694; *Hale v. Skinner*, 117 Mass. 474; *Haas v. Plautz*, 56 Wis. 105; 43 Am. R. 699, 14 N. W. 65; *Brown v. Tucker*, 47 Ga. 485; *Greene v. Smith*, 57 Vt. 268.

³² *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *Willard v. Albertson*, 23 Ind. App. 162, 53 N. E. 1076; *Logansport v. Uhl*, 99 Ind. 531, 50 Am. R. 109; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *McClelland v. Miller*, 28 Ohio St. 488; *Rettinger v. Passaic*, 45 N. J. L. 146; *Wingate v. Astoria*, (Ore.) 65 Pac. 982; *Elliott Roads & Streets*, (2d ed.) §§ 379, 589, 590, and numerous authorities cited.

³³ *Busenbark v. Clements*, 22 Ind. App. 557, 53 N. E. 665; numerous authorities are cited and the doctrine is fully explained in this case. Among the authorities cited are, *De Pauw Plate Glass Co. v. Alexandria*, 152 Ind. 443, 52 N. E. 608; *Louisville &c. R. Co. v. Beck*, 119 Ind. 124, 21 N. E. 471; *Hellencamp v. Lafayette*,

30 Ind. 182; *Strosser v. Ft. Wayne*, 100 Ind. 443; 2 *Hermann on Estoppel*, § 1221; see also, *Elliott Roads and Streets*, (2d ed.) § 592, to the effect that there may be an estoppel even where the statute is unconstitutional.

³⁴ *Strosser v. Ft. Wayne*, 100 Ind. 443; *Moshier v. Frost*, 110 Ill. 206; *Daniels v. Tearney*, 102 U. S. 415; *Davis v. Wakelee*, 156 U. S. 680, 689, 15 Sup. Ct. 555; *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. 241; *Davis, Belan & Co. v. National Sur. Co.*, 139 Cal. 223, 72 Pac. 1001; *Duckett v. Rountree &c. Co.*, 99 Mo. App. 444, 73 S. W. 926; *Central of Ga. R. Co. v. James*, 117 Ga. 832, 45 S. E. 223; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499, 72 Pac. 119.

³⁵ *Lee v. Templeton*, 73 Ind. 315; *Steinbach v. Relief Ins. Co.*, 77 N. Y. 498; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Barrier v. Kelly*, (Miss.) 33 So. 974.

³⁶ *Bigelow Estop.*, (4th ed.) 633; *Longfellow v. Moore*, 102 Ill. 289;

So, as already shown, there may be an estoppel in pais, or at least a preclusion in the nature of an estoppel in pais, where one accepts and retains the benefit of what he is attempting to overturn.³⁷ There are also many instances in which parties holding a certain relation to others are estopped. Thus, a tenant and his privies are generally estopped, when in possession, from disputing the landlord's title.³⁸ So the same rule generally applied to those holding a subordinate title such as bailees or the like.³⁹ And it has likewise been applied to trustees and others holding a similar relation,⁴⁰ and in the case of negotiable instruments.⁴¹

Keyes v. Scanlan, 63 Wis. 345, 23 N. W. 570; *Blake v. Ins. Co.*, 12 Gray (Mass.) 265.

³⁷ *Goddard v. Renner*, 57 Ind. 532; *Williams v. Richards*, 152 Ind. 528, 53 N. E. 765; *Ballard v. Camplin*, (Ind.) 67 N. E. 505; *State v. Germania Bank*, (Minn.) 95 N. W. 1116; *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 350; *Clugish v. Koons*, 15 Ind. App. 599, 43 N. E. 158; *Daniels v. Tearney*, 102 U. S. 415; *Rau v. Little Rock*, 34 Ark. 303.

³⁸ Vol. I, § 270; *Bishop v. La-louette*, 67 Ala. 197; *Caldwell v. Smith*, 77 Ala. 157; *Earle v. Hale*, 31 Ark. 470; *Standley v. Stephens*, 66 Cal. 541; *White v. Barlow*, 72 Ga. 887; *Hardin v. Jones*, 86 Ill. 313; *Coburn v. Palmer*, 8 Cush. (Mass.) 124; *Worthington v. Lee*, 61 Md. 530; *Page v. McClinch*, 63 Me. 472; *Wilson v. Maltby*, 59 N. Y. 126; *Rowland v. Dillingham*, 82 N. Y. S. 470; *Doe d. Plevin v. Brown*, 7 A. & E. 447; *Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

³⁹ *Osgood v. Nichols*, 5 Gray (Mass.) 420; *Gosling v. Birnie*, 7 Bing. N. Cas. 339; *Tribble v. Ander-*

son, 63 Ga. 31; *Shelsbury v. Scott*, 1 Yelv. 23; *Biddle v. Pond*, 3 L. J. Q. B. 137; *Betteley v. Reed*, L. R. 4 Q. B. 511; "Idaho," *The*, 93 U. S. 575; *Seneca v. Allen*, 99 N. Y. 532; *Pulliam v. Burlingame*, 81 Mo. 111, 5 Am. R. 229; *Glynn v. George*, 20 N. H. 114 (licensee); *Wilson v. Maltby*, 59 N. Y. 126 (same); *Kinsman v. Parkhurst*, 18 How. (U. S.) 28 (agent who has collected money for principal); *Scobey v. Kinningham*, 131 Ind. 552, 31 N. E. 355; *Carson v. Cochran*, 52 Minn. 67, 53 N. W. 1130; *Farris v. Houston*, 74 Ala. 169.

⁴⁰ *Willison v. Watkins*, 3 Pet. (U. S.) 48; *Bybee v. Oregon & C. R. Co.*, 139 U. S. 665, 11 Sup. Ct. 641; *Smith v. Sutton*, 74 Ga. 528; *Irby v. Kitchell*, 42 Ala. 438; *Burke v. Turner*, 90 N. Car. 588.

⁴¹ *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181; *Garland v. Jacomb*, L. R. 8 Exch. 216; *Erwin v. Down*, 15 N. Y. 575; *White v. Continental Nat. Bank*, 64 N. Y. 316, 2 Am. R. 612; *Nat. Bank v. Bangs*, 106 Mass. 441, 8 Am. R. 349; *State Bank v. Fearing*, 16 Pick. (Mass.) 533; *Sanderson v. Collman*, 4 M. & G. 209; *Robinson v. Yarrow*, Taunt. 455; *London & S. W. Bank v. Wentworth*, L. R. 5 Exch. 96.

§ 2074. **Persons affected—Extent of estoppel—Dedication.**—It has been held that the extent of an estoppel created by false representations and action thereon is commensurate with the thing represented, and operates to place the other party in the same position as if the representation were true.⁴² In other words, one who represents a fact to exist and thereby induces another to act, may be estopped not only to deny the existence of such fact, but also to dispute the legal consequences of its existence.⁴³ As a general rule, only parties and their privies are bound by, or can take advantage of, an estoppel.⁴⁴ But, where the representations are addressed to the public generally, or to all who may have occasion to act upon them, there may be an estoppel in favor of any one of such persons who does so.⁴⁵ Many cases of implied dedication of highways would seem to come within this principle.⁴⁶

§ 2075. **Pleading—When evidence is admissible.**—In some jurisdictions an estoppel in pais may be shown in evidence and is available as a defense under the general issue without being specially pleaded.⁴⁷ In most of the code states, however, it must generally be specially pleaded in order to be made available.⁴⁸ Thus, where the de-

⁴² *Grissler v. Powers*, 81 N. Y. 57, 61.
⁴³ *Dodge v. Pope*, 93 Ind. 480.
⁴⁴ *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642; *Marine Bank v. Fiske*, 71 N. Y. 353; *Mayenborg v. Haynes*, 50 N. Y. 675; *Durant v. Pratt*, 55 Vt. 270; *Harvey v. West*, 87 Ga. 553, 13 S. E. 693; *Kinney v. Whiton*, 44 Conn. 262, 26 Am. R. 462; *Hopple v. Hipple*, 33 Ohio St. 116; *John Shillito Co. v. McClung*, 51 Fed. 868, 876; *Reg. v. Ambergate &c. R. Co.*, 1 El. & Bl. 372, 72 E. C. L. 372; *Peek v. Gurney*, L. R. 6 H. L. 377.
⁴⁵ *McLean v. Dow*, 42 Wis. 610, representations to commercial agencies may come within this principle; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 24 Am. St. 210; *Pence v. Arbuckle*, 22 Minn. 417.
⁴⁶ *Elliott Roads and Streets*, (2d ed.) §§ 125, 126, 128, 131-133; see also, *Parrish v. Stephens*, 1 Ore. 59; *Corsicana v. Anderson*, (Tex. Civ. App.) 78 S. W. 261; *Seldschlag v. Antioch*, (Ill.) 69 N. E. 949; *Schettler v. Lynch*, 23 Utah 305, 64 Pac. 955; *Cincinnati v. White*, 6 Pet. (U. S.) 431.
⁴⁷ *Duchess of Kingston's Case*, 2 Smith L. C. (pt. 2) 794, 954; *Freeman v. Cooke*, 2 Exch. 652, 18 L. J. Exch. 114; *Hawley v. Middlebrook*, 28 Conn. 537; *Lites v. Addison*, 27 S. Car. 227; *Alexander v. Walter*, 8 Gill (Md.) 247; *Wilmington &c. Bank v. Wollaston*, 3 Harr. (Del.) 90; *Turnipseed v. Hudson*, 50 Miss. 435; *Chase v. Deming*, 42 N. H. 274, 280; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846.
⁴⁸ *Webb v. Hancock Mut. L. Ins. Co.*, (Ind.) 69 N. E. 1006; *Wood v. Ostram*, 29 Ind. 177; *Center School Tp. v. State*, 150 Ind. 163, 49 N. E. 961; *Grand Haven First Nat. Bank v. Zeims*, (Iowa) 61 N. W. 483; *De*

defendant in an action for damages for cutting and removing trees from the plaintiff's land did not specifically plead an estoppel based on the claim that the plaintiff had represented to the defendant that the trees on the land was in the defendant's grantor, and had advised the defendant to purchase it, evidence of such representations was held to be competent.⁴⁹ So, evidence that the plaintiff's agent informed the defendant that the plaintiff made no claim to certain lots in question and that the defendant acted thereon, was held inadmissible upon a general denial.⁵⁰ It is also held in a recent case, and in other cases cited in the second note to this section, that if an estoppel is specifically pleaded it cannot be made available as a defense even though it is shown by the evidence.⁵¹

§ 2076. **Burden of proof.**—It is generally held that the burden of proving the facts necessary to constitute an estoppel is upon the party who asserts and sets it up.⁵² In most of the cases cited the burden of establishing the estoppel was held to be upon the defendant who pleaded it, but in one of them the plaintiff pleaded it and the burden was held to be upon him.⁵³ It has also been held that the facts necessary to work an estoppel must be affirmatively shown,⁵⁴ and that the estoppel must be established by a preponderance of the evidence.⁵⁵

Votie v. McGerr, 15 Colo. 467, 24 Pac. 923; Gaines v. Mississippi Bank, 12 Ark. 769; Dwelling House Ins. Co. v. Johnson, 47 Kans. 1, 27 Pac. 100; Bruce v. Phoenix Ins. Co., 24 Ore. 486, 34 Pac. 16; Erickson v. Oakland First Nat. Bank, 44 Neb. 622, 62 N. W. 1078; Wilkins v. Suttles, 114 N. Car. 550, 19 S. E. 606; Gillson v. Price, 18 Nev. 109, 1 Pac. 459; Homberger v. Alexander, 11 Utah 363, 40 Pac. 260; Walker v. Baxter, 6 Wash. 246, 33 Pac. 426; Hilton v. Colvin, (Ky.) 78 S. W. 890; Golden v. Tyer, (Mo.) 79 S. W. 143, see note in 27 Am. St. 344-349.

⁴⁰ *Hilton v. Colvin*, (Ky.) 78 S. W. 890.

⁵⁰ Wood v. Ostram, 29 Ind.177. For other instances in which the evidence was held inadmissible, see,

**Delphi v. Startzman, 104 Ind.
N. E. 937.**

²¹ Jones v. Peebles, (Ala.) : 564; see also, Mabury v. Lou &c. Co., 60 Fed. 645; You Brehe, 19 Nev. 379, 3 Am 892; State v. Pepper, 31 Ind. where there was no opportunity to plead the estoppel; Sammon Newman, 27 Ind. 508.

"Spear v. Spear, (Me.) 54
1106; Bethune v. McDonald,
Car. 88, 14 S. E. 674; Delan
Canning, 52 Wis. 266, 8 N. W.
Merrill v. Tobin, 30 Fed. 738;
v. Mason, 2 Md. 380; Baldw
Lowe, 22 Iowa 367; Hill v. I
31 Pa. 331.

⁴³ *Merrill v. Tobin*, 30 Fed. 100 (1st Cir. 1898).

⁵⁵ Stanley v. Marshall, (Ill.)
E. 58.

§ 2077. **Evidence to establish.**—Where an estoppel is properly pleaded evidence that tends to prove any of the essential elements of such estoppel on the one hand, or to rebut or disprove the same, on the other hand, is admissible, unless the particular evidence in general is rendered inadmissible by some rule of exclusion. What is necessary to be proved in order to establish an estoppel depends largely on the facts and nature of the estoppel pleaded, and upon the rules and principles already stated in regard to the elements necessary to constitute an estoppel. It is said, in substance by Mr. Bigelow, and in some of the reported cases, that the following elements must be present or appear in order to constitute an estoppel by conduct: (1) there must have been a representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party would act upon it; (5) the other party must have been induced to act upon it.⁵⁶ And in another place it is said by Mr. Bigelow⁵⁷ that, "to establish an estoppel in pais by conduct it is held that it must be shown: (1) that the party sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe, as a man of ordinary prudence would influence his conduct inconsistent with the evidence he proposed to give,⁵⁸ or the title he proposes to set up; (2) that the other party has acted upon, or been influenced by, such act or declaration; (3) that the party will be prejudiced by allowing the truth of the admission to be disproved."⁵⁹ Mr. Pomeroy states the essential elements of an equitable estoppel as follows: (1) there must be conduct, acts, language, or silence, amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his said conduct, or at least, the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the

⁵⁶ Bigelow Estoppel 437 (1st ed. 480); *Hosford v. Johnson*, 74 Ind. 479; *Bynum v. Preston*, 69 Tex. 287, 6 S. W. 428, 5 Am. St. 49, 51; *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891, 10 Am. St. 307, 309.

⁵⁷ Bigelow Estoppel, 600.

⁵⁸ Bigelow v. Woodward, 15 Gray (Mass.) 560; *Mason v. Bair*, 33 Ill. 194.

⁵⁹ *Brown v. Bowen*, 30 N. Y. 519; *Plumb v. Cattaraugus &c. Ins. Co.*, 18 N. Y. 392; *Dezell v. Odell*, 3 Hill (N. Y.) 215.

time when it was acted upon by him; (4) the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon (there are several familiar species, in which it is simply impossible to ascribe intention or even expectation to the party estopped), that his conduct will be acted upon by the one who afterwards claims the benefit of estoppel; (5) the conduct must be relied upon by the other party, thus relying, he must be led to act upon it; (6) he must in fact be induced to act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."⁶⁰ But, as he well observes, it would be unsafe and misleading to rely on these general requisites, as applicable to every case without modification or limitation. As a general rule, however, these are the elements that must, in most cases, be shown to be present in order to establish such an estoppel. Although estoppels in pais are not now ordinarily regarded as "odious," yet the rule still prevails that they must be pleaded with certainty. So, the evidence to establish the estoppel must be clear and satisfactory. Indeed, it is frequently said that there can be no estoppel by mere inference,⁶² but this principle is more especially applicable to pleading and should not, we think, be so applied as to preclude the jury from making reasonable inferences from the evidence as to the existence of essential facts.

§ 2078. **Questions of law and fact.**—It is said that whether the conduct shown in particular will work an estoppel is a question of law for the court to determine.⁶³ So, when all the essential facts are established by uncontroverted evidence and make a case in which there is necessarily an estoppel under the law as applied to such facts.

⁶⁰ Pomeroy Eq. Jur., § 805.

Orne, 77 Pa. St. 89; Bell of the

⁶¹ Mills v. Graves, 38 Ill. 455, 87 Am. St. 314; Trenton Banking Co. v. Duncan, 86 N. Y. 221; Miller v. Hampton, 37 Ala. 347; Johnson v. Owen, 33 Iowa 512; Roach v. Brannon, 57 Miss. 490; Bennett v. Dean, 41 Mich. 472; Townsend Sav. Bank v. Todd, 47 Conn. 190; Keating v.

20 Wall. (U. S.) 421.

⁶² Lash v. Rendell, 72 Ind. 4; Robbins v. Magee, 76 Ind. 381; Tuley v. Fruits, 20 Ind. App. 534, 51 N. E. 111.

⁶³ Bigelow Estoppel, 600; Mann v. Cogan, 49 N. H. 331.

the court may so decide as a matter of law without submitting the question to the jury.⁶⁴ And so, on the other hand, if there is no evidence whatever tending to establish an estoppel or an essential element thereof, it seems equally clear that the court may so decide as a matter of law. But an estoppel, well pleaded, usually presents a question of fact for the jury, if there is any evidence fairly tending to establish it, and, in a recent case, it was held that whether or not the party asserting the estoppel furnished money on the faith of the representations of the agent of the other party, and whether or not it was deceived into doing so by such representations, apparently sanctioned by the principal, were questions of fact which should have been submitted to the jury.⁶⁵

⁶⁴ *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428, 19 Atl. 289, 19 Am. St. 600. ⁶⁵ *Gaylord v. Nebraska &c. Bank*, 54 Neb. 104, 74 N. W. 415, 69 Am. St. 705, 708, 709.

CHAPTER CIII.

EXECUTORS AND ADMINISTRATORS.

Sec. 2079. Generally. 2080. Presumptions. 2081. Burden of proof. 2082. Prima facie evidence—Proof of plaintiff's representative character. 2083. Prima facie evidence—Evidence of representative character of defendant. 2084. Absentee. 2085. Parol evidence. 2086. Admissions and declarations. 2087. Admissions and declarations of decedent. 2088. Recitals in deed. 2089. Inventory and appraisement.	Sec. 2090. Current reports. 2091. Indirect purchase by executor or administrator. 2092. Executor as witness of will. 2093. Attorney's fees. 2094. Testimony of interested parties against the estate. 2095. State statutes. 2096. United States courts rule. 2097. Transactions after death of decedent. 2098. When administrator is competent to testify. 2099. Deposition of decedent. 2100. Competency of co-defendant with administrator.
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§ 2079. **Generally.**—Executors and administrators are made, by the laws of the different states, trustees of all the property in their hands, and they derive their power from letters granted by the probate court. This is strictly true as to administrators, and it is also true of executors in a sense at least, in most jurisdictions in this country, that executors derive their power ultimately from the letters issued by the court, though they may derive it primarily, but not completely, from the testator's will. Creditors must, generally, come into the court of administration; and executors and administrators must usually sue and be sued in their representative capacity.¹

¹ 11 Am. & Eng. Ency. of Law, 741, 742; 2 Blackstone Comm., 494; Ansley v. Baker, 14 Tex. 607, 65 Am. Dec. 136; Wilson v. Davis, 37 Ind. 141; Carrett v. Boeling, 37 U. S. App. 42; at common law executors were considered as deriving their power solely from the will, and the probate was only evidence of their right. For a case in which an executor was held entitled to sue personally there being no creditors and he being the only person interested, see Ewers v. White, 114 Mich. 266, 75 N. W. 271.

§ 2080. **Presumptions.**—It will be presumed in every case that an executor or administrator is necessary, unless facts are shown making exception to the general rule.² After an executor or administrator is once appointed the presumption arises that the court appointing had jurisdiction, that all the legal steps have been complied with and that the appointment was regular.³ Under the statutes and authorities of many states it is not necessary for an administrator or executor to make proof of his letters from the probate court.⁴ When an executor or administrator brings suit it will be presumed, in most jurisdictions, that he has been duly and legally appointed, that he is acting in good faith, and that all of his acts are regular;⁵ and this presumption is conclusive unless denied by a special verified plea.⁶ When the defendant files any pleading, except the verified special answer denying the capacity of the executor or administrator to sue, this conclusive legal presumption generally controls concerning his capacity to sue, and no evidence will be heard to the contrary.⁷ In the absence of evidence to the contrary it will be presumed that a decedent died intestate.⁸ But there is no presumption, in the absence of evidence, that a deceased person died within the state or that his estate is within the jurisdiction of the state.⁹

W. 184; see also, where the action is on a personal contract with himself or for a violation of his equal possession, *Hunt v. Stevens*, Taunt. 113, 115; *Hollis v. Smith*, East 293; *Heath v. Chilton*, 12 & W. 632; *Yarborough v. Ward*, Ark. 204; see also, *Sears v. Daly*, Ore. 346, 73 Pac. 5; *Burrell v. Arn*, 34 Ore. 501, 56 Pac. 809, and authorities cited.

Ansley v. Baker, 14 Tex. 607, 65 N. Dec. 136; *Green v. Rugely*, 23 N. Dec. 540; *Northwestern Conference v. Myers*, 36 Ind. 375.

Railroad Co. v. Belle Center, 48 Ohio St. 273, 27 N. E. 464; *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168; *Proyer v. Richmond*, 16 Ohio St. 5.

But see as to the rule at common law where the cause of action accrued to the deceased in his life-

time, *Williams Exr's*, (7th Eng. ed.) 304, 1875, 1876.

² *Sherman v. Willett*, 42 N. Y. 146; *Gutridge v. Vanatta*, 27 Ohio St. 366; *Bennett v. Gaddis*, 79 Ind. 347.

³ *Noonan v. Bradley*, 9 Wall. (U. S.) 394; *Belden v. Meeker*, 47 N. Y. 307; *McDowell v. North Adm.*, 24 Ind. App. 435, 55 N. E. 789; *Armstrong v. Lear*, 12 Wheat. (U. S.) 175; *Remick v. Butterfield*, 31 N. H. 70.

⁴ *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Brooks v. Walker*, 3 La. Ann. 150; *Stephenson v. Martin*, 84 Ind. 160; *McDowell v. North*, 24 Ind. App. 435, 55 N. E. 789.

⁵ *Bulkley v. Redmond*, 2 Brad. (N. Y.) 281.

⁶ *Whittlesey v. Heberer*, 48 Ind. 260.

§ 2081. **Burden of proof.**—The burden of showing that administration is unnecessary has been held to be upon the heirs, if they resist an application for administration,¹⁰ and when the court has once granted letters, the burden is upon the party assailing the letters.¹¹ It is unnecessary, in most jurisdictions, for the executor or administrator to prove his capacity to sue as a representative of the estate, unless the opposite party shall by special plea deny this right. In the absence of this verified plea, the burden is upon the contestant party to show that the executor or administrator had no power or that his appointment was not regular or his qualification insufficient.¹² The burden is also, in the absence of a verified plea, upon the party attempting to show want of jurisdiction;¹⁴ and where the plea that the plaintiff is administrator is properly denied, it is held that the burden may be entirely lifted from the executor or administrator by the production of the letters and record of the probate court appointing the appointment.¹⁵

§ 2082. **Prima facie evidence—Proof of plaintiff's representative character.**—The letters granted by the probate court, or a duly authenticated copy thereof, are at least prima facie, and, in some jurisdictions, conclusive evidence of the right of the executor or administrator to sue in all matters relating to the decedent's estate, and prima facie evidence of the death of the person on whose estate the letters have been granted, that the representative has been duly appointed and legally qualified and that the court had jurisdiction of the subject matter.¹⁷ The order of appointment of an administrator

¹⁰ *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168. 53 N. Y. 610; *Comstock v. Cra* 3 Wall. (U. S.) 403.

¹¹ *Barnett v. Van Meter*, 7 Ind. App. 45, 33 N. E. 666; *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168. ¹² *Antram v. Ten Eck*, 11 Oh. 665.

¹³ *McDowell v. North Adm.*, 24 Ind. App. 435, 55 N. E. 789, but he may then have to prove it; *Campbell v. United States*, 13 Ct. Cl. (U. S.) 108; *Williams Exr's*, 304 305, 1887, 1888. ¹⁴ *Farnsworth v. Briggs*, 6 561; 2 *Starkie Ev.* 516, 547. ¹⁵ *King v. Chase*, 15 N. H. 9, 4 Dec. 675; *Pick v. Strong*, 26 303, 3 N. W. 697, conclusive on direct attack; *Carroll v. C* 60 N. Y. 121, 123; *Denver &c. v. Woodward*, 4 Colo. 1.

¹⁶ *Brown v. Burdick*, 25 Ohio St. 266; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168. ¹⁷ *Remick v. Butterfield*, 31 70, 64 Am. Dec. 316; *Selbert v. 8 Kans. 52*; *Fletcher's Adm.* ders, 7 Dana (Ky.) 345, 32 Am. 96.

¹⁸ *Welch v. N. Y. Central R. Co.*,

prima facie correct and evidence that the decedent was a resident of the county where the letters are issued. The letters also impute that the bond is regular, and it is prima facie true that a judgment against the estate is evidence of indebtedness.¹⁸ The inventory returned to the court by an executor or administrator is prima facie evidence that he has received the assets named in the instrument.¹⁹ The allowance of a claim by an administrator, has also been held to be prima facie evidence of its correctness and the liability of the estate for such amount.²⁰ "The probate itself," says Professor Greenleaf,²¹ "is the only legitimate ground of the executor's right to sue for the personality, and is conclusive evidence, both of his appointment and of the contents of the will,"²² and if granted at any time previous to the declaration, it is sufficient; for the probate relates back to the death of the testator.²³ The same principle governs in the case of an administrator, whose title, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to enable him to maintain an action for an injury to the goods of the intestate, or for the price, if they have been sold by one who had been his agent.²⁴ But the defendant may show that the probate itself, or

¹⁸ *Eichelberger v. Gross*, 42 Ohio St. 549.

¹⁹ *Cameron v. Cameron*, 15 Wis. 1, 2 Am. Dec. 652; *McWille v. Van Hook*, 35 Miss. 428, 72 Am. Dec. 27; *Railroad Co. v. Belle Center*, 3 Ohio St. 273, 27 N. E. 464.

²⁰ *Thomas v. Chamberlain*, 39 Ohio St. 112.

²¹ 2 Greenleaf Ev., § 839.

²² In most jurisdictions the decree of a probate court, appointing an executor or administrator, cannot be attacked collaterally, except by proving that it is void, as for want of jurisdiction, for fraud, or that it is forgery; it cannot be attacked for irregularity: *Bradley v. Missouri Pac. R. Co.*, 51 Neb. 653, 71 N. W. 282; *Van Gaasbeek v. Staples*, 35 App. Div. (N. Y.) 271, 83 N. Y. 225, affirmed in, 177 N. Y. 524, 69 N. E. 1132; *Templeton v. Ferguson*, 9 Tex. 47, 33 S. W. 329; *Davis v. Miller*, 109 Ala. 589, 19 So. 699; *Cun-*

nius v. Reading School Dist., 206 Pa. St. 469, 56 Atl. 16; *Mohamidu v. Pitchey*, L. R. (1894) A. C. 437; *Missouri &c. R. Co. v. McWherter*, (Kans.) 53 Pac. 135; *Dobler v. Strobel*, 9 N. Dak. 104, 81 Am. St. 535-562, note; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697, the decree of a probate court, as to the appointment of an administrator, made in the exercise of its jurisdiction, is conclusive, in an action by the administrator against a stranger to recover a debt due to the intestate; *Emery v. Hildreth*, 2 Gray (Mass.) 230.

²³ *Smith v. Milles*, 1 Term R. 475, 480; *Woolley v. Clark*, 5 B. & A. 744; *Wankford v. Wankford*, 1 Salk. 299, 301, 306, 307; *Loyd v. Finlayson*, 2 Esp. 564; 1 Comyn Dig. 340, 341, tit. Administration, B. 9, 10; *Dublin v. Chadbourn*, 16 Mass. 433.

²⁴ *Foster v. Bates*, 12 M. & W. 226; *Tharpe v. Stallwood*, 6 Scott N. R. 715.

the letter of administration, is a forgery; or that it was utterly void for want of jurisdiction over the subject, by the court which granted it;³⁵ whether because the person was still living, or because he had no domicile within the jurisdiction of the court, where this is essential;³⁶ or for any other sufficient cause." The representative character of the plaintiff as administrator may also be shown by an exemplification of the record of the grant of the letters, and frequently in other ways provided by statute.³⁷ And where the plaintiff sues as administrator *de bonis non*, it has been held sufficient to prove the grant of administration to himself, reciting the letters granted to the predecessor administrator, without other proof of the letters.³⁸

§ 2083. *Prima facie* evidence.—Evidence of representative character of defendant.—If a defendant is sued as executor or administrator, his representative character may be shown either by evidence such as that already considered as proof of that character in the hands of the plaintiff, or, in most jurisdictions, in a proper case, by proof of acts of intermeddling in the estate as estop him to deny the title, and make him what is termed an executor *de son tort*.³⁹ In all such cases the question, whether the party is chargeable as executor *de son tort*, has been said to be a mixed question of law and fact, the province of the jury being only to say whether the facts are sufficiently proved. If the defendant desires to controvert the fact of the representative character, this is done, at common law, by the plea of *ne unques executor, or administrator*; in which case, it is said, the burden of proving the affirmative is on the plaintiff, who must prove, not only the

³⁵ Buller N. P. 143, 247; Noell v. Wells, 1 Lev. 235, 236; Emery v. Hildreth, 2 Gray (Mass.) 230; Spencer v. Wolfe, 49 Neb. 8, 67 N. W. 858; Cummings v. Lynn, (Iowa) 96 N. W. 857; Hussey v. Southard, 90 Me. 296, 38 Atl. 221; but it has been held that this want of jurisdiction must be apparent on the record; McFeeley v. Scott, 128 Mass. 16.

³⁶ Harvard College v. Gore, 5 Pick. (Mass.) 370; King's Estate, In re, 105 Iowa 320, 75 N. W. 187.

³⁷ Certified copies of the letters testamentary, and the bond, are evidence of his appointment, without

the will or probate thereof: *Man v. Watry*, 45 Wis. 491; see *Sands v. Hickey*, 135 Ala. 322, 32 So. 827; *Murray v. Barden*, 13 Car. 136, 43 S. E. 600.

³⁸ *Catherwood v. Chabaud*, 1 C. 155.

³⁹ *Collier v. Jones*, 86 Ind. Wilson v. Davis, 37 Ind. 141; *B v. Gardner*, 11 Ind. App. 475, 3 E. 290; *Kahn v. Tinder*, 77 Ind. Rohn v. Rohn, 98 Ill. App. 509 affirmed in 204 Ill. 184, 68 N. E. Stephens v. Atkins Bros., (La. So. 108.

⁴⁰ *Padget v. Priest*, 2 Term R. 9

pointment of the defendant to that office, but that he has taken upon himself the trust;²¹ and this may be by his proving the will, or taking the oaths, and giving bond, or, if he is charged as executor de son tort, by proving acts of intermeddling with the estate and controverting property that should have been used in the payment of debts and distribution. "The plaintiff should always take the precaution," says Professor Greenleaf, "where this plea is pleaded, to serve the defendant with notice to produce the letters testamentary, or letters of administration, at the trial, they being presumed to be in his possession, in order to lay a foundation for the introduction of secondary evidence."²² He must also give some evidence of the identity of the party with the person described in the letters as executor or administrator. If the evidence shows the defendant liable as an executor de son tort, by intermeddling, he may discharge himself by proof that he delivered the goods over to the rightful executor before action brought, but not afterwards;²³ or, that he subsequently took out letters of administration, and has administered the estate according to law."²⁴ If he had received the money of third persons, assumpsit for money had and received, would lie against him, at common law, without declaring against him as executor.²⁵

§ 2084. **Absentee.**—If a person is absent from his home or usual place of residence for the certain number of years, defined by the statutes of the different states, and nothing is heard of him by those who are interested in knowing his whereabouts, the presumption arises that such person is dead and letters of administration may be issued upon his estate. Such letters when issued are prima facie evidence

²¹ 1 Chitty Pl. 484; *King v. Sutton*, 10 Saund. 274, n. 3, mere application for order of probate without an actual grant thereof is not a probate of the will which will entitle a creditor to sue the executor; *Mohamidu v. Pitchey*, L. R. (1894) A. C. 437; *McDonald v. Hanna*, 100 Mich. 412, 9 N. W. 171; see also, *Ralston's Estate*, 158 Pa. St. 645, 28 Atl. 139.

²² 2 Greenleaf Ev., § 343, citing *Saunders Pl. & Ev.* 511, 512; 2 *Starkie Ev.* 320; *Douglass v. Forrest*, 4 Bing. N. Cas. 686, 704; *Atkins v. Tregold*, 2 B. & C. 23, 30;

Cottle v. Aldrich, 4 M. & S. 175, *Sed quære* as to this presumption; and see, *Waite v. Gale*, 2 Dowl. & Lownes 925, 9 Jur. 782.

²³ *Curtis v. Vernon*, 3 Term R. 587; *Vernon v. Curtis*, 2 H. Bl. 18; *Andrews v. Gallison*, 15 Mass. 325.

²⁴ 2 Greenleaf Ev., § 343; *Shillaber v. Wyman*, 15 Mass. 322; *Andrews v. Gallison*, 15 Mass. 325; *Kahn v. Tinder*, 77 Ind. 147.

²⁵ *Waite v. Gale*, 9 Jur. 782, 2 Dowl. & L. 925; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469.

§ 2087. **Admissions and declarations of decedent.**—The admissions or declarations of the decedent made concerning certain transactions are admissible, under and in accordance with rules already stated, against the personal representative when such transactions are the subject of litigation.⁴⁹ This rule applies even to admissions made to a stranger.⁵⁰ Declarations made by a decedent after the purchase of property, and while in possession and in disparagement of his title, are competent as a part of the *res gestae*,⁵¹ although elsewhere shown, the competency of admissions of the decedent against his personal representative does not always depend upon the doctrine of *res gestae*. Statements by a decedent, made in the presence of the defendant, and which are entirely favorable to decedent's estate, cannot, ordinarily, be used any more than if he were plain in the action; but if made in the presence of defendant and accepted in by him, they may be admitted.⁵² Declarations of an ancestor of the tenure by which he holds land, are admissible, in a proper case to prove seisin in another party; and in an action against heirs for the recovery of real estate, it is held competent to prove the admissions of the ancestor that he did not hold the land as owner.⁵³ The admissions against title are not only admissible against his personal representative and heirs, but they are generally admissible against all claiming under him.⁵⁴

§ 2088. **Recitals in deed.**—The recital of an order of sale, or like, in a deed made by an executor or administrator is presumptively

correct. *L. R.* 4 Eq. 451; *Hill v. Walker*, 4 K. & J. 166.

⁴⁹ *Forsythe v. Ganson*, 5 Wend. (N. Y.) 558; *Slade v. Leonard*, 75 Ind. 171; 1 *Greenleaf Ev.*, § 189; *Denman v. McMahan*, 37 Ind. 241; see for numerous other authorities, Vol. I, § 261.

⁵⁰ *Jones Ev.*, § 243; *Clauser v. Ruckman*, 104 Ind. 588, 4 N. E. 202.

⁵¹ *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. 860, 19 N. E. 190; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 442; *Currier v. Gale*, 14 Gray (Mass.) 504, 77 Am. Dec. 343; *Garber v. Doerson*, 117 Pa. St. 162, 11 Atl. 777.

⁵² *Philadelphia Trust Co. v. Phila-*

delphia Co., 177 Pa. St. 38, 38 688; *Cheeseman v. Kyle*, 15 Ohio 15; *Chase v. Ewing*, 51 Barb. (N. Y.) 597; *Bristol v. Bristol*, 82 276; *Ewbank Tr. Ev.*, § 367; *Ab Tr. Ev.* (2d ed.), § 75.

⁵³ *Vanduyn v. Hepner*, 45 Ind. 171; *Slade v. Leonard*, 75 Ind. 171; *Greenleaf Ev.*, § 189.

⁵⁴ *Nelson v. Iverson*, 24 Ala. 9 Am. Dec. 442; *Norton v. Pettib* 7 Conn. 319, 18 Am. Dec. 116; *Bley v. Spofford*, 23 N. H. 444, 55 Dec. 205; *Beers v. Hawley*, 2 C 467; *Waring v. Warren*, 1 Jo (N. Y.) 340; *Jackson v. Bar* Johns. (N. Y.) 230, 4 Am. Dec. 2

evidence thereof at least after the lapse of a considerable time.⁵⁵ In many states, statutes make the recitals in such deeds, or even their execution, prima facie evidence of the regularity of the proceedings.⁵⁶ So, in other cases, such recitals may be prima facie evidence of the facts recited where the instrument is an ancient document.⁵⁷ And a recital in an administrator's deed as to the authority of the grantor has even been held to estop such grantor from denying it.⁵⁸

§ 2089. Inventory and appraisement.—The inventory, as returned, is prima facie evidence that the executor or administrator has received the assets named therein; this may, however, be rebutted.⁵⁹ It is presumed that personal property enumerated in an inventory belongs to the decedent;⁶⁰ but it is held that the executor or administrator is not estopped by the inventory to show that the property belonged to a third party or even to himself.⁶¹ Admissions made in an inventory will not operate as an estoppel in pais, unless objected upon by others, who would be prejudiced in consequence thereof.⁶² The legal right to show the true owner of the property does not depend upon the knowledge or ignorance of title by a party at the time of returning the inventory, and as the inventory is only prima facie evidence, the true title may generally be shown.⁶³ So, an appraisement is prima facie evidence of the value of the articles named in it,⁶⁴ but evidence may be introduced to show real value;

⁵⁵ *Baeder v. Jennings*, 40 Fed. (U. S.) 199.

⁵⁶ *Egan v. Grece*, 79 Mich. 629, 45 N. W. 74; *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713, 716.

⁵⁷ See Vol. II, § 1278.

⁵⁸ *Williams v. Corzine*, 85 Tex. 499, 2 S. W. 399; *Larco v. Casaneuava*, 10 Cal. 560.

⁵⁹ *Hilton v. Briggs*, 54 Mich. 265, 10 N. W. 47; *Stewart's Estate*, In re, 37 Pa. St. 175, 26 W. U. C. (Pa.) 553, 20 Atl. 554; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *McWillie v. Van Vacter*, 35 Miss. 428, 2 Am. Dec. 127, but the burden is held to be upon the administrator who has inventoried them to show

that they did not belong to the estate; *Baykey*, In re, (N. J.) 59 Atl. 215.

⁶⁰ *King's Estate*, In re, 12 W. N. C. (Pa.) 109; *Lamme v. Dodson*, 4 Mont. 560.

⁶¹ *White v. Shepperd*, 16 Tex. 163; *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

⁶² *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

⁶³ *Dunham v. Chatham*, 21 Tex. 231, 73 Am. Dec. 242; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

⁶⁴ *Matter v. Radovich*, 74 Cal. 536, 5 Am. St. 466; *Mullon*, In re, 145 N. Y. 98, 39 N. E. 821; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652.

and it is not conclusive either against the executor or administrator or against third parties.⁶⁶

§ 2090. Current reports.—The current reports filed by an executor or administrator and approved by the proper court are *prima facie* evidence against the personal representative, but are not conclusive against him.⁶⁷ And the allowance by the court of the executor's current or partial reports of an executor or administrator is not conclusive upon the heirs or devisees of the decedent.⁶⁸ An administrator or executor may use the account books of the decedent which furnish information concerning debts sued upon, and where they are ambiguous, parol evidence may be introduced to explain them. So, in an action by an executor or administrator the defendant is entitled to use the account books of plaintiff's intestate, and if items sued upon do not appear upon the books, this is a circumstance to be considered by the jury.⁶⁹ So, evidence of third persons has been received in regard to entries in account books known to have been made by the deceased.⁷⁰

§ 2091. Indirect purchase by executor or administrator.—Where in an action one party sets up an indirect purchase on the part of the executor or administrator, the relationship between the purchaser and the executor or administrator may be shown.⁷¹ This may also be shown by the circumstances connected with the sale of the property, as that the nominal purchaser shortly afterwards conveyed his interest to the executor or administrator, especially if no money was really paid,⁷² or if the purchaser had no funds or means with which to make payment.⁷³

⁶⁶ *Harrison v. Harrison*, 39 Ala. 489. (N. Y.) 60; *Marsh v. Brown*, 18 H. (N. Y.) 319.

⁶⁷ *Morrison v. Burlington & C. R. Co.*, 84 Iowa 663, 51 N. W. 75. ⁷¹ *Davies v. Hughes*, 86 Va. 909, S. E. 488; *Remick v. Butterfield*, N. H. 70, 64 Am. Dec. 316; *Jennison v. Hopgood*, 7 Pick. (Mass.) 1, Am. Dec. 258; *Worthy v. Johnson*, Ga. 236, 52 Am. Dec. 399; *Culver v. Collins*, 11 N. J. Eq. 215.

⁶⁸ *Fraim v. Millison*, 59 Ind. 123; *Collins v. Tilton*, 58 Ind. 374; *State v. Brutch*, 12 Ind. 381. ⁷² *Coat v. Coat*, 63 Ill. 73; *McNair v. Fuller*, 121 N. Car. 209, 28 S. 299.

⁶⁹ *Slade v. Leonard*, 75 Ind. 171. ⁷³ *Obert v. Obert*, 10 N. J. Eq. 91.

⁷⁰ *Carroll v. Davis*, 9 Abb. N. Cas. 299.

§ 2092. **Executor as witness of will.**—The executor of a will is a competent witness in support of the will as to matters accruing during the life time of the testator;⁷⁴ and evidence is admissible of all the circumstances surrounding the author of the instrument, subject to those limitations which are always observed when the rule is applied.⁷⁵ Either by statute or judicial decision it is now the rule in most jurisdictions that an executor's right to commissions is not such an interest as disqualifies him from being an attesting witness.⁷⁶

§ 2093. **Attorney's fees.**—Where the administrator acts both as administrator and as attorney, it is proper for the court to hear evidence as to the value of the services rendered as attorney in order to fix the fees that shall be allowed the administrator.⁷⁷ The court may hear evidence as to the value of administrator's services in order to determine how much was legally allowed as attorney fees.⁷⁸

§ 2094. **Testimony of interested parties against the estate.**—The statutes of the different states have placed limitations upon the admission of the testimony of a party or interested witness, as against the estate of the deceased person, or his heirs, or successors.⁷⁹ The statutes of each state must be consulted to arrive at the exact limitations. The object of these statutes is to place both parties on an equality, and if death has silenced one party, not to allow the other party to take advantage of this.⁸⁰ The test of interest, generally adopted, is, that the witness will either gain or lose by the direct legal operation of the judgment, or that the record will be legal evidence

⁷⁴ *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225.

⁷⁵ *Jarman Wills*, 380, note 1; *Dougherty, Adm., v. Rogers*, 119 Ind. 254, 3 L. R. A. 847, 20 N. E. 779; *Price v. Price*, 89 Ind. 90.

⁷⁶ *Meyer v. Fogg*, 7 Fla. 292; *Richardson v. Richardson*, 35 Vt. 238; *Stewart v. Harriman*, 56 N. H. 25; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Jordan's Est., In re*, 161 Pa. St. 393, 29 Atl. 3; *Noble v. Burnett*, 10 Rich. (S. Car.) 505.

⁷⁷ *Russell v. Hilton*, 37 Misc. (N. Y.) 642, 76 N. Y. S. 233.

⁷⁸ *Pollard v. Barkley*, 117 Ind. 40, 17 N. E. 294.

⁷⁹ *Stalling v. Hinson*, 49 Ala. 92; *McKaig v. Hebb*, 42 Md. 227; *Pope v. Allen*, 90 N. Y. 298; *Wilcox v. Corwin*, 117 N. Y. 500, 23 N. E. 165; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. 860, 19 N. E. 190.

⁸⁰ *Brown v. Brightman*, 11 Allen (Mass.) 226; *Latimer v. Sayre*, 45 Ga. 468; *Hubbell v. Hubbell*, 22 Ohio St. 208; *McGehee v. Jones*, 41 Ga. 123; *Brown v. Lewis*, 9 R. I. 497; *Crawford v. Robie*, 42 N. H. 162; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. 860, 19 N. E. 190.

against him in another action, and the interest must be a present, certain and vested one, and not one that is remote or uncertain.⁸¹ In determining the competency of a witness, the accepted rule is, not to regard the mere letter of the statute, but to look to its spirit and purpose.⁸² And in an action by an administrator it has been held that the defendants are not disqualified from testifying to matters as to which the decedent in his life time would not have been a competent witness.⁸³ This general subject has already been considered,⁸⁴ but it seems desirable to treat it briefly in this connection in addition to what has already been said.

§ 2095. State statutes.—While the wording of the statutes of the different states differs yet in the main the substance of most of them is the same regarding the incompetency of an interested party testifying against the estate. In Indiana: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the life time of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."⁸⁵ So, "In all suits by or against heirs or

⁸¹ *Connelly v. O'Connor*, 117 N. Y. 91, 22 N. E. 753; *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894; *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. 725.

⁸² *Wiseman v. Wiseman*, 73 Ind. 112, 38 Am. R. 115; *Durham v. Shannon*, 116 Ind. 403, 9 Am. St. 860, 19 N. E. 190.

⁸³ *Abbott Tr. Ev.* (2d ed.) 79; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

⁸⁴ Vol. II, §§ 737, 738; for additional recent authorities, see, *Great Camp &c. v. Savage*, (Mich.) 98 N. W. 26; *Hendricks v. Daniel*, 119 Ga. 358, 46 S. E. 438; *Mankey v. Willoughby*, 21 App. Dec. (D. C.) 314; *Huit v. Huit*, (Iowa) 98 N. W. 123; *United Loan & Deposit Co. v. Bitzer*, (Ky.) 78 S. W. 183; *Sorensen v. So-*

rensen, (Neb.) 98 N. W. 837; *Dwinell v. Holt*, (Vt.) 56 Atl. 99; *Meyer v. Hafemeister*, 119 Wis. 538, 97 N. W. 165, in all of which the statute was held to make the witness or evidence incompetent. In the following cases the particular evidence was held admissible: *Duckworth v. Duckworth*, (Md.) 56 Atl. 490; *Bell v. Chartier*, 106 Ill. App. 149; *Dawson v. Wombles*, (Mo. App.) 78 S. W. 823; *Wetherington v. Williams*, (N. Car.) 46 S. E. 728; *Crowley v. Crowley*, 72 N. H. 241, 56 Atl. 190; *Rosseau v. Rouss*, 86 N. Y. S. 497; *Sloan v. Sloan*, 21 Ind. App. 315, 52 N. E. 413, statute not applicable where claim is prosecuted by one estate against another.

⁸⁵ *Burns' R. S.* (Ind.), § 506; *Matton v. Young*, 45 N. Y. 696; *McGehee*

devisees, founded on a contract with, or demand against, the ancestor, to obtain title to or possession of property, real or personal, of or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.”⁸⁶

§ 2096. **United States courts rule.**—In the United States courts a witness is competent to testify in all civil actions, whether he is a party to or interested in the issue tried: “Provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the law of the state in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty.”⁸⁷ This statute, rather than the state law, governs in such cases in the federal courts.⁸⁸

§ 2097. **Transactions after death of defendant.**—Neither the personal representative nor the adverse party will be allowed to testify as to matters occurring before the death of the decedent, within the prohibition of the statute; but both may testify, in a proper case, as to matters which have arisen after the death. Thus, it has been held, the administrator may testify concerning all contracts made with him while serving in his representative capacity.⁸⁹

v. Jones, 41 Ga. 123; Brown v. does or does not operate to exclude
 Brightman, 11 Allen (Mass.) 226; testimony of parties, see, Potter v.
 Jones v. Jones, 36 Md. 457; Hubbell Third Nat. Bank, 102 U. S. 163; Mo-
 v. Hubbell, 22 Ohio St. 208; New nongahela Nat. Bank v. Jacobus, 109
 York Code Civ. Pro., § 829; Bennett U. S. 275, 3 Sup. Ct. 219; Beaumont
 v. Austin, 5 Hun (N. Y.) 536; Mc- v. Webster, 81 Fed. 535; Hobbs v.
 Kaig v. Hebb, 42 Md. 227. McLean, 117 U. S. 567, 6 Sup. Ct.
 ⁸⁶ Burns’ R. S. (Ind.), § 507. 870; Steiner v. Eppinger, 61 Fed.
 ⁸⁷ U. S. R. S., § 858. 253.

⁸⁸ Page v. Burnstine, 102 U. S. 664; ⁸⁹ Sedgwick v. Tucker, 90 Ind. 271;
 De Beaumont v. Webster, 81 Fed. Volles v. Volles, 51 Ind. 385; see
 535; Morris v. Norton, 75 Fed. 912; also, Walker v. Neil, 117 Ga. 733, 45
 but see, Continental Nat. Bank v. S. E. 387.
 Hellman, 81 Fed. 36; as to when it

§§ 2098-2100.] EXECUTORS AND ADMINISTRATORS.

An administrator would not ordinarily be allowed to testify to anything occurring before the death of the decedent which would prejudice the interests of the estate, but an executor might testify to proper circumstance surrounding the execution of the will.⁹⁰

§ 2098. When administrator is incompetent to testify.—In Indiana it has been held that where an administrator has paid a claim he will not be allowed to prove the justness of the claim, his mistake he would have to reimburse the estate.⁹¹ An executor or administrator may only testify concerning a claim due him from the estate, when the court grants such permission; and the estate properly represented by some one appointed by the court to defend the claim.⁹²

§ 2099. Deposition of decedent.—In Indiana, where the deposition of the decedent has been taken, or his testimony, concerning the same transaction, is on record, either in the case at issue or in any other case, where his testimony covered the same ground, this deposition or record may be used, and the adverse party will be compelled to testify for himself, but only so far as the matter is embraced by the deposition or former testimony.⁹³ And it is held that the fact that such a deposition is on file is enough to allow the adverse party to testify as to the matters covered by it and thus remove the incompetency.

§ 2100. Competency of a co-defendant with administrator.—In New York, in an action upon a joint note or joint contract, against the surviving maker and the executor or administrator of the deceased, the surviving maker, having an interest in holding the executor or administrator as a defendant liable, to reduce his share of the judgment, is incompetent to testify as to transactions that occurred between himself and the deceased.

⁹⁰ Covert v. Sebern, 73 Iowa 564, § 737, n. 52, for similar rulings in other states.
⁹¹ Wilcox v. Corwin, 117 N. Y. 23 N. E. 165; but see, Fletch v. Sanders, 7 Dana (Ky.) 100.
⁹² Goodwin v. Goodwin, 48 Ind. 584.
⁹³ Bentley v. Brown, 123 Ind. 552, 32 Am. Dec. 96, which holds that a party may be a witness for himself if his adversary consent, and his deposition read without objection.

⁹⁴ Webb v. Corbin, 78 Ind. 403.
⁹⁵ Coble v. McClintock, 10 Ind. App. 562, 38 N. E. 74; see also, Vol. II, operate for himself as well as for the estate.

The deposition of a competent witness at the time of taking the deposition is not rendered inadmissible by a subsequent marriage with the administratrix on whose behalf the deposition was taken, where the cause for taking it still existed.⁹⁶

co-defendant, especially if he be insolvent and have no real interest.

⁹⁶ Cameron v. Cameron, 15 Wis. 1, 82 Am. Dec. 652.

CHAPTER CIV.

FALSE IMPRISONMENT.

Sec.	Sec.
2101. False imprisonment—Definition.	2111. Private person—Arrest without warrant.
2102. False imprisonment and malicious prosecution—Distinction.	2112. Private person aiding officer.
2103. Burden of proof.	2113. Judicial officers—Liability.
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2105. Restraint.	2115. Damages.
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2109. Motive and good faith.	2119. Advice of counsel.
2110. Peace officer—Arrest without warrant.	2120. Arrest under warrant—Justification.
	2121. Warrant fair on its face—Protection.

§ 2101. **False imprisonment—Definition.**—Judge Valentine, the Kansas Supreme Court, has given a most apt definition of false imprisonment in the following language: "False imprisonment necessarily a wrongful interference with the personal liberty of individual. The wrong may be committed by words alone, or by act alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard."¹ "Two things are requis-

¹ *Comer v. Knowles*, 17 Kans. 436.

in order to constitute the offense: (1) Detention of the person; (2) the unlawfulness of such detention. A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. The want of lawful authority is an essential element: malice is not."³ The authorities generally agree on the proposition that false imprisonment is the illegal restraint of the person of any one against his will. Generally it includes an assault and battery, or at least a technical assault.⁴ And false imprisonment has been defined to be the "unlawful restraint of a person without his consent either with or without process of law."⁴ And by another court as being in the "nature of a trespass to the person committed by one against another in unlawfully arresting or detaining him against his will."⁵ And if a person is imprisoned without process, and such imprisonment is unjustifiable, it is false imprisonment.⁶

§ 2102. False imprisonment and malicious prosecution—Distinction.—The distinction must be observed between false imprisonment and malicious prosecution, both in pleading and proof. At common law the action for false imprisonment was trespass on the case; for malicious prosecution it was trespass vi et armis. Where detention or imprisonment is without authority and against the will, it is false imprisonment, whether with or without malice or want of probable cause. Where the detention or imprisonment is under legal process, but the action has been instituted and prosecuted maliciously and without probable cause, it is malicious prosecution. Indeed, in the latter there need be no imprisonment.⁷ False imprisonment is based either upon a void writ or where the arrest is made without writ and without reasonable grounds therefor; while malicious prosecution is

³ *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663. *v. Tate*, 43 Ind. 60; *Comer v. Knowles*, 17 Kans. 436; *Turner v.*

⁴ *State v. Lunsford*, 81 N. Car. 528; *Walker*, 3 Gill & J. (Md.) 377; *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932; *Jackson v. Knowlton*, 173 Mass. 94; *Ahern v. Collins*, 39 Mo. 145; *Marks v. Townsend*, 97 N. Y. 590; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Berry v. Hamill*, 12 S. & R. (Pa.) 210; *Herzog v. Graham*, 9 Lea (Tenn.) 152; *Murphy v. Martin*, 58 Wis. 276.

⁵ *Johnson v. Bouton*, 35 Neb. 898.

⁶ *Burns v. Erben*, 40 N. Y. 463.

⁷ *Murphy v. Martin*, 58 Wis. 276; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321; *King v. Johnston*, 81 Wis. 578; *Bergeron v. Peyton*, 106 Wis. 377.

⁸ *Rich v. McInerny*, 103 Ala. 345; *Colter v. Lower*, 35 Ind. 285; *Boaz*

based upon a valid writ issued maliciously and without probable cause.⁸ In actions for false imprisonment, at most, but two things need be proved: (1) Detention of the person; (2) the unlawfulness of such detention. While in actions for malicious prosecution the proof must establish the propositions: (1) The existence of malice (2) want of probable cause; (3) the favorable termination of a prosecution.⁹ It has been held that where the plaintiff shows that the defendant has deprived him of his liberty by unlawful means, malice and the want of probable cause will be presumed.¹⁰ It seems to be the rule that in actions for false imprisonment the question of probable cause, when involved, should be submitted to the jury.¹¹ In drawing the line of distinction between these two classes of cases, the Supreme Court of New York states the rule as follows: "It is obvious that these two classes of wrongs and remedies require different rules both of pleading and evidence, and are essentially distinct. In an action for false imprisonment, the gist of the action is an unlawful detention. Malice in the defendant will be inferred, so far at least as to sustain the action, and the only bearing of evidence to show or disprove actual malice is upon the question of damages. So, also, probable cause, or reasonable grounds of suspicion against the party arrested afford no justification of an arrest or imprisonment which is without authority of law. There are some cases in which the existence of a reasonable ground of suspicion is spoken of as a defense in actions for false imprisonment; but upon examination it will be found that these cases turn upon the authority given to magistrates in particular instances to arrest upon suspicion merely, to prevent or punish crimes, and in which, therefore, a reasonable suspicion is a sufficient authority and justification for an arrest; or else they are cases in

⁸ Sheppard v. Furniss, 19 Ala. 760; one v. Kiernan, 23 R. I. 578; Murphy v. Watson, 9 Conn. 140; v. Martin, 58 Wis. 276.
⁹ Lovier v. Gilpin, 6 Dana (Ky.) 321; *Thorp v. Carvalho, 14 Misc. (N. Y.) 554; Warren v. Dennett, 17 Misc. (N. Y.) 86; Cunningham v. East River &c. Co., 60 N. Y. Super. 282.
¹⁰ Warren v. Dennett, 17 Misc. (N. Y.) 86; Perry v. Sutley, 18 N. Y. S. 633.
¹¹ Perry v. Sutley, 18 N. Y. S. 633; Murray v. Long, 1 Wend. (N. Y.) 140; Hall v. Suydam, 6 Barb. (N. Y.) 83; Wanser v. Wyckoff, 9 Hun (N. Y.) 178.

which the actual commission of a felony was first proved, and the case turned upon the ground for suspecting the person arrested."¹² In actions for malicious prosecution, proof of actual malice and want of probable cause is vital to the support of the action. While in actions for false imprisonment malice is not essential, but may be proved for the purpose of enhancing the damages; but the defendant may disprove the malice.¹³

§ 2103. **Burden of proof.**—The burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence the substance of the charge; it rests with the plaintiff to prove the arrest and detention; and that the same was unlawful or unauthorized; or in case it was upon a lawful writ or process, such abuse of the process as would constitute false imprisonment by reason of the abuse of such process. Where the defendant was charged with procuring the wrongful arrest of the plaintiff, the court instructed the jury on the question of burden of proof as follows:¹⁴ "It is not absolutely necessary to show that the defendant gave personal orders or directions to the police touching the arrest, in order to establish a *prima facie* case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances and the conduct and acts of the defendant raise a fair and reasonable presumption that a wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption. The burden of proof upon the proposition as to the arrest being directed or procured by the defendant is upon the plaintiff. She must establish this proposition by fair preponderance of the evidence. If, to your minds, she has failed to do that, or if the evidence on this point is evenly balanced, so that it does not preponderate in favor either of one side or the other, your verdict will be in favor of the defendant. If you find from the whole evidence that the defendant complained to the police of the robbery of the jewels in her house, and stated various circumstances of sus-

¹² *Brown v. Chadsey*, 39 Barb. (N. Y.) 253, 262.

¹³ *Von Latham v. Libby*, 38 Barb. (N. Y.) 339; *Warren v. Dennett*, 17 Misc. (N. Y.) 86; for a full discussion on the distinctions between false imprisonment and malicious prosecution and the collection of the

authorities, see, *Fiero Torts*, 547; 1 *Jaggard Torts*, 630, 631.

¹⁴ *Stewart v. Feeley*, 118 Iowa 524; *Brock v. Stimson*, 108 Mass. 520; *Perry v. Buss*, 15 N. H. 222; *Fuller v. Rounceville*, 29 N. H. 554; *Noyes v. Edgerly*, 71 N. H. 500.

picion which had come to her knowledge, and the police officer inquired into those circumstances and on his own authority arrested the plaintiff and took her to the police station, the defendant is entitled to your verdict."¹⁵ It has been held that "evidence tending to show that the plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no authority to issue in the premises, is sufficient to sustain a count for false imprisonment."¹⁶ The plaintiff must recover, if at all, upon the facts stated in his complaint, and proof which shows that the arrest was under a warrant and the process was abused by an unreasonable detention, and a refusal to receive bail, will not support a complaint which alleges a wrongful and unlawful imprisonment.¹⁷

§ 2104. **Arrest.**—Where an officer informs a person that he has a warrant for him, and thereupon such person submits to the custody of the officer, it is a sufficient arrest.¹⁸ And where the evidence shows that the officer notified the person that he had a warrant for him, and asked him if he would submit, and the person answered that he would, it was held sufficient proof of arrest.¹⁹ "Every confinement of a person is an imprisonment, whether it be in a common prison or a private house, or in the stocks, or even by forcibly detaining one on the public streets."²⁰ "Arrest signifies a restraint of the person by a restriction of the right of locomotion—which cannot be implied from the mere notification, or summons on petition, or any other sort of such process, by which no bail is required, nor restraint of personal liberty."²¹ But an arrest is not made where the officer merely informs a person that it is his business to arrest him, but does not take the person into custody and does not deprive him of his freedom of motion.²² A recent writer on the law of torts thus defines arrest: "Arrest signifies the restraint of a man's person. It may be considered as the beginning of an imprisonment. Mere words alone will not constitute an arrest, unless, of course, the person submits. The

¹⁵ *Limbeck v. Gerry*, 15 Misc. (N. Y.) 663, 672.

¹⁶ *Boeger v. Langenberg*, 97 Mo. 390.

¹⁷ *Nelmitz v. Conrad*, 22 Ore. 164; *Ocean &c. Co. v. Williams*, 69 Ga. 251.

¹⁸ *Van Voorhes v. Leonard*, 1 T. & C. (N. Y.) 148.

¹⁹ *Haskins v. Young*, 2 Dev. (N. Car.) 527.

²⁰ *Floyd v. State*, 12 Ark. 43.

²¹ *Hart v. Flynn*, 38 Ky. (8 D. 190); *French v. Bancroft*, 1 (Mass.) 502.

²² *Hill v. Taylor*, 50 Mich. 548.

must in all instances be circumstances indicating that the party is under restraint and within the power of the officer. Violence is unnecessary to effect an arrest if it can be made without. It was the rule at common law, and so with us under many decisions, that a sheriff, constable, or peace officer, in the absence of any express statutory provision, may arrest, without process, upon reasonable suspicion, one who is charged with the commission of a felony, and detain him until a warrant can be obtained."²³

§ 2105. **Restraint.**—To sustain a charge of false imprisonment it is not necessary for the plaintiff to prove that the person charged used violence, or laid hands upon him, or placed him in a jail or prison. But it is sufficient to prove that the defendant at some time or place, and in some manner, restrained the plaintiff of his liberty, or otherwise detained him in any manner from going where he wished, or prevented him from doing what he desired.²⁴ And it has been held that proof of mere words is sufficient to constitute a detention or imprisonment where it is also shown that they did actually impose a restraint upon the person.²⁵ Mr. Starkie says: "In ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting, until actual violence be used."²⁶ The Supreme Court of Michigan on this subject say: "It is the fact of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which, to all appearance, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not sub-

²³ Kinkead Torts, § 215.

²⁴ Hawk v. Ridgway, 33 Ill. 473; Brushaber v. Stegemann, 22 Mich. 266; McNay v. Stratton, 9 Ill. App. 215; Smith v. State, 7 Humph. (Tenn.) 43; Bloomer v. State, 3 Sneed (Ten.) 66; Sorenson v. Dundas, 50 Wis. 335; Mowry v. Chase, 100 Mass. 79; Strout v. Gooch, 8 Me. 126; Gold v. Bissell, 1 Wend. (N. Y.) 210; Arrowsmith v. Le Mesurier, 5 B. & P. 211; Ahern v.

Collins, 39 Mo. 145; Bonesteel v. Bonesteel, 28 Wis. 245; Murphy v. Martin, 58 Wis. 276; Van Voorhes v. Leonard, 1 Thomp. & C. (N. Y.) 148.

²⁵ Pike v. Hanson, 9 N. H. 491; Page v. Mitchell, 13 Mich. 63, 68; Josselyn v. McAllister, 25 Mich. 45; Moore v. Thompson, 92 Mich. 498; Johnson v. Tompkins, 1 Baldw. (U. S.) 571.

²⁶ 3 Starkie Ev., 1448.

mit cannot be regarded as arrested until his person is touched; when he does submit, no such necessity exists. If the plaintiff yielded through fear to the demands of the two defendants armed with clubs, we cannot doubt he was imprisoned within the meaning of the law. While the authorities agree that actual manual seizure is not necessary, there must be that or some equivalent which amounts to personal coercion, as there can be no action for false imprisonment where the plaintiff has not been arrested or restrained of his liberty.²⁸ The gist of the action of false imprisonment, or, some authorities say, it, the gravamen of the offense, is the unlawful detention of another without his consent, or, more properly, against his will. It is necessary that the proofs show that the party causing the arrest or imprisonment is actuated by malice, as this is not an essential element of the case. Hence the charge is made out when the proof shows that the plaintiff was detained or restrained of his liberty without lawful authority.²⁹ Proof of but two things are requisite, "detention of person, and unlawfulness of such detention."³⁰

§ 2106. **Restraint—Illustrations.**—It was held sufficient unlawful restraint or detention where the proof showed that the defendant had locked the plaintiff's servant in his bank, even where it appeared that the bank was closed at the usual time, and the servant was in the bank, but was not permitted to go out.³¹ And where it was shown that while the prisoner was under arrest the officer or defendant took him to an improper place and by threats and intimidation wrongfully extorted money from him, they were held liable in an action for false imprisonment.³² So, where a man was placed in a boat and taken from the place where he had a right to be, it was a sufficient restraint to constitute false imprisonment.³³ And where a man was arrested on suspicion and chained, there was a

²⁸ *Brushaber v. Stegemann*, 22 Mich. 266.

²⁹ *Hill v. Taylor*, 50 Mich. 549; *Moore v. Thompson*, 92 Mich. 498; *Kirk v. Garrett*, 84 Md. 383.

³⁰ *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Hobbs v. Ray*, 18 R. I. 84; *McConnell v. Kennedy*, 29 S. Car. 180; *Rich v. McInerney*, 103 Ala. 345; *Boaz v. Tate*, 43 Ind. 60; *McCarthy*

v. DeArmit, 99 Pa. St. 63; *Noyes v. Edgerly*, 71 N. H. 500.

³¹ *Rich v. McInerney*, 103 Ala.

³² *Woodward v. Washburn*, 3 (N. Y.) 369.

³³ *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Wood v. Graves*, 144 Mass. 350; *Baldwin v. Weed*, 17 Wend. (N. Y.) 224; *Page v. Cushing*, 38 Me. 224; *Crowell v. Gleason*, 10 Me. 325.

³⁴ *People v. Wheeler*, 73 Cal. 25.

bility for false imprisonment.⁸⁴ Where one man met another in a highway, stopped him and refused to permit him to pass along the highway, it was held an illegal imprisonment.⁸⁵ Where a man with a drawn revolver kept another in a corn-crib with the threat that he would keep him there until he was as cold as the grave, it was held a case of false imprisonment.⁸⁶ So, as to locking another in a private room, accompanied with threats of violence.⁸⁷ And it was held sufficient where a young lady was taken into a physician's inner office and charged with having committed larceny, and she was not permitted to leave the room.⁸⁸ So, where a priest, with the assistance of others, brought another into his house and compelled him, in fear of bodily injury, to retract certain charges he had made against the priest.⁸⁹

§ 2107. **Abuse of process—Unreasonable restraint.**—While it is the general rule that, in order to constitute false imprisonment, the restraint must be unlawful in its inception either by virtue of an arrest without warrant or by arrest on a void process, yet there may be false imprisonment where the arrest and detention are made under a lawful warrant or legal process. Where a peace officer arrests a person on a warrant or other lawful process, it is the duty of such officer to take him immediately before some magistrate or judge authorized to inquire into the cause of the arrest; and if, failing to do so, he detains the person as a prisoner an unreasonable length of time, he will be liable for an action for false imprisonment. This rule is stated as follows: "It cannot be questioned that when a person is arrested either with or without a warrant, it becomes the duty of the officer or the individual making the arrest to convey the prisoner in a reasonable time and without unnecessary delay before a magistrate to be dealt with as the exigency of the case may require. The power to make the arrest does not include the power to unduly detain in custody; but on the contrary is coupled with a correlative duty, incumbent on the officer, to take the accused before a magistrate 'as soon as he reasonably can.' If the officer fails to do this and unreasonably detains the accused in custody, he will be guilty

⁸⁴ *Lavina v. State*, 63 Ga. 513.

⁸⁵ *McNay v. Stratton*, 9 Ill. App.

⁸⁶ *Bloomer v. State*, 3 Sneed 215.

(Tenn.) 66; *Hawk v. Ridgway*, 33

⁸⁷ *Hildebrand v. McCrum*, 101 Ind.

Ill. 473; *Floyd v. State*, 12 Ark. 43;

61.

People v. Wheeler, 73 Cal. 252;

⁸⁸ *Moore v. Thompson*, 92 Mich.

Comer v. Knowles, 17 Kans. 436, 498.

439.

⁸⁹ *Grace v. Dempsey*, 75 Wis. 313.

of a false imprisonment, no matter how lawful the original a may have been."⁴⁰ Thus, it was held to be false imprisonment w a sheriff took a person into custody by virtue of the warrant, imprisoned him for thirty days before taking him before an o authorized to inquire into the cause of the arrest.⁴¹

§ 2108. **Malice.**—In such an action it is not necessary to p or prove that the imprisonment complained of was either malic or without probable cause.⁴² And it has been held that it is necessary to allege or prove that the defendant acted illegally wrongfully, or without any competent authority. The authorit act must be shown by the defendant.⁴³ But malice and wilfulness become a part of the case in false imprisonment. In the Kansas already quoted, it was further said: "It is true, however, that m and wilfulness may belong to any particular case of false impri ment; but when they do so belong to such particular case, they long to it as a portion of the special facts of that case, for w special or exemplary damages may be awarded, and do not belon the case as a portion of the general and essential facts of the case which general damages may be awarded."⁴⁴ In actions for false imprisonment malice is not properly an essential element, and the can be affected by probable cause, or the want of probable cause, when there has been an arrest without a warrant, and it then beco a part of the defendant's case, and the plaintiff is required to offe proof upon the subject.⁴⁵ While malice and want of probable c are not essential elements in an action for false imprisonment, y has been held that where these are averred in the complaint as

⁴⁰ Kirk v. Garrett, 84 Md. 383, 407; 390; Johnson v. Bouton, 35 Baltimore &c. R. Co. v. Cain, 81 Md. 898; Richardson v. Huston, 1 87; Twilley v. Perkins, 77 Md. 252; Dak. 484; 2 Starkie Ev., 1112. Rohan v. Sawin, 5 Cush. (Mass.) ⁴³ Gallimore v. Ammerman, 39 281; Firestone v. Rice, 71 Mich. 377; 323; Carey v. Sheets, 60 Ind. 17. Wright v. Court, 4 B. & C. 596; 1 ⁴⁴ Comer v. Knowles, 17 Kans. Hilliard Torts, 223, § 19. Grace v. Dempsey, 75 Wis. 313;

⁴¹ Anderson v. Beck, 64 Miss. 113. beck v. Gerry, 15 Misc. (N. Y.)

⁴² Rich v. Melnery, 103 Ala. 345; ⁴⁵ Colter v. Lower, 35 Ind. Akin v. Newell, 32 Ark. 605; Colter Carey v. Sheets, 60 Ind. 17; Co v. Lower, 35 Ind. 285; Boaz v. Tate, v. Knowles, 17 Kans. 436; Joh 43 Ind. 60; Carey v. Sheets, 60 Ind. v. Bouton, 35 Neb. 898; Hobb 17; Comer v. Knowles, 17 Kans. 436; Ray, 18 R. I. 84; Hewitt v. I Wentz v. Bernhardt, 37 La. Ann. burger, 66 Hun (N. Y.) 230; 1 636; Boeger v. Langenberg, 97 Mo. gard Torts, 630, 631.

ments of the cause of action, their existence must be made to appear by the proofs or the plaintiff will not be entitled to recover.⁴⁶ It has been said that "even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damages, but have nothing whatever to do with the cause of action."⁴⁷

§ 2109. **Motive and good faith.**—In an action for damages for false imprisonment, ordinarily the motives with which a defendant acted are not material, and proof of such motives is improper. And the fact that the defendant acted in good faith and under an honest belief will constitute no defense whatever as to the actual damages. But where exemplary or punitive damages are sought, then proof of good motives may go in mitigation of any but actual damages.⁴⁸ The good faith of the officer making the arrest will not prevent the person arrested from recovering his actual damages for the alleged false imprisonment.⁴⁹ Where the plaintiff in an action for false imprisonment testified that he was arrested by an officer for a certain purpose, which purpose might tend to enhance the damages, the defendant may prove that he was not induced to make the arrest for any such purpose as the one to which the plaintiff had testified, and where anything more than actual damages are claimed, the defendant may show that he acted prudently, wisely or in good faith, and for this purpose may prove the information on which he acted.⁵⁰ "Good faith, honest belief, and the advice of counsel may be shown to rebut the presumption of malice, and to avoid punitive damages; but not to justify an arrest and imprisonment under an absolutely void process."⁵¹ Where the officer making the arrest was mistaken as to

⁴⁶ *Rich v. McInerney*, 103 Ala. 345.

⁴⁷ *Marks v. Townsend*, 97 N. Y. 590; *Taylor v. Alexander*, 6 Ohio 144.

⁴⁸ *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Paget v. Cook*, 1 Allen (Mass.) 522; *Livingston v. Burroughs*, 33 Mich. 511; *Wachsmuth v. Merchants' &c. Bank*, 96 Mich. 426; *McConnell v. Kennedy*, 29 S. Car. 180; *Hays v. Creary*, 60 Tex. 445; *Formwalt v. Hylton*, 66 Tex. 288; *Landrum v. Wells*, 7 Tex. Civ. App. 625; *Tenney v. Harvey*, 63 Vt. 520; *Par-*

sons v. Harper, 16 Gratt. (Va.) 64;

Frazier v. Turner, 76 Wis. 562; *American &c. Co. v. Patterson*, 73 Ind. 430, 437.

⁴⁹ *Livingston v. Burroughs*, 33 Mich. 511; *Painter v. Ives*, 4 Neb. 122.

⁵⁰ *Livingston v. Burroughs*, 33 Mich. 511.

⁵¹ *Johnson v. Maxon*, 23 Mich. 129; *Johnson v. Morton*, 94 Mich. 1; *Wachsmuth v. Merchants' &c. Bank*, 96 Mich. 426; *Miller v. Adams*, 52 N. Y. 409; *Fischer v. Langbein*, 108

the identity of the person, it was held that his good faith would not exempt him from liability for the actual damages caused by unlawful arrest.⁵² Even peace officers cannot justify an abuse of process by showing that they acted in good faith. Such evidence is in mitigation of damages only.⁵³ The fact that the person causing the arrest believed the person arrested to be another man is no justification, but may be a matter of extenuation.⁵⁴ Where the arrest is unlawful or without authority of law, the question of motive does not affect the liability of the person causing the arrest; in such case he is liable for the false imprisonment, however pure his motive may have been.⁵⁵ Where in an action for false imprisonment it is shown that the defendant abused the legal process, but claimed that there was no liability in the absence of malice, it was said: "It is no defense that the defendant was doing an illegal act by the defendant that injured the plaintiff, though it was done in the execution of legal process, yet it was an act in abuse of that process. It was an imprisonment of the plaintiff under that process when the right to do so had ceased. It was an equally illegal whether the original action was malicious or in bad faith, with or without probable cause, and the end of it can have no legal or logical connection with the plaintiff's right to recover in this suit."⁵⁶ The rule is that if the acts complained of were lawful, they are none the less so because the party instituting a legal proceeding was actuated by motives of revenge and malignity.⁵⁷ Where several persons were charged with participating in the arrest and imprisonment, it was held error to refuse to permit them to testify as to their purpose in going to the place where the arrest was made.

§ 2110. **Peace officers—Arrest without warrant.**—It is now a settled rule that a peace officer may arrest without warrant one

N. Y. 84; *Vredenburg v. Hendricks*, 17 Barb. (N. Y.) 179; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Fenelon v. Butts*, 53 Wis. 344; *Comer v. Knowles*, 17 Kan. 436.

⁵² *Holmes v. Blyler*, 80 Iowa 365; *Stewart v. Feeley*, 118 Iowa 524; *3 Sutherland Damages*, 732.

⁵³ *Holmes v. Blyler*, 80 Iowa 365; *Johnson v. Bouton*, 35 Neb. 898; *Hays v. Creary*, 60 Tex. 445.

⁵⁴ *Sugg v. Pool*, 2 S. & P. (Ala.) 196.

⁵⁵ *Chrisman v. Carney*, 33 Ark.

⁵⁶ *Gibbs v. Randlett*, 58 N. H.

⁵⁷ *Taylor v. Alexander*, 6 Ohio

Diehl v. Friester, 37 Ohio St.

Davis v. Burgess, 54 Mich.

Lark v. Bande, 4 Mo. App.

Taaffe v. Slevin, 11 Mo. App.

Bierwith v. Pieronnet, 65 Mo.

431; *O'Connor v. Bucklin*, 59 N.

589; *Burns v. Erben*, 1 Robt.

Y.) 555.

⁵⁸ *Girdner v. Taylor*, 62 T. (Helsk.) 244.

has committed or is committing a breach of peace in his presence without being liable in damages to an action for false imprisonment. Such an officer is also justified, when upon reasonable suspicion and in good faith he arrests a person who is charged with the commission of a felony, although it may subsequently develop that no crime of that character was in fact committed.⁵⁹ But it has been held that a peace officer has no right to arrest without a warrant, after the offense has been committed, in any case where the punishment for such offense is a fine or imprisonment in jail only.⁶⁰ So, a sheriff was held liable for false imprisonment where he went into another county, arrested a person without warrant, took him back and imprisoned him in his own county, and thereafter sent him to the county from whence the request to arrest came, and it was then ascertained that the prisoner was not the party wanted and he was discharged.⁶¹ It is the duty of an officer in making an arrest to exercise reasonable care and diligence; indeed, he is bound to use all reasonable means to avoid even possible mistakes, and he is not warranted in relying on circumstances which he may deem suspicious, nor can he make an arrest upon a mere idle rumor, but he should make such diligent inquiry as the circumstances will permit before he arrests one person upon the information received from another.⁶² Where it ap-

⁵⁹ *Bryan v. Bates*, 15 Ill. 87; *Doering v. State*, 49 Ind. 56; *Veneman v. Jones*, 118 Ind. 41; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Commonwealth v. Tobin*, 108 Mass. 426; *Kirk v. Garrett*, 84 Md. 383; *Edger v. Burke*, 96 Md. 715; *Quinn v. Heisel*, 40 Mich. 576; *State v. Underwood*, 75 Mo. 230; *Burns v. Erben*, 40 N. Y. 463; *Fulton v. Staats*, 41 N. Y. 498; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Neal v. Joyner*, 89 N. Car. 287, 290; *Jackson v. Knowlton*, 173 Mass. 94; *Ballard v. State*, 43 Ohio St. 340; *McCarthy v. De Armit*, 99 Pa. St. 63; *Wade v. Chaffee*, 8 R. I. 224; *Eanes v. State*, 6 Humph. (Tenn.) 53; *Roddy v. Finnegan*, 43 Md. 490, 504; *Baltimore &c. R. Co. v. Cain*, 81 Md. 87; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Phillips v.*

Trull, 11 Johns. (N. Y.) 486; *Derecourt v. Corbishley*, 5 E. & B. 188; *Rex v. Birnie*, 1 Moo. & R. 160; *Smith v. Donnelly*, 66 Ill. 464; *State v. Sims*, 16 S. Car. 486; *Main v. McCarty*, 15 Ill. 441; *Shanley v. Wells*, 71 Ill. 78; *Filer v. Smith*, 96 Mich. 347; *Simmerman v. State*, 16 Neb. 615; *Diers v. Mallon*, 46 Neb. 121; *Weser v. Welty*, 18 Ind. App. 664.

⁶⁰ *Bright v. Patton*, 5 Mack. (U. S.) 534.

⁶¹ *Mitchell v. Malone*, 77 Ga. 301; *Thomas v. State*, 91 Ga. 204, 206; *Gordon v. Hogan*, 114 Ga. 354.

⁶² *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Stanton v. Hart*, 27 Mich. 539; *Filer v. Smith*, 96 Mich. 347; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Ballard v. State*, 43 Ohio St. 340; *Central R. Co. v. Brewer*, 78 Md. 394;

peared from the proof that the defendant peace officer arrested plaintiff, who was upon a public street in a state of intoxication, having assaulted a citizen, and took him into custody and detained him three hours until he became sober, when he was convicted on a criminal charge, this was held to be a sufficient justification. Where an officer makes an arrest without a warrant, it is his duty to take the person so arrested before a magistrate and make complaint before such officer; failing to do this, he becomes a trespasser ab initio.⁶⁴

§ 2111. **Private person—Arrest without warrant.**—According to the adjudicated cases, proof that may justify an officer in making an arrest may not be sufficient to justify a private person who arrests on suspicion and without warrant. As heretofore shown, an officer may be justified where he acted upon information received from another which he had reason to believe; but this is not sufficient to justify a private person. The rule on this subject has been stated thus: "If a felony has been committed by the person arrested, the arrest may be justified by any person without warrant. If an innocent person is arrested upon suspicion by a private individual, the individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual was arrested without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to believe."⁶⁵ The Supreme Court of Nebraska, in *New-*

Edger v. Burke, 96 Md. 715; *Brockway v. Crawford*, 3 Jones L. (N. Car.) 434.

* *Wiltse v. Holt*, 95 Ind. 469.

* *Stewart v. Feeley*, 118 Iowa 524; *Brock v. Stimson*, 108 Mass. 520.

* *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Carson v. Dessau*, 142 N. Y. 445; *Burns v. Erben*, 40 N. Y. 463; *Slater v. Wood*, 9 Bosw. (N. Y.) 15; *Meyer v. Clark*, 41 N. Y. Super. 107; *Wilson v. Manhattan R. Co.*, 2 Misc. (N. Y.) 127; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Eanes v. State*, 6 Humph. (Tenn.) 53; *New-*

man v. New York & C. R. Co., 54 (N. Y.) 335; *Doering v. State*, Ind. 56; *Limbeck v. Gerry*, 15 (N. Y.) 663; *Siegel & Co. v. Snodgrass*, 70 Ill. App. 116; *Sundmeyer v. Block*, 39 Ill. App. 553; *Dodge v. Board*, 43 Ill. 95; *Kindred v. State*, 51 Ill. 401; *Hight v. Naylor*, 8 Ill. App. 508; *Beckwith v. Philby*, 100 Ill. 635; *Samuel v. Payne*, 1 Ill. 358; *Hobbs v. Branscomb*, 3 Cal. 420; *Ledwith v. Cotchpole*, 10 Cal. 291; *Allen v. Wright*, 8 Cal. P. 522; *Cowles v. Dunbar*, 2 Cal. P. 565; *Davis v. Russell*, 5 Cal. 354; *Reg. v. Tooley*, 2 Ld. Rep. 1.

the difference between the right of a peace officer and a private person to arrest without warrant, say: "The public safety and the due apprehension of criminals charged with heinous offenses imperiously require that such arrests be made without warrant by an officer of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is conferred to cases of actual guilt of the party arrested, and the arrest can only be justified by proving such guilt. But as to constables, and other peace officers, acting officially, the law clothes them with greater authority (than private persons), and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony: and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings under a complaint on oath and a warrant thereon."⁶⁶ In order to justify a private person in making an arrest, the proof must show two things: (1) that a felony has been actually committed; (2) that the circumstances in connection with the commission of the felony are such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who committed the crime.⁶⁷ As stated by some authorities, a private citizen is authorized to arrest another only when a felony has actually been committed.⁶⁸ But a private person is not authorized to make an arrest for a mere misdemeanor, and cannot justify the act by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds; nor can he lawfully cause the arrest to be made by an officer without a warrant.⁶⁹ Nor is such private person authorized to

1296; *Lawrence v. Hedger*, 3 Taunt. 13, 14.

⁶⁶ *Diers v. Mallon*, 46 Neb. 121; *Doering v. State*, 49 Ind. 56.

⁶⁷ *Burns v. Erben*, 40 N. Y. 463; *Allen v. Wright*, 8 Car. & P. 522.

⁶⁸ *Kennedy v. State*, 107 Ind. 144; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Commonwealth v. Carey*, 12 Cush. (Mass.) 246; *Morley v. Chase*, 143 Mass. 396; *Commonwealth v. Sullivan*, 165 Mass. 183; *Bacon v. Bacon*, 76 Miss. 458; *Lynch v. Metropolitan &c. R. Co.*, 90 N. Y. 77;

Brooks v. Commonwealth, 61 Pa. St. 352; *Doughty v. State*, 33 Tex. 1;

Bergeron v. Peyton, 106 Wis. 377; *Long v. State*, 12 Ga. 293; *Smith v.*

Donnelly, 66 Ill. 465; *State v. Mowry*, 27 Kans. 369; *Burns v. Erben*, 40 N. Y. 463; *Ruloff v. People*, 45 N. Y. 213; *Brockway v. Crawford*, 3 Jones L. (N. Car.) 433; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Keenan v. State*, 8 Wis. 132.

⁶⁹ *Palmer v. Maine Cent. R. Co.*, 92 Me. 399.

arrest without a warrant upon information of the commission of a felony upon which he had reason to rely. Such an arrest by a private person is illegal, though an officer might be justified in acting upon such information.⁷⁰ A person was held liable in an action for false imprisonment where he procured the arrest of his alleged debtor upon an affidavit that was radically defective and wholly insufficient to bring the case within the provisions of the statute which provided for the arrest.⁷¹ But, it is held in some jurisdictions that a private person may arrest without warrant where a misdemeanor or a breach of the peace has in fact been committed by the person arrested.⁷² The rule as to the right or liability of a private person in making an arrest has been stated as follows: "A private person has a right to arrest a man on suspicion of felony without a warrant; but if he does so, and it turns out that the wrong man is imprisoned, he must be prepared to show, in jurisdiction: (1) that a felony has been committed; and (2) that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it or was implicated in it."⁷³ It is also the rule that where a private person makes complaint to a magistrate against another and an arrest

⁷⁰ *Cary v. State*, 76 Ala. 78; *Carr v. State*, 43 Ark. 99; *Long v. State*, 12 Ga. 293; *Ryan v. Donnelly*, 71 Ill. 100; *Allen v. Leonard*, 28 Iowa 529; *People v. Burt*, 51 Mich. 199; *Simmerman v. State*, 16 Neb. 615; *Reuck v. McGregor*, 32 N. J. L. 70; *Burns v. Erben*, 40 N. Y. 463; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Brockway v. Crawford*, 3 Jones L. (N. Car.) 433; *Wakely v. Hart*, 6 Bin. (Pa.) 316; *Brooks v. Commonwealth*, 61 Pa. St. 352.

⁷¹ *Fkumoto v. Marsh*, 130 Cal. 66.

⁷² *Knot v. Gay*, 1 Root (Conn.) 66; *Smith v. Donnelly*, 66 Ill. 464; *Baltimore &c. R. Co. v. Cain*, 81 Md. 87; *Burns v. Erben*, 40 N. Y. 463, 466; *State v. Sims*, 16 S. Car. 486; *Timothy v. Simpson*, 1 C. M. & R. 756, 757; *Simmons v. Millingen*, 2 C. B. 524; *Shaw v. Chairtie*, 3 C. & K. 21; *Grant v. Moser*, 5 Man. & G. 127;

Cohen v. Huskisson, 2 M. & W. 477; *Webster v. Watts*, L. R. 11 Q. B. 311.

⁷³ *Maliniemi v. Gronlund*, 92 Mich. 222; *Filer v. Smith*, 96 Mich. 347; *Long v. State*, 12 Ga. 293; *Morley v. Chase*, 143 Mass. 396; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Brockway v. Crawford*, 3 Jones L. (N. Car.) 433; *State v. Bryant*, 65 N. Car. 327; *State v. Shelton*, 79 N. Car. 605, 607; *Brooks v. Commonwealth*, 61 Pa. St. 352; *Eanes v. State*, 6 Humph. (Tenn.) 53; *Veneman v. Jones*, 118 Ind. 41; *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Baltimore &c. R. Co. v. Cain*, 81 Md. 87; *Hobbs v. Branscomb*, 3 Campb. 420; *Hopkins v. Crowe*, 7 Car. & P. 373; *Derecourt v. Corbishley*, 5 El. & Bl. 188; *Price v. Seeley*, 10 C. & F. 28; *Collett v. Foster*, 2 H. & N. 356; *Samuel v. Payne*, 1 Doug. 360.

is made under a warrant duly issued by such magistrate having jurisdiction, the person thus making complaint will not be liable for false imprisonment even where the complaint is defective.⁷⁴ And where the arrest was made by a private person without warrant, and where no crime had been committed or attempted in the presence of the person making the arrest, it was held that it was not necessary to aver the want of reasonable or probable cause, and where such averments were made they were held to be surplusage and could be disregarded.⁷⁵

§ 2112. *Private person aiding officer.*—The authorities are not agreed upon the proposition of what proof will relieve a private person from liability when required to assist an officer in making an arrest, assuming that the officer has power to call private citizens to his aid in making an arrest. Some courts hold that in such cases the private person aids the officers at his peril; that he is bound to know whether the officer acts under a legal and valid warrant; and that he is entitled to the same protection as the officer, and no more.⁷⁶ The burden of proof is on a private person to show that the arrest complained of was made under a legal and valid warrant, and such person is entitled to the same protection as the officer holding the warrant, and no more. The rule is that when a private person is called upon by an officer to assist in making an arrest, he is bound to know that the warrant or process under which the officer acts is valid and legal.⁷⁷ The weight of authority and the better reasoning support the proposition that where a known public officer calls a private person to assist him in making an arrest, such private person may justify in an action for false imprisonment by proving that the officer was a known public officer. The rule on this subject is thus stated by the Supreme Court of Vermont: "It was enough that he was the sheriff (or deputy sheriff), a known public officer, who called on him for aid in the execution of his office; it was his duty to

⁷⁴ *Coupal v. Ward*, 106 Mass. 289; *Johnson v. Von Hettler*, 84 Ill. 315; *Barker v. Stetson*, 7 Gray (Mass.) 53; *Langford v. Boston &c. R. Co.*, 144 Mass. 431; *Wheaton v. Beecher*, 39 Ill. App. 553; *Hight v. Naylor*, 86 Ill. 112, 118; *Sundmacher v. Block*, 49 Mich. 348; *Everett v. Henderson*, 146 Mass. 89; *Herzog v. Graham*, 9 Lea (Tenn.) 152.

⁷⁶ *Mitchell v. State*, 12 Ark. 50.

⁷⁷ *Mitchell v. State*, 12 Ark. 50; *Burnap v. Wight*, 14 Ill. 301; *Goodwine v. Stephens*, 63 Ind. 112; *Higgins v. Halligan*, 46 Ill. 173;

yield immediate obedience to the demand. The nature of the requires that there should be no delay in rendering the required assistance; no nice inquiries into the written authority of the sheriff to do what he is doing. It is sufficient that the officer asks for aid in a matter in which he has by law a right to ask for aid, and he is a known public officer. The person, who is thus called upon, is protected by the call from being sued for rendering the required assistance. If the officer has no warrant, or authority that will justify him, he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is, or upon which the officer acts, and who relies upon the official character of the call of the sheriff as his security for doing what is required, is clearly entitled to protection against suits by the person arrested. The necessity of the case forbids that he should have the means of knowing, or the time to inquire into the anterior proceedings. Nor does the law intend that any such inquiry should be tolerated, or that men called upon to aid officers in arresting criminals shall stop to examine papers and to take counsel as to the legality of the process under which the officer acts."⁷⁸ It seems to be the rule, however, that where the original act of the officer in the service of civil process is unlawful, all persons assisting him will be trespassers, although acting by his command."⁷⁹ In speaking of this rule, a very recent writer on torts says: "Such a doctrine being harsh and unjust, the contrary rule of exemption from liability on the part of the person called upon to assist prevails. Indeed, it was held at common law that those who obey the command of the sheriff in arresting criminals will be thereby justified, though the sheriff be acting without authority. There is a difference with respect to civil and criminal matters. Generally, in this country statutes have been passed in various states authorizing sheriffs and other arresting officers to require the aid of others in arresting persons accused of crime, and to provide for punishment of any who refuse such assistance. A person so called upon by an arresting officer, whom he knows to be an officer, is protected by the call from any liability on account of assisting in a resulting illegal arrest or imprisonment. The officer may not be liable legally, and therefore a trespasser; but the person assisting him

⁷⁸ *McMahan v. Green*, 34 Vt. 69; ⁷⁹ *Oystead v. Shed*, 12 Mass. 511; *Wheelock v. Archer*, 26 Vt. 380; *Elder v. Morrison*, 10 W. 511; *Dietrichs v. Schaw*, 43 Ind. 175; (N. Y.) 128; *Hooker v. Smith*, 100 N. Y. 151; *Goodwine v. Stephens*, 63 Ind. 112. Vt. 151.

at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff. It has been contended that such person should ascertain, at his peril, whether the officer has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he should not act until he is satisfied that the officer is acting legally. This contention has been answered by the courts in the negative. It is said that it is enough that he is called upon by a known officer, that the nature of the case requires that there should be no delay. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop and examine the papers, or to take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required. One who is called upon to aid in the execution of a warrant is entitled to the same protection as is the officer himself, and to have this protection it is not necessary that he be in the actual physical presence of the officer. If such person makes the arrest, he should, upon demand, show his authority, and if he cannot do so, but states that it is in the possession of the officer, that is sufficient."⁸⁰

§ 2113. Judicial officers—Liability.—It is now the universally recognized rule that judicial officers, acting judicially in matters within the scope of their jurisdiction, are not liable in actions for their conduct, or the exercise of such functions, and may always justify on proof of their official⁸¹ positions. On the question of the liability of such officers Judge Cooley says: "Whenever the state confers judicial powers upon an individual, it confers them with full immunity from private suit. In effect, the state says to the officer, that those duties are confided to his judgment; that he is to exercise his judgment, fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they con-

⁸⁰ 1 Kinkead Torts, § 228.

Mich. 576; Kelsey v. Klabunde, 54

⁸¹ Trammell v. Town of Russell-ville, 34 Ark. 105; Pepper v. Mayes, 125, et seq.

81 Ky. 673; Brooks v. Mangan, 86

cern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. Where the justice has jurisdiction of the subject matter, he cannot be held liable for an erroneous exercise of judgment or a wrong decision.⁸³ But, it is held that where a justice of the peace issues a warrant which he has no power to issue, that he and the minister or officer executing it are liable.⁸⁴ So, a justice was held liable for false imprisonment where he imprisoned the person for non-payment of a fine for contempt where the judgment imposing the fine did not provide for the imprisonment.⁸⁵ And a justice has been held liable where he committed a person to prison where the crime was committed out of his jurisdiction.⁸⁶ And such officers are held liable where they commit persons on charges which do not constitute crimes.⁸⁷ So, as to a police judge who committed a person in the absence of a charge and warrant.⁸⁸ This protection to judicial officers applies only to acts which are judicial; but where the act is ministerial and its performance does not involve the exercise of judgment, the officers are liable for their wrongful, malicious or corrupt acts.⁸⁹

§ 2114. **Corporations—Liability.**—It is now the universally accepted rule that corporations are liable for false imprisonment as well as for other torts.⁹⁰ As to the liability of corporations in o

⁸³ Cooley Torts, 408.

⁸⁴ Austin v. Vrooman, 128 N. Y. 229; Henke v. McCord, 55 Iowa 378; Brooks v. Mangan, 86 Mich. 576; Gifford v. Wiggins, 50 Minn. 401; Robertson v. Parker, 99 Wis. 652; Goodwine v. Stephens, 63 Ind. 112.

⁸⁵ Grumon v. Raymond, 1 Conn. 40; Allen v. Gray, 11 Conn. 95; Hewitt v. Newburger, 141 N. Y. 538; Wright v. Hazen, 24 Vt. 143; Muzzy v. Howard, 42 Vt. 23; Carleton v. Taylor, 50 Vt. 220; Vaughn v. Congdon, 56 Vt. 111; Church v. Pearne, 75 Conn. 350.

⁸⁶ Lanpher v. Dewell, 56 Iowa 153.

⁸⁷ Bell v. McKinney, 63 Miss.

Dietrichs v. Schaw, 43 Ind. 175; De Courcey v. Cox, 94 Cal. 1; Grove v. Van Duyn, 44 N. J. L. 1; Truesdell v. Combs, 33 Ohio St. 1 Kinkead Torts, § 228.

⁸⁸ Glazar v. Hubbard, 102 Ky. 1; Simmons v. Vandyke, 138 Ind. 1; State v. McDaniel, 78 Miss. 1.

⁸⁹ Noxon v. Hill, 2 Allen (Mass.) 215; Way v. Townsend, 4 Allen (Mass.) 114; Jones v. Werden Cush. (Mass.) 133.

⁹⁰ Owsley v. Montgomery & Co., 37 Ala. 560; American Ex. Co. v. Patterson, 73 Ind. 430.

of torts, Mr. Beach says: "The doctrine that an action will not lie against a corporation for a tort is exploded. The same rule applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants."⁸¹ And corporations are now held liable even where motive or malicious intent is necessary. "It is now well settled that a corporation may be liable in tort, even though a malicious intent is necessary to be proved. The malice of the agent is imputable to the corporation."⁸²

§ 2115. **Damages.**—In an action for false imprisonment in the absence of malice, the injured party is entitled to recover for loss of time, interruption to business, the bodily and mental suffering which may have been occasioned by the wrong, and the expenses reasonably incurred to procure his discharge from the imprisonment.⁸³ It is held that in such an action the plaintiff may recover

⁸¹ *Kansas City &c. R. Co. v. Sanders*, 98 Ala. 293; *Beach Priv. Corp.*, § 455; *Owsley v. Montgomery &c. R. Co.*, 37 Ala. 560; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Board &c. v. Schroeder*, 58 Ill. 353; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis &c. R. Co. v. Anthony*, 43 Ind. 183; *American Ex. Co. v. Patterson*, 73 Ind. 430; *Lothrop v. Adams*, 133 Mass. 471; *Cody v. Adams*, 7 Gray (Mass.) 59; *Reed v. Home Sav. Bank*, 130 Mass. 443; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573; *South &c. R. Co. v. Chapell*, 61 Ala. 527; *Jordan v. Alabama &c. R. Co.*, 74 Ala. 85; *McDougald v. Bellamy*, 18 Ga. 411; *Wheeler &c. Mfg. Co. v. Boyce*, 36 Kans. 350; *Woodward v. St. Louis &c. R. Co.*, 85 Mo. 142; *Carter v. Howe &c. Co.*, 51 Md. 290; *Childs v. Bank*, 17 Mo. 213; *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9; *First Baptist Church v. Schenectady Co.*, 5 Barb. (N. Y.) 79; *Lynch v. Metropolitan &c. R. Co.*, 90 N. Y. 77; *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Pittsburg &c.*

R. Co. v. Slusser, 19 Ohio St. 157; *Atlantic &c. R. Co. v. Dunn*, 19 Ohio St. 162; *Goddard v. Grand Trunk R.*, 57 Me. 202; *Boogher v. Life Asso. &c.*, 75 Mo. 319; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469; *Goff v. Great Northern R. Co.*, 3 El. & El. 672; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; 2 *Beach Priv. Corp.*, § 447.

⁸² *Wachsmuth v. Merchants' &c. Bank*, 96 Mich. 426; *Carter v. Howe &c. Co.*, 51 Md. 290; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Salt Lake City v. Hollister*, 118 U. S. 256; *Philadelphia &c. R. Co. v. Quigley*, 21 How. (U. S.) 202.

⁸³ *Ocean &c. Co. v. Williams*, 69 Ga. 251; *Blanchard v. Burbank*, 16 Ill. App. 375; *Stewart v. Maddox*, 63 Ind. 51; *Wheeler &c. Co. v. Boyce*, 36 Kans. 350; *Wentz v. Bernhardt*, 37 La. Ann. 636; *Ross v. Leggett*, 61 Mich. 445; *Rown v. Christopher &c. R. Co.*, 34 Hun (N. Y.) 471; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y.) 468; *Abrahams v. Cooper*, 81 Pa. St. 232; *Hays v. Creary*, 60 Tex. 445; *Parsons v. Harper*, 16 Gratt.

for loss of work occasioned by such imprisonment not only, up to time of the suit, but also for time lost thereafter, if by reason of arrest complained of he was deprived of work he otherwise would have obtained.⁹⁴ In an action by a seaman against the master of a vessel, for unauthorized imprisonment until his effects were lost or sold, it was held that he was entitled to recover for the time of imprisonment, the value of the articles lost or sold, with interest on the amount and the price of his passage home; but that no vindictive damages could be added in the absence of proof of bad motives of the master.⁹⁵ In such an action there can be no recovery for loss resulting from sickness after the imprisonment has ceased, unless the pleading and the proof show, or the law will imply, that such sickness was caused by the defendant's wrong.⁹⁶ But it has been held that the plaintiff may prove the filthy condition of the jail in which he was imprisoned or he may show any other discomfort or deprivation to enhance the compensatory damages for mental anguish and bodily suffering.⁹⁷ Where an arrest was made after the action had been begun, it was held that the expense of the defense of the suit in which the arrest was made, not caused by the refusal of bail, should not be included in the damages.⁹⁸ Proof of actual malice is not required in order to submit the question of exemplary damages to the jury. "Where such an arrest is made under circumstances that indicate wanton disregard of the rights of the person arrested, the jury will be warranted in giving punitive damages. There need be no evidence of hatred or ill will in order to authorize the submission of the question of exemplary damages in such cases to the jury."⁹⁹ In this class of cases exemplary or punitive damages may be allowed where the elements of fraud, malice, gross negligence or oppression are made to appear from the evidence.¹⁰⁰ But where

(Va.) 64; *Ogg v. Murdock*, 25 W. Va. 139; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Fenelon v. Butts*, 53 Wis. 344; *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262; *Kilbourn v. Thompson*, McA. & M. (D. C.) 401; *Clarke v. American & C. Co.*, 35 Fed. 478.

⁹⁴ *Thompson v. Ellsworth*, 39 Mich. 719.

⁹⁵ *Jay v. Almy*, 1 Woodb. & M. (U. S.) 262.

⁹⁶ *Atchison & C. R. Co. v. Rice*, 36 Kans. 593.

⁹⁷ *Kindred v. Stitt*, 51 Ill. 401; *Rahams v. Cooper*, 81 Pa. St. 2; *Fenelon v. Butts*, 53 Wis. 344; *Clarke v. American & C. Co.*, 35 Fed. 478.

⁹⁸ *Gibbs v. Randlett*, 58 N. H. 90.

⁹⁹ *Pearce v. Needham*, 37 Ill. App. 90.

¹⁰⁰ *Rich v. McInerney*, 103 Ala. 3; *Comer v. Knowles*, 17 Kans. 4; *Josselyn v. McAllister*, 22 Mich. 300; *Livingston v. Burroughs*, Mich. 511; *Johnson v. Bouton*,

the circumstances indicate a wanton disregard of the rights of the person arrested the jury will be warranted in giving punitive damages.¹⁰¹ When there is no possible way of measuring damages with any certainty, the sound discretion of the jury under all the circumstances is held to be the only measure practicable.¹⁰² Where the recovery of damages depends on the existence of malice and would be enhanced by proof of it, any proof which negatives or denies the malice is proper for the purpose of reducing the damages. Under this rule evidence of good faith is generally admissible in mitigation; but the mitigation will be limited to the damages it tends to controvert, and will not be extended to reduce the actual damages.¹⁰³

§ 2116. **Justification—Burden of proof.**—As shown by a former section,¹⁰⁴ the plaintiff makes a *prima facie* case when he proves the arrest or restraint. This *prima facie* case is sufficient until overcome by the defendant, and when the defendant attempts to justify the arrest the burden of proof is on him to establish his defense by a preponderance of the evidence; if he attempts to justify on the ground that the person arrested committed a breach of the peace, or other offense in his presence, the burden is on him to establish that fact by satisfactory evidence. In such a case proof of his motive in making the arrest on information he received from others would be immaterial and improper.¹⁰⁵ In actions for false imprisonment the burden is on the defendant to prove justification.¹⁰⁶ The rule is that where a private person induces an officer to arrest another without a warrant, where the offense has not been committed in the view of the officer, such person will be liable, and in an action

Neb. 898; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253, 262; *Neill v. Hart*, 115 Pa. St. 347; *McConnell v. Kennedy*, 29 S. Car. 180; *Herzog v. Graham*, 9 Lea (Tenn.) 152; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Sorenson v. Dundas*, 50 Wis. 335.

¹⁰² *Pearce v. Needham*, 37 Ill. App. 90.

¹⁰³ *Reno v. Willson*, 49 Ill. 95; *Montross v. Bradsby*, 68 Ill. 185; *Cudahy v. Powell*, 35 App. 29; *Pearce v. Needham*, 37 Ill. App. 90; *Farman v. Lauman*, 73 Ind. 568; *Brushaber*

v. Stegemann, 22 Mich. 266; *Harris v. Louisville & C. R. Co.*, 35 Fed. 116.

¹⁰⁴ *Brown v. Chadsey*, 39 Barb. (N. Y.) 253, 262; *Fenelon v. Butts*, 53 Wis. 344; *Grace v. Dempsey*, 75 Wis. 313; *Barnes v. Viall*, 6 Fed. 661.

¹⁰⁵ See, ante, § 2103.

¹⁰⁶ *Shanley v. Wells*, 71 Ill. 78.

¹⁰⁷ *St. John v. Eastern R. Co.*, 1 Allen (Mass.) 544; *Bassett v. Porter*, 10 Cush. (Mass.) 418; *Jackson v. Knowlton*, 173 Mass. 96; *Blake v. Damon*, 103 Mass. 199; *Sellman v. Wheeler*, 95 Md. 751; *Edger v. Burke*, 96 Md. 715.

for false imprisonment can only justify by showing that the claim made by him was well founded.¹⁰⁷ As a matter of defense a defendant must either prove that he did not imprison or restrain the plaintiff against his will, or he must justify the imprisonment.¹⁰⁸ An answer in justification need only admit the imprisonment and the manner thereof as charged in the complaint; it should not admit that the imprisonment was wrongful and unlawful, as this would amount to a confession.¹⁰⁹ And an answer justifying an arrest either with or without a warrant on the ground that a crime had been committed, must set forth the grounds of suspicion in order that the court may determine whether or not they afford probable cause and so that the plaintiff may be advised in advance of the nature of the defense.¹¹⁰ Where the defendant failed to plead the facts constituting justification it was held that they were nevertheless entitled to introduce any evidence under the general denial which tended to show that they acted in good faith and without malice in making the arrest for the purpose of mitigating the damages, though such evidence might tend to prove a complete justification.¹¹¹

§ 2117. **Probable cause—Definition.**—The courts recognize the difficulty of giving an accurate or comprehensive definition of the term “probable cause.” The reason for this is that in a certain sense it is a relative term not depending on the actual state of the given cause, but rather upon the honest and reasonable belief of the person instituting the proceedings under all the facts and circumstances of the particular case. One definition as given is that “such suspicion as would induce a reasonable man to commence prosecution;”¹¹² by another court, as, “a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious

¹⁰⁷ *Burnap v. Marsh*, 13 Ill. 535; *Ga.* 251; *Edger v. Burke*, 96 Ga. 715.

Veneman v. Jones, 118 Ind. 41; *Ross v. Leggett*, 61 Mich. 445; *Lark v. Bande*, 4 Mo. App. 186; *Taaffe v. Slevin*, 11 Mo. App. 507; *McGarrahan v. Lavers*, 15 R. I. 302; *Barker v. Graham*, 2 W. Bl. 866; *Collett v. Foster*, 2 Hurl. & N. 356; *Griffin v. Coleman*, 4 Hurl. & N. 265.

¹⁰⁸ *Floyd v. State*, 12 Ark. 43.

¹⁰⁹ *Ocean &c. Co. v. Williams*, 69

¹¹⁰ *Wasson v. Canfield*, 6 Bl. (Ind.) 406; *White v. McQueen*, Mich. 249; *Brown v. Chadsey*, Barb. (N. Y.) 253; *Wade v. Chas.* 8 R. I. 224; *Boynton v. Tidwell*, Tex. 118.

¹¹¹ *Richardson v. Huston*, 1 Dak. 484.

¹¹² *Cabanes v. Martin*, 3 Dev. Car.) 454.

man in believing that the party is guilty of the offense."¹¹³ Another court said of this, "it is a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief."¹¹⁴ In summing up these definitions the Supreme Court of Pennsylvania in a later case say: "The substance of all these definitions is a reasonable ground for belief of guilt. It can make no difference what induces the belief, if it be reasonably sufficient. While mere floating rumors are not an adequate foundation for it, plainly representations of others may be, and especially representations made by those who have had opportunities for knowledge, or who have made an investigation. While on the one hand individuals are to be protected against rash, wanton and causeless prosecutions, the public interests demand that courts shall not frown upon honest efforts to bring the guilty to justice."¹¹⁵ And the same court in another case said: "Absolute certainty being unattainable in human affairs, we are compelled, in our most important concerns, to act on probabilities, and the law, which is derived from the nature and position of man, exacts no more from one who institutes criminal proceedings than that reasonable and prudential caution, which the safety of others demands, and where that exists, does not make him responsible for the event. He, therefore, who has probable cause, or, in other words, reasonable grounds for belief of guilt, stands acquitted of liability, whatever may have been his motives."¹¹⁶ The conclusion from the definitions is thus stated by the same court: "The belief must be that of a reasonable and prudent man, else the most baseless prosecutions would be safe. But some allowance will be made where the prosecutor is so personally injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. And all that can be required of him is that he shall act as a reasonable and prudent man would be likely to act under like circumstances."¹¹⁷ As defined by a Maryland court: "Probable cause, according to the definition adopted by this court, is a reasonable ground of suspicion, supported by circum-

¹¹³ *Muns v. Dupont*, 2 Wash. (U. S.) 463.

¹¹⁶ *Travis v. Smith*, 1 Pa. St. 234, 237.

¹¹⁴ *Selbert v. Price*, 5 W. & S. (Pa.) 438; *Travis v. Smith*, 1 Pa. St. 234; *Beach v. Wheeler*, 30 Pa. St. 69.

¹¹⁷ *McCarthy v. De Armit*, 99 Pa. St. 63, 69; *Cole v. Curtis*, 16 Minn. 182; *Fisher v. Forrester*, 9 Cas. (Pa.) 501.

¹¹⁵ *Smith v. Ege*, 52 Pa. St. 419, 422; *Rich v. McInerny*, 103 Ala. 345.

stances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. It is very true probable cause does not depend on the actual state of the case in point of fact as it may turn out upon legal investigation. It is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion."¹¹⁸

§ 2118. **Probable cause—Existence.**—In many cases of false imprisonment probable cause or want of probable cause may be the controlling question, and especially on the question of damages. What facts and circumstances amount to probable cause is a question of law for the courts; but whether such facts and circumstances do exist in any particular case is a question of fact for the jury, and where there is any controversy as to such facts the case must be submitted to the jury with instructions from the court as to what facts will constitute probable cause. If all the facts and circumstances introduced in evidence are insufficient to establish probable cause, it is the duty of the court so to instruct the jury, and where the admitted facts amount to probable cause it is the duty of the court to direct a verdict for the defendant even though it appeared that he acted with malice.¹¹⁹ On the question of the existence of probable cause, it is said in a New York case: "Good faith, merely, is not sufficient to protect the defendant from liability. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant the cautious man in the belief that the plaintiff was guilty of the crime with which

¹¹⁸ *Boyd v. Cross*, 35 Md. 194; 377; *Huntington v. Gault*, 81 Mich. 377; *Cooper v. Utterbach*, 37 Md. 282; 144, 155; *White v. McQueen*, 96 Mich. 249; *Filer v. Smith*, 96 Mich. 249; *McWilliams v. Hoban*, 42 Md. 56; 347; *Burns v. Erben*, 40 N. Y. 463; *Johns v. Marsh*, 52 Md. 323; *Bowen v. Tascocoe*, 84 Md. 497; *Torsch v. Turner v. O'Brien*, 5 Neb. 542; *Ross v. Langworthy*, 13 Neb. 492, 495; *Dell*, 88 Md. 459.

¹¹⁹ *Beach v. Wheeler*, 30 Pa. St. 69; *McCarthy v. De Armit*, 99 Pa. St. 63; *Hamilton v. Smith*, 39 Mich. 222; *Firestone v. Rice*, 71 Mich. 222; *Diers v. Mallon*, 46 Neb. 121; *Boyd v. Cross*, 35 Md. 194; *Van Voorhes v. Leonard*, 1 T. & C. (N. Y.) 148.

he was charged, to make out a probable cause as would be a defense.¹²⁰ On the question of probable cause it will be sufficient where the proof shows that the defendant had reasonable grounds for belief at the time he made the arrest. And for the purpose of showing the existence of probable cause it is proper and permissible to prove statements made to the defendant by third persons.¹²¹ It is held that probable cause, or reasonable grounds of suspicion against the party arrested, will constitute no defense in an action for false imprisonment where the arrest or imprisonment is without authority of law.¹²² Where an arrest is made without a warrant, or on a void or irregular warrant, it seems to be the rule that it is proper to show probable cause, or the want of probable cause as affecting the question of malice and the right to recover punitive or exemplary damages.¹²³

§ 2119. *Advice of counsel.*—In this class of cases, and in kindred classes, it is sometimes proper to make proof that the party causing the arrest consulted with, and took the advice of, an attorney before instituting any proceedings. The question in cases of false imprisonment is not so much the effect of such advice as when it may be proved as a fact. The first rule is that in false imprisonment where it is shown that the arrest was illegal and unauthorized, and compensatory damages alone are claimed, no proof of the advice of counsel is proper or permissible.¹²⁴ The second rule on this subject is that where malice, ill will or wanton oppression is made to appear, and exemplary or punitive damages are thereby claimed, it is proper to show that the defendant acted on the advice of counsel for the purpose of rebutting either the proof or legal presumption of malice.¹²⁵ But to have this effect the proof must show that the person

¹²⁰ *Hall v. Suydam*, 6 Barb. (N. Y.) 83; *Perry v. Sutley*, 45 N. Y. St. 61, 18 N. Y. S. 633; *Edger v. Burke*, 96 Md. 715.

¹²¹ *French v. Smith*, 4 Vt. 363; *Coleman v. Allen*, 79 Ga. 637; *Joiner v. Ocean St. Co.*, 86 Ga. 238.

¹²² *Brown v. Chadsey*, 39 Barb. (N. Y.) 253.

¹²³ *Botts v. Williams*, 17 B. Mon. (Ky.) 687; *Roth v. Smith*, 54 Ill. 431, 432; *Simpson v. McCaffrey*, 13 Ohio 508; *Day v. Woodworth*, 13

How. (U. S.) 361; *Beckwith v. Bean*, 98 U. S. 266.

¹²⁴ *Wachsmuth v. Merchants' &c. Bank*, 96 Mich. 426; *Filler v. Smith*, 96 Mich. 347; *Frazier v. Turner*, 76 Wis. 562; *Block v. Myers*, 33 La. Ann. 776.

¹²⁵ *Josselyn v. McAllister*, 22 Mich. 300; *Mortimer v. Thomas*, 23 La. Ann. 165; *Ogg v. Murdock*, 25 W. Va. 139; *Livingston v. Burroughs*, 33 Mich. 511.

causing the arrest made a full, complete and fair statement of the facts to an attorney who was learned in the law, and then took and acted upon advice thus received.¹²⁶ As stated by one of the judges, the rule is: "It is only where there exists probable cause and the arrest is effected under the advice of learned counsel, consulted in good faith and who are correctly informed of the facts, that a person can be exonerated from such damages."¹²⁷

§ 2120. **Arrest under warrant—Justification.**—In action for false imprisonment an answer setting up the fact that the complaint of was made by an officer under a valid and legal warrant and sustained by proof of these facts on the trial is universally held to be a sufficient justification and a complete defense to the action. The rule is also held to extend to the protection of the minor officer even where he has knowledge of facts which would render the process void for want of jurisdiction.¹²⁸ It is held to be that a warrant issued on a valid complaint will protect the officer serving it and the complaining witness from liability for false imprisonment.¹²⁹ A distinction seems to be made in this respect between courts of limited and courts of general jurisdiction. In courts of limited jurisdiction, acting without jurisdiction of the subject matter or the person, its decree or judgment is a nullity, and can be set aside by no one. But in courts of general jurisdiction, the want of jurisdiction must appear upon the face of the process, or the officer

¹²⁶ *Fourchy v. Bayly*, 33 La. Ann. 778; *Filer v. Smith*, 96 Mich. 347; *Page v. Miller*, 13 Ohio C. C. 663, 671; *Ogg v. Murdock*, 25 W. Va. 139; *Cooper v. Utterbach*, 37 Md. 282; *Clark v. Baldwin*, 25 Kans. 120; see also, Ch. CXIII.

¹²⁷ *Block v. Meyers*, 33 La. Ann. 776; *Vinal v. Core*, 18 W. Va. 1, 4.

¹²⁸ *Rhodes v. King*, 52 Ala. 272; *Leib v. Shelby Iron Co.*, 97 Ala. 626; *Floyd v. State*, 12 Ark. 43; *Cassler v. Fales*, 139 Mass. 461; *Wheaton v. Beecher*, 49 Mich. 348; *Jennings v. Thompson*, 54 N. J. L. 55; *Marks v. Sullivan*, 9 Utah 12; *Messman v. Inlenfeldt*, 89 Wis. 585.

¹²⁹ *Watson v. Watson*, 9 Conn. 140;

Henke v. McCord, 55 Iowa 377; *ple v. Warren*, 5 Hill (N. Y.) 170; *Earl v. Camp*, 16 (N. Y.) 562; *Stewart v. Haw* Wend. (N. Y.) 552; *Webber* 24 Wend. (N. Y.) 485; *Marks* 11van, 9 Utah 12; *Hammer* lantyne, 13 Utah 324; *Erske* Hohnbach, 14 Wall. (U. S.) 6
¹³⁰ *Ward v. Cozzens*, 3 Mich. *Johnson v. Maxon*, 23 Mich. *Murphy v. Walters*, 34 Mich. *Schultz v. Huebner*, 108 Mich. *Marks v. Townsend*, 97 N. Y. *Aldrick v. Meeks*, 62 Vt. 89; *ton v. Taylor*, 50 Vt. 220.

be justified.¹³¹ But an arrest upon an illegal or void writ is no protection.¹³²

§ 2121. **Warrant fair on its face—Protection.**—The rule of protection and justification extends to a process that is fair on its face and issued by proper authority.¹³³ What is meant by being fair on its face has been stated as follows: "That process may be said to be fair on its face which proceeds from a court or magistrate, or a body having authority by law to issue process of that nature, and which is legal in form and on its face contains nothing to notify or fairly apprise the author that it issued without authority. When such appears to be the process the officer is protected in making service and he is not concerned with any illegality that may exist back of it."¹³⁴ In Indiana it was held that where a justice of the peace issued a warrant directed to any constable and delivered it to a person not a constable, such person could not justify under the warrant for the reason that the statute required the person to be particularly authorized by name to serve the writ.¹³⁵ But if the officer makes an arrest under process void upon its face, he is personally liable in an action by the person wronged.¹³⁶

¹³¹ *Cutler v. Wadsworth*, 7 Conn. 6; *Bowler v. Eldredge*, 18 Conn. 1. *Girr*, 1 Gray (Mass.) 1; *Blake's Case*, 106 Mass. 501; *Cassier v. Fales*, 139 Mass. 461; *Cooley Torts*, 160; *Buzzell v. Emerton*, 161 Mass. 176.

¹³² *Learnard v. Bailey*, 111 Mass. 160; *Buzzell v. Emerton*, 161 Mass. 176. ¹³³ *Dietrichs v. Schaw*, 43 Ind. 175; *Hayden v. Souger*, 56 Ind. 42; *American Ex. Co. v. Patterson*, 73 Ind. 430; *Wells v. Jackson*, 3 Munf. (Va.) 458.

¹³⁴ *Leib v. Shelby Iron Co.*, 97 Ala. 626; *Trammell v. Russellville*, 34 Ark. 105; *Tryon v. Pingree*, 112 Mich. 338; *Kelsey v. Klabunde*, 54 Neb. 760. ¹³⁵ *McLendon v. State*, 92 Tenn. 520; *Wells v. Jackson*, 3 Munf. (Va.) 458; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316.

¹³⁶ *Trammell v. Russellville*, 34 Ark. 105; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46; *Willmarth v. Burt*, 7 Metc. (Mass.) 257; *Fisher v. Mc-*

CHAPTER CV.

FRAUD, FRAUDULENT CONVEYANCE, AND DURESS.

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Fraud.

§ 2122. **Proof of fraud.**—Fraud is said to consist in acts, or omissions to act, which involve a breach of legal duty, trust or confidence, which are injurious to the party complaining; and when one party charges another with having fraudulently performed such acts or with having omitted to do such acts to the injury of the complaining party, he must establish the commission or the omission of such acts by proof. The proofs required to establish the acts constituting the fraud may be positive or they may be circumstantial, or they may be both positive and circumstantial.¹ Fraud should not be inferred where it appears to be only possible; but, it is said, that it should be established by positive proof, or by circumstances of such force as not to permit of serious doubt.² The law prescribes no rule as to the quantity of evidence to prove fraud; it does not require the degree of certainty as in criminal cases; a preponderance is all the law requires.³ It has been held that the evidence need not be sufficient to satisfy the jury of the existence of the fact, as a plaintiff would be entitled to recover if the facts necessary were established by a preponderance of the evidence.⁴ The law does not require conclusive

¹ Kennedy v. Kennedy, 2 Ala. 571; Snodgrass v. Branch Bank, 25 Ala. 161; Warren v. Gabriel, 51 Ala. 235.

² Vanderveer, In re, 20 N. J. Eq. 463.

³ Schmick v. Noel, 72 Tex. 1, 8 S. W. 83; Wylie v. Posey, 71 Tex. 84, 9 S. W. 87.

⁴ Baines v. Ullmann, 71 Tex. 529, 9 S. W. 543; Bluntzer v. Dewees, 79 Tex. 272, 15 S. W. 29; Watkins v. Wallace, 19 Mich. 57, 77; O'Donnell v. Segar, 25 Mich. 367; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809; Ross v. Miner, 67 Mich. 410, 35 N. W. 60; Ferris v. McQueen, 94

proof in such case, as this would too frequently result in the practical frustration of justice and render abortive all efforts to disclose fraud; the law is satisfied with a reasonable degree of certainty. While the proof must show that the fraud existed at the time of the transaction complained of, yet it is recognized by some courts that it is only possible to prove the fraud by proof of subsequent transactions which throw light on the original transaction.⁶ "It is very seldom that perfectly clear proof can be produced of fraud. In civil cases one party is as much entitled as the other to any doubt which may arise on the evidence. If the plaintiff in this case produce such evidence of the fact he alleged against the defendant's title, as a jury could reasonably and safely rest their conscience upon, it is enough."⁷

§ 2123. **Pleading fraud in general terms.**—In some of the cases, and especially in some classes of these cases, it was held sufficient as against a demurrer, to plead the fraud in general terms. Thus in an action on a sealed note it was held sufficient to charge that the note was obtained by fraud. The reason given was that the nature of a valid instrument precluded any inquiry into the want of consideration; and that therefore any representations made to induce its execution, as to the nature or sufficiency of the consideration, were not subject to inquiry, and that therefore the adverse party could not be misled by supposing that the inquiry under the plea of fraud would be the investigation of some question which the law would not permit.⁸ And as no inquiry could be made into the consideration of a specialty, and as the only question that could be controverted was the execution of the instrument, it was held that a plea of fraud in general terms was sufficient; but this rule was confined to cases where the fraud related to the execution of the instrument.⁹

Mich. 367, 54 N. W. 164; State v. Ross, 118 Mo. 23, 69, 23 S. W. 196.

⁶ Brower v. Goodyer, 88 Ind. 572; Stanfield v. Stiltz, 93 Ind. 249; Adams v. Curtis, 137 Ind. 175, 36 N. E. 1095.

⁷ Ross v. Miner, 64 Mich. 204, 31 N. W. 185; Burrill v. Kimbell, 65 Mich. 217, 31 N. W. 142; Glessner v. Patterson, 164 Pa. St. 224, 231, 30 A. 355; Van Sciver Co. v. McPherson, 199 Pa. St. 331, 49 Atl. 73.

⁸ Abbey v. Dewey, 25 Pa. St. 25; Young v. Edwards, 72 Pa. St. 25.

⁹ Saunders v. Stotts, 6 Ohio 1; Derby v. Corlett, 1 Clev. L. 210, 4 Ohio Dec. (Reprint) 283.

¹⁰ Vrooman v. Phelps, 2 Johns. (N. Y.) 177; Van Valkenburgh v. R. 12 Johns. (N. Y.) 337; Dorr v. M. sell, 13 Johns. (N. Y.) 430; 1 v. Roosevelt, 9 Cow. (N. Y.) 3; Jackson v. Hills, 8 Cow. (N. Y.) 290; Franchot v. Leach, 5 Cow.

§ 2124. **Pleading fraud—Specific facts.**—It is now conceded to be the general, if not the universal rule, in pleading fraud, whether in the complaint or answer, that it is necessary to set out with particularity the facts or acts constituting the fraud. The reason for this rule is that fraud is not in itself a fact, but is a term that the law applies to certain facts, and as a conclusion from them.¹⁰ The general rule has been stated as follows: "It is not sufficient to plead fraud generally, or merely to characterize actions as fraudulent. The facts and circumstances constituting the fraud should be set forth. There should be some concealment, misrepresentation, craft, finesse, or abuse of confidence, by which another is misled, to his detriment, and these, or some of them, must be alleged and proved. Mere epithets, or adverbs characterizing conduct, which may be innocent, amount to nothing."¹¹ There are other reasons why fraud should be so pleaded. "Pleadings in equity and at law are designed to apprise parties and the court of the material facts on which the asserted right depends, and to invoke attention to the points

Y.) 506; *Stevens v. Judson*, 4 Wend. (N. Y.) 473; *Belden v. Davies*, 2 Hall (N. Y.) 433, 446; *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

* *Mock v. Pleasants*, 34 Ark. 63; *Wetherly v. Straus*, 93 Cal. 233, 28 P. 1045; *Arthur v. Gard*, 3 Colo. App. 133, 32 Pac. 343; *Tucker v. Parks*, 7 Colo. 62, 1 Pac. 427, 3 Pac. 486; *De Votie v. McGerr*, 15 Colo. 467, 24 Pac. 923; *Dean v. Mason*, 4 Conn. 428; *Crocker v. Higgins*, 7 Conn. 342; *Brainerd v. Arnold*, 27 Conn. 617; *Deans v. Wilcoxon*, 25 Fla. 980, 7 So. 163; *Klein v. Horine*, 47 Ill. 430; *Jones v. Albee*, 70 Ill. 34; *Smith v. Brittenham*, 98 Ill. 188; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796; *Jenkins v. Long*, 19 Ind. 28; *Farmer v. Calvert*, 44 Ind. 209; *Thomas v. Ruddell*, 66 Ind. 326; *Root v. Schaffner*, 39 Iowa 375; *Gray v. Earl*, 13 Iowa 188; *Booth v. Booth*, 3 Litt. (Ky.) 58; *Coleman v. McKinney*, 3 J. J. Marsh. (Ky.) 246; *Timms v. Shannon*, 19 Md. 296;

Holcomb v. Noble, 69 Mich. 396; *Martin v. Lutkewitte*, 50 Mo. 58; *Turner v. Killian*, 12 Neb. 580; *Hamilton v. Ross*, 23 Neb. 630, 37 N. W. 467; *Gouverneur v. Elmendorf*, 5 Johns. Ch. (N. Y.) 79; *Evertson v. Miles*, 6 Johns. (N. Y.) 138; *James v. McKernon*, 6 Johns. (N. Y.) 543; *Forsyth v. Clark*, 3 Wend. (N. Y.) 637; *Smith v. Long*, 9 Daly (N. Y.) 429; *Bailey v. Ryder*, 10 N. Y. 363; *Keel v. Levy*, 19 Ore. 450, 24 Pac. 253; *McCrelish v. Churchman*, 4 Rawle (Pa.) 26; *Johnson's Appeal*, 9 Pa. St. 416; *Horan v. Long*, 11 Tex. 230; *Irion v. Mills*, 41 Tex. 310, 316; *Knibb v. Dixon*, 1 Rand (Va.) 249; *Patton v. Taylor*, 7 How. (U. S.) 132; *Very v. Levy*, 13 How. (U. S.) 345; *Voorhees v. Bonesteel*, 16 Wall. (U. S.) 16; *Noonan v. Lee*, 2 Black (U. S.) 499.

¹¹ *McIlroy v. Buckner*, 35 Ark. 555; *Twombly v. Kimbrough*, 24 Ark. 459, 464.

to which testimony should be directed."¹² And as fraud is never presumed, it is the rule that, where it is relied upon as a ground of relief, the facts and circumstances constituting the fraud must be stated in the bill with distinctness and precision, so that an issue may be formed which will apprise both parties of proof proper to be taken.¹³ To justify the imputation of fraud, it is said, the facts must be so stated that they are not explicable on any other reasonable hypothesis.¹⁴ The courts are now practically unanimous in holding to this general rule requiring the facts constituting the fraud to be pleaded with great certainty and particularity, whether stated in the complaint, answer or reply.¹⁵ In the absence of all allegations of fraud in the pleading, no proof on that subject can be offered.¹⁶

¹² *Crocket v. Lee*, 7 Wheat. (U. S.) 522.

¹³ *Kennedy v. Kennedy*, 2 Ala. 571; *Conway v. Ellison*, 14 Ark. 360; *Pendleton v. Galloway*, 9 Ohio 178.

¹⁴ *Steele v. Kinkle*, 3 Ala. 352, 358; *Durr v. Jackson*, 59 Ala. 203.

¹⁵ *McKeay v. Collehan*, 13 Ala. 828; *Flewellen v. Crane*, 58 Ala. 627; *Pickett v. Pipkins*, 64 Ala. 520; *Morgan v. Morgan*, 68 Ala. 80; *Chamberlain v. Dorrance*, 69 Ala. 40; *Meadows v. Meadows*, 73 Ala. 356; *McHan v. Ordway*, 76 Ala. 347; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Burford v. Steele*, 80 Ala. 147; *Penny v. Jackson*, 85 Ala. 67, 4 So. 720; *Steiner v. Parsons*, 103 Ala. 215, 13 So. 771; *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649; *Abraham v. Gray*, 14 Ark. 301; *Conway v. Ellison*, 14 Ark. 360; *Keller v. Vowell*, 17 Ark. 445; *Seaborn v. Sutherland*, 17 Ark. 603; *Ringgold v. Stone*, 20 Ark. 526; *Twombly v. Kimbrough*, 24 Ark. 459; *Mock v. Pleasants*, 34 Ark. 63, 68; *McIlroy v. Buckner*, 35 Ark. 555; *Hanf v. Whittington*, 42 Ark. 491; *Jackson v. Reeve*, 44 Ark. 496; *Harris v. Taylor*, 15 Cal. 348; *Crane v. Hirschfelder*, 17 Cal. 467; *Oakland v. Carpentier*, 21 Cal. 642, 666; *Castle*

v. Bader, 23 Cal. 75, 76; *Oroville & R. Co. v. Plumas Co.*, 37 Cal. 354; *Capuro v. Builders' Ins. Co.*, 39 Cal. 123; *Triscony v. Orr*, 49 Cal. 612; *Sacramento &c. Bank v. Hynes*, 5 Cal. 195; *Goodwin v. Goodwin*, 5 Cal. 560; *Kidder's Estate*, 66 Cal. 487, 6 Pac. 326; *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Green v. Hayes*, 70 Cal. 276, 11 Pac. 716; *Pehrson v. Hewitt*, 79 Cal. 594, 2 Pac. 950; *Albertoli v. Braham*, 8 Cal. 631, 22 Pac. 404; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *Woodroof v. Howes*, 88 Cal. 184, 2 Pac. 111; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 62; *Wetherly v. Straus*, 93 Cal. 283, 29 Pac. 1045; *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565; *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. 310; *Robinson v. Dolores &c. Co.*, 2 Colo. App. 17, 29 Pac. 750; *Bull v. Bull*, 2 Root (Conn.) 476; *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474; *Mutual Loan &c. Asso. v. Price*

¹⁶ *Bailey v. Ryder*, 10 N. Y. 363; *Byard v. Holmes*, 34 N. J. L. 296; *Knibb v. Dixon*, 22 Va. 249; *Patton v. Taylor*, 7 How. (U. S.) 132; *Voorehes v. Bonesteel*, 16 Wall. (U. S.) 16; *Noonan v. Lee*, 2 Black (U. S.) 499.

§ 2125. **Proof need not follow pleading strictly.**—The complainant is not held to the strictest proof of the fraud as laid; but he is

19 Fla. 127; Powell v. Parker, 38 Ga. 644; Hand v. Dexter, 41 Ga. 454; Carswell v. Hartridge, 55 Ga. 412; Martin v. Moore, 63 Ga. 531; McCook v. Bernd, 79 Ga. 391, 5 S. E. 75; Slack v. McLagan, 15 Ill. 242; Wood v. Goss, 21 Ill. 604; Goodrich v. Reynolds, 31 Ill. 490; Newell v. Bureau County, 37 Ill. 253; Klein v. Horine, 47 Ill. 430; Jones v. Albee, 70 Ill. 34; Hopkins v. Woodward, 75 Ill. 62; Cole v. Joliet &c. Co., 79 Ill. 96; Smith v. Brittenham, 98 Ill. 188; Roth v. Roth, 104 Ill. 35; East St. Louis &c. Co. v. People, 119 Ill. 182, 10 N. E. 397; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; People v. Healy, 128 Ill. 9, 20 N. E. 692; East St. Louis v. Millard, 14 Ill. App. 483; Ward v. Luneen, 25 Ill. App. 160; Salsbury v. Falk, 28 Ill. App. 297; Curry v. Keyser, 30 Ind. 214; Darnell v. Rowland, 30 Ind. 342; Hess v. Young, 59 Ind. 379; Neidefer v. Chastain, 71 Ind. 363; West v. Wright, 98 Ind. 335; Bodkin v. Merit, 102 Ind. 293, 1 N. E. 625; Conant v. National &c. Bank, 121 Ind. 323, 22 N. E. 250; Huffman v. Copeland, 139 Ind. 221, 38 N. E. 861; Stroup v. Stroup, 140 Ind. 179; Seward v. Liberty, 142 Ind. 551, 39 N. E. 864; Guy v. Blue, 146 Ind. 529, 45 N. E. 1050; Cotterell v. Koon, 151 Ind. 182, 51 N. E. 255; Hamilton v. Toner, 17 Ind. App. 389, 46 N. E. 921; Hale v. Walker, 31 Iowa 344; Ockendon v. Barnes, 43 Iowa 615; Mason v. Searles, 56 Iowa 532, 7 N. W. 370; Mills v. Collins, 67 Iowa 164, 25 N. W. 109; Kerr v. Steman, 72 Iowa 241, 33 N. W. 654; Leavenworth &c. R. Co. v. Douglas Co., 18 Kans. 169; State v. Williams, 39 Kans. 517, 18 Pac. 727; Kingman &c. R. Co. v. Quinn, 45 Kans. 477, 25 Pac. 1068; Dwinal v. Smith, 25 Me. 379; Stover v. Poole, 67 Me. 217; Stevens v. Moore, 73 Me. 559; Merrill v. Washburn, 83 Me. 189, 22 Atl. 118; Grove v. Rentch, 26 Md. 367; Barnard v. Eaton, 2 Cush. (Mass.) 294; Nichols v. Rogers, 139 Mass. 146, 29 N. E. 377; Rhead v. Hounson, 46 Mich. 243, 9 N. W. 267; Wait v. Kellogg, 63 Mich. 138, 30 N. W. 80; Pforzheimer v. Selkirk, 71 Mich. 600, 40 N. W. 12; McMahon v. Rooney, 93 Mich. 390, 53 N. E. 539; Kelley v. Wallace, 14 Minn. 236; Cummings v. Thompson, 18 Minn. 246; Catchings v. Manlove, 39 Miss. 655; Memphis &c. R. Co. v. Neighbors, 51 Miss. 412, 413; Martin v. Lutkewitte, 50 Mo. 58; Smith v. Sims, 77 Mo. 269; Reed v. Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; Hoester v. Sammelmann, 101 Mo. 619, 14 S. W. 728; Williams v. Chicago &c. R. Co., 112 Mo. 463, 496, 20 S. W. 631; Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613; Goodson v. Goodson, 140 Mo. 206, 41 S. W. 737; Bickle v. Irvine, 9 Mont. 251, 23 Pac. 244; Arnold v. Baker, 6 Neb. 134; Tepoel v. Saunders &c. Bank, 24 Neb. 815, 40 N. W. 415; Weld v. Locke, 18 N. H. 141; Bell v. Lamprey, 52 N. H. 41; Byard v. Holmes, 34 N. J. L. 296; Small v. Boudinot, 9 N. J. Eq. 381; Rorback v. Dorsheimer, 25 N. J. Eq. 516; Phillips v. Schooley, 27 N. J. Eq. 410; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881; Knapp v. Brooklyn, 97 N. Y. 520; Wood v. Amory, 105 N. Y. 278, 11 N. E. 636; McMurray v. Gifford, 5 How. Pr. (N. Y.) 14; Butler v. Viele, 44 Barb. (N. Y.) 166; Libb, v. Rosekrans, 55 Barb. (N. Y.) 202;

required to prove the substance of the charge. The rule in respect has been stated as follows: "Plaintiff is, perhaps, not to prove the representations precisely as alleged, but he must prove the substance or the material part of such representations; and the strictness than that the law does not require."¹⁷ Where the allegations are regarded as divisible, or the fraud charged consists of several separate matters, the plaintiff may succeed if he can prove any one of them which, of itself, makes a cause of action. Where the petition or complaint states facts amounting to fraud, and also states facts amounting to a fraud, proof of either is offered to sustain either, and the instructions may be made applicable to both.¹⁸

- Service v. Heermance, 2 Johns. (N. Y.) 96; Brereton v. Hull, 1 Den. (N. Y.) 75; Ynguanzo v. Salomon, 3 Daly (N. Y.) 153; Harway v. New York, 1 Hun (N. Y.) 628; Hilsen v. Libby, 44 N. Y. Super. Ct. 12; Lawrence v. Foxwell, 49 N. Y. Super. Ct. 273; Witherspoon v. Carmichael, 6 Ired. Eq. (N. Car.) 143; Bryan v. Spruill, 4 Jones Eq. (N. Car.) 27; Young v. Greenlee, 82 N. Car. 346; Helms v. Green, 105 N. Car. 251, 11 S. E. 470; Pendleton v. Galloway, 9 Ohio 178; Pelton v. Bemis, 44 Ohio St. 51, 4 N. E. 714; Nicolai v. Lyon, 8 Ore. 56; Misner v. Knapp, 13 Ore. 135; 9 Pac. 65; Sterling v. Mercantile &c. Ins. Co., 32 Pa. St. 75; Marr's Appeal, 78 Pa. St. 66; Hostetter v. City of Pittsburgh, 107 Pa. St. 419; Knight v. Pugh, 4 W. & S. (Pa.) 445; Phillips v. Potter, 7 R. I. 289; Fraser v. Hext, 2 Strobb. 31 (S. Car.) 250; Cumins v. Lawrence Co., 1 S. Dak. 158, 46 N. W. 182; M'Caleb v. Perry, 5 Hayw. (Tenn.) 88; Shepherd v. Shepherd, 12 Helsk. (Tenn.) 276; Fort v. Orndoff, 7 Helsk. (Tenn.) 167; Payne v. Metz, 14 Tex. 56; Austin v. Talk, 20 Tex. 164; Adams v. Huffmaster, 42 Tex. 15; Hendrix v. Nunn, 46 Tex. 141; Bo Crow, 2 Tex. Civ. App. 591, 612; Rasmussen v. McKnight, Utah 315, 3 Pac. 83, 4 Pac. 528; Voorhees v. Fisher, 9 U. S. 34 Pac. 64; Ide v. Gray, 11 Steed v. Baker, 13 Gratt. (Vt.) Southall v. Farish, 85 Va. 4 E. 534; Hale v. West Virginia Co., 11 W. Va. 229; Zell Gr. v. Heatherly, 38 W. Va. 409, 611; Supervisors &c. v. De Wis. 624; Riley v. Riley, 372; Landauer v. Vietor, 434, 34 N. W. 229; Knox v. 4 How. (U. S.) 298; St. Louis Co. v. Johnston, 133 U. S. 10 Sup. Ct. 390; Fogg v. B. U. S. 118, 11 Sup. Ct. 476; B. O'Hara, 8 Fed. 529; Hazard v. wold, 21 Fed. 178; Lafayette Neely, 21 Fed. 738; Phelps v. Hott, 35 Fed. 455.
- ¹⁷ Ladd v. Pigott, 114 Ill. 6 E. 503; Endsley v. Johns, 469, 12 N. E. 247; Packard v. 115 Mass. 405.
- ¹⁸ Endsley v. Johns, 120 12 N. E. 247.
- ¹⁹ Hughes v. Funston, 23 I.

§ 2126. **Prima facie case.**—The rule in some jurisdictions is that when the complaining party makes proof of facts and circumstances which not only cast a suspicion on the transaction complained of, but show a state of facts which cannot be fairly or reasonably reconciled with fair dealing and honesty of purpose, he has then overcome the presumption of purity of intention and has made a prima facie case.²⁰ As fraud may be inferred from facts and circumstances proved, it is the rule that when such facts and circumstances are sufficient to make a prima facie case of fraudulent intent, they may be taken as conclusive evidence of such intent unless met by proof of other facts and circumstances sufficient to rebut and overcome the prima facie case already made.²¹

§ 2127. **No presumption of fraud.**—The universal rule is that fraud is never presumed. The legal presumptions are in favor of honesty and fair dealing. There can be no imputation of fraud when the circumstances and facts upon which it is based are consistent with honesty and purity of intention.²² While the general rule obtains that fraud is not presumed as a matter of law, yet it may be inferred from proof of certain facts. No arbitrary or inflexible rule can be given as to the quantum or degree of evidence required to raise a presumption of actual fraud. The rule as to this has been stated as follows: "The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation. It need not possess such a degree of force as to be irresistible; but there must be evidence of tangible facts from which a legitimate inference of a fraudulent intent may be drawn. As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such

²⁰ *Smith v. Branch Bank*, 21 Ala. 125; *Alabama &c. Ins. Co. v. Pettway*, 24 Ala. 544; *Stiles v. Lightfoot*, 26 Ala. 443; *Thames v. Rembert*, 63 Ala. 561; *Pickett v. Pipkin*, 64 Ala. 520; *Cromelin v. McCauley*, 67 Ala. 542; *Adams v. Thornton*, 78 Ala. 489; *Meyrovitz v. Glaser &c.*, 132 Ala. 103, 31 So. 360; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

²¹ *Steele v. Kinkle*, 3 Ala. 352; *Tompkins v. Nichols*, 53 Ala. 197; *Morgan v. Olvey*, 53 Ind. 6; *Lyman v. Cessford*, 15 Iowa 229; *Schofield v. Blind*, 33 Iowa 175; *Drummond v. Couse*, 39 Iowa 443; *Kellogg v. Aherin*, 48 Iowa 299; *Bixby v. Carskaddon*, 55 Iowa 533, 8 N. W. 354; *Jack v. Brown*, 60 Iowa 271, 14 N. W. 304; *Dallam v. Renshaw*, 26 Mo. 533.

²² *Parker v. Valentine*, 27 W. Va. 677.

presumption existed. As it is against a presumption of fact, perhaps even a slight one, it requires somewhat more evidence than would suffice to prove the acknowledgement of an obligation or the delivery of a chattel. It is not necessary, however, that the fraud shall be proved beyond a reasonable doubt. Issues of fact in such cases are determined by a preponderance of testimony, and the same rule applies as well to cases in which fraud is imputed as to any other fact. "Fraud is not presumed, but, like every other fact, it may be proved by circumstances; and courts, while not indulging presumptions that it is imputable, cannot refuse to draw from uncontroverted facts the inferences flowing from them logically and naturally."²⁴ On this subject the Supreme Court of Missouri say: "Fraud, it is sometimes said, may be inferred. But this expression must not be construed to warrant the mere assumption of a fact. This inference can only be drawn legitimately from some tangible, responsible fact in proof. It is a deduction which an intelligent mind may honestly make from the incidents and circumstances surrounding the transaction and which appear to be inconsistent with the good faith and veracity of the actor. If, however, the conduct of the party, and the transaction under consideration, reasonably consist as well with integrity and fair dealing, the law rather refers the act to the honest motive."²⁵ While the courts generally recognize the rule that fraud cannot be presumed, yet it is conceded by almost every court that it can be inferred from facts which are clearly proved and which lead to that conclusion.²⁶

²⁴ Bump Fraud. Conv. 602; Adams v. Thornton, 78 Ala. 489; Hempstead v. Johnston, 18 Ark. 123; Colquitt v. Thomas, 8 Ga. 258; Reed v. Noxon, 48 Ill. 323; Carter v. Gunnels, 67 Ill. 270; Rhodes v. Green, 36 Ind. 7; Kelly v. Lenihan, 56 Ind. 448; Dillie v. McMillan, 52 Iowa 463, 464, 3 N. W. 601; Thomas v. Hughes, 8 B. Mon. (Ky.) 369; Hatch v. Bayley, 66 Mass. 27; Parkhurst v. McGraw, 24 Miss. 134; Jaeger v. Kelley, 52 N. Y. 274; Henry v. Henry, 8 Barb. (N. Y.) 588; Lockhard v. Beckley, 10 W. Va. 87; White v. Perry, 14 W. Va. 66; Kaine v. Weigley, 22 Pa. 179.

²⁵ Pickett v. Pipkin, 64 Ala. 48; Adams v. Thornton, 78 Ala. 489; Am. Dec. 49; Nicely v. Rogers, Iowa 441; Burleigh v. White, 67 Me. 23; Rumbolds v. Parr, 51 Me. 23; Page v. Dixon, 59 Mo. 43; St. Estel, 6 Mo. App. 6; Shultz v. Island, 85 N. Y. 464.

²⁶ Funkhouser v. Lay, 78 Mo. 462; Garesche v. MacDonald, 100 N. Y. 1, 15 S. W. 379.

²⁷ Jackson v. Summerville, 13 Pa. St. 359; Lasher v. Medical Press, 203 Pa. St. 313, 52 Atl. 1135.

§ 2128. **No presumption of fraud—Limitation.**—The proposition that fraud is never presumed has its limitations. The rule is probably correct that fraud will not be presumed in absence of all evidence. But it is equally true that presumption of fraud may arise on proof of certain facts. The Supreme Court of Pennsylvania states the limitations on this rule as follows: "It is said that fraud must be proved, and is never presumed. This proposition can be admitted only in a qualified and very limited sense. But it is often urged at the bar, and sometimes assented to by the judges, as if it were a fundamental maxim of the law universally true, incapable of modification and open to no exception; whereas it has scarcely extent enough to give it the dignity of a general rule; and, as far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this: that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. It is not true that fraud can never be presumed. Presumptions are of two kinds, legal and natural. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption."²⁷ On this subject the Supreme Court of Illinois said: "This is but the mere expression of the abhorrence with which the law regards fraud and its unwillingness to believe that any person could be guilty of conduct so base. It is true that the law never presumes fraud without some evidence. The legal presumption exists that every man is innocent of intentional wrong, and is honest of purpose until the contrary is proved. But it is not true that the law will never imply fraud without direct and positive proof. Under a rule so stringent, fraud would rarely be proved. It loves deceit and stratagem; and its inextricable windings can often only be traced by circumstances."²⁸

§ 2129. **Inferred from proofs.**—The courts are unanimous in adhering to the rule as generally stated, that fraud is never presumed. By this rule is meant that fraud is not presumed as a matter

²⁷ *Kaine v. Weigley*, 22 Pa. St. 179; ²⁸ *Strauss v. Kranert*, 56 Ill. 254;
Montgomery Webb Co. v. Dienelt, *Bowden v. Bowden*, 75 Ill. 143.
 133 Pa. St. 585, 19 Atl. 428; *Orr v.*
Peters, 197 Pa. St. 606, 47 Atl. 849.

of fact. But the courts are equally unanimous that fraud may be inferred from proofs of certain facts or circumstances. It is generally conceded that from the difficulty of proof of a purpose to defraud and the impossibility of proving fraudulent intent fraud may be necessarily inferred from a given state of facts. Where the facts, so far as they are capable of proof, and the surrounding circumstances plainly point to a wrongful or corrupt purpose, the inference for such inference is sufficiently established. The proof of civil and criminal intent are analogous inferences drawn from the facts and circumstances. This principle has been plainly recognized by courts in many jurisdictions. The Supreme Court of Missouri on this subject said: "And though fraud is never presumed, it is as legitimate to infer its existence from surrounding circumstances pointing unmistakably to a wrongful purpose as it is to infer, under similar circumstances, the commission of a crime; this is done daily. Anything, therefore, which satisfies the mind and conscience of the existence of fraud is sufficient."^{28*} And the Supreme Court of Pennsylvania stated this principle as follows: "A guilty deed, like any other fact, may be inferentially established. Almost all human knowledge rests in inferences from proofs. The fact that fraud has been committed is not an exception, and it may be proved in the same manner. Nor has the author of a fraud any right to complain of the latitude of proofs which the law allows for it is a universal truth that the more thoroughly an honest transaction is investigated the more honest it will appear. It is only in those cases where the evidence is so weak that the truth is not apparent in the deeds which are reprobated by coming to light. . . . If there is evidence from which a jury might have reasonably inferred the fraud, we are to presume that they based their verdict on that evidence." "Fraud is seldom capable of direct proof. It must be established by facts and circumstances taken together, and the natural inferences to be drawn therefrom, which will satisfy the ordinary, unbiassed man, either as a juror or outside of the jury-box, that it exists."²⁹

§ 2130. Burden of proof.—The question of fraud is one of fact and the burden of proof rests upon the complainant where a charge of fraud is made, not only to raise a suspicion of fraud but to

^{28*} *Massey v. Young*, 73 Mo. 260;
Ross v. Miner, 67 Mich. 410, 35 N.
 W. 60; *State v. Mason*, 112 Mo. 374,
 2 S. W. 629.

²⁹ *Stauffer v. Young*, 39 Pa. St. 179;
Kaine v. Weigley, 22 Pa. St. 179;
³⁰ *Ross v. Miner*, 67 Mich. 410,
 N. W. 60.

it with a more reasonable degree of clearness by preponderating testimony.³¹ The plain statement of the proposition is that fraud is a question of fact which must be alleged and proved.³² The burden of proof is on the complainant to make out the charge of fraud by a preponderance of the evidence; nothing more than this is required.³³ This does not mean, however, that a jury must be satisfied by a preponderance of the evidence. The law imposes no such degree of proof. The jury are only required to believe from the preponderance of the evidence, and not to be satisfied.³⁴ It is not sufficient to support an allegation of fraud to prove slight circumstances of suspicion only.³⁵ The presumption of innocence and fair dealing will prevail until overthrown by clear proof of fraud.³⁶ As stated by the Kentucky Supreme Court: "The true rule in all courts, without regard to their character, must be to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence and beget a belief of the truth of the allegation of fraud."³⁷ "When it is remembered that parties entering into fraudulent schemes, endeavor to cover up the true purpose, we must not expect to find clear and undisputed evidence of its existence. The parties seldom entrust their plans to others, and usually, as far as possible, adopt legal forms and the usual course of business to conceal their designs. From these considerations it is usually a matter of much difficulty to detect and expose fraud in almost every species of transaction."³⁸ A charge of fraud may be proved by positive or circumstantial evidence, or both, but the burden of establishing it by competent evidence rests upon the party making the charge and not upon him who denies it.³⁹ The defendant's

³¹ Cannon v. Jackson, 40 Ark. 417.
See § 2149.

³² Powell v. Stickney, 88 Ind. 310;
Stix v. Sadler, 109 Ind. 254, 9 N. E.
905; Caldwell v. Boyd, 109 Ind. 447,
9 N. E. 912; Levi v. Kraminer, 2
Ind. App. 594, 28 N. E. 1028; Balti-
more & C. R. Co. v. Scholes, 14 Ind.
App. 524, 43 N. E. 156.

³³ Ford v. Chambers, 19 Cal. 143;
Hamilton v. Bishop, 22 Iowa 211;
Lillie v. McMillan, 52 Iowa 463, 3
W. 601; Bixby v. Carskaddon, 55
Iowa 533, 8 N. W. 354; Jack v.
Brown, 60 Iowa 271, 14 N. W. 304.

³⁴ Ruff v. Jarrett, 94 Ill. 475.

³⁵ Mead v. Conroe, 113 Pa. St. 220,
8 Atl. 374.

³⁶ Lutton v. Hesson, 18 Pa. St. 109;
Baer's Estate, In re, 60 Pa. St. 430;
Lasher v. Medical Press Co., 203 Pa.
St. 313, 52 Atl. 1135.

³⁷ Marksbury v. Taylor, 10 Bush
(73 Ky.) 519.

³⁸ Gill v. Crosby, 63 Ill. 190; Chron-
ister v. Anderson, 73 Ill. App. 524.

³⁹ Warren v. Gabriel, 51 Ala. 235;
1 Greenleaf, §§ 13, 74.

fraud is an integral part of the plaintiff's case, and the burden of proof on this issue is on the plaintiff throughout the entire case.⁴⁰

§ 2131. Burden of proof to defeat written instrument.—When it is sought to overturn a written instrument by oral proof of fraud, it seems that more evidence, or evidence to a greater degree of certainty, is required than in ordinary transactions that rest in proof of fact. The rule has been stated thus: "The evidence of fraud must be precise and indubitable. Otherwise it should be withdrawn from the jury."⁴¹ The Supreme Court of Maine said of such a case: "The plaintiff must prevail, not only upon a preponderance of evidence, but such preponderance must be based upon testimony that is clear, and strong, satisfactory and convincing."⁴²

§ 2132. Fraud as a defense—Burden.—In many, perhaps in a majority, of the cases where the question of fraud has arisen, it has been pleaded as a defense to the action. This is always in the nature of an affirmative defense. And where a defense is based upon the proposition of fraud the burden is upon the defendant to prove this allegation. This simply follows the rule that the burden of proof is on the party charging the fraud, to prove it.⁴³

§ 2133. Difficulty of making proof of fraud.—The courts generally recognize the extreme difficulty in making proof of fraud, and the rules of proof on this subject have been tempered with a latitude of investigation that is not permitted in matters susceptible of demonstrative proof. This difficulty of proof arises from the inherent nature of fraud, and hence the necessity of the rule that permits proof by its manifestations as revealed in falsity and unfairness. The Supreme Court of Texas, recognizing the difficulty in making actual proof of fraud, say: "It is not in its nature discernible

⁴⁰ Burnham v. Noyes, 125 Mass. 85.

⁴¹ Wharton Ev., § 932; Young v. Edwards, 72 Pa. St. 257; Cummins v. Hurlbutt, 92 Pa. St. 165; Blerer's Appeal, 92 Pa. St. 265; Mead v. Conroe, 113 Pa. St. 220, 8 Atl. 374.

⁴² Parlin v. Small, 68 Me. 289; Baker v. Vining, 30 Me. 121; Burleigh v. White, 64 Me. 23; Brown v. Blunt, 72 Me. 415.

⁴³ Stewart v. Thomas, 15

(Mass.) 171; Baldwin v. Park, Mass. 79; Beatty v. Fishel, 100 Mass. 448; Wood v. Massachusetts Asso., 174 Mass. 217, 54 N. E. 1; Nelson v. Minneapolis St. R. Co., Minn. 167, 63 N. W. 486; Jones v. Greaves, 26 Ohio St. 2.

the direct evidence of the senses; and is usually so covert and concealed, or is attended with such attempts at concealment, as to be incapable of proof otherwise than by circumstantial or presumptive evidence. Its existence, in a given case, may be proved, either by intrinsic evidence of unfairness in the transaction itself or by evidence of facts and circumstances attending it, which, by the ordinary tests by which we judge of the motives to action appear inconsistent with an honest purpose. And when it is said that fraud cannot be presumed it is not meant that the presumption of fraud may not arise and be legitimately deduced by a jury from such evidence; but only, that it is not to be assumed of a transaction that it is fraudulent, in the absence of proof afforded by intrinsic evidence of unfairness in the transaction itself, or extrinsic facts and circumstances leading to that conclusion. There is reason to apprehend that juries are not unfrequently misled, in cases of this character, by being told that fraud cannot be presumed, but must be proved; thereby inducing the belief that fraud is a thing which has a material existence, is tangible, and cannot be otherwise proved than by evidence direct and positive. Such is not its nature; it is not a thing susceptible of ocular observation or physical demonstration. Yet its existence, in a given case, may be sufficiently demonstrated for judicial purposes, and to warrant judicial action, by intrinsic evidence of unfairness in the contract or transaction itself."⁴⁴ On this subject the Supreme Court of Missouri further say: "Fraud is rarely ever susceptible of positive proof, for the obvious reason that it does not cry aloud in the streets nor proclaim its iniquitous purposes from the housetops. Its vermiculations are chiefly traceable by 'covered tracks and studious concealments.'"⁴⁵

§ 2134. **Latitude and scope of proof.**—The difficulty in making proof of fraud is compensated to a certain extent by the courts in permitting very great latitude in the range of the evidence. This has arisen from the necessity of the case and in order that the ends of justice may be attained. As fraud is a question of intent, the courts hold that inquiry may be made into any relevant matter

⁴⁴ *Burch v. Smith*, 15 Tex. 219, 223; 20 S. W. 629; *State v. Ross*, 118 Mo. 23, 69, 23 S. W. 196.

⁴⁵ *Stanfield v. Stiltz*, 93 Ind. 249; *Adams v. Curtis*, 137 Ind. 175, 36 N. E. 1095; *Massey v. Young*, 73 Mo. 260; *Leeper v. Bates*, 85 Mo. 224; *State v. Mason*, 112 Mo. 374, 23 S. W. 196.

which tends to throw light upon the question of the intent with which the act under investigation was done. "Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence."⁴⁶ It is said that if the evidence offered has any bearing on the question, however remote, it should be admitted. While great latitude is allowed in the admission of circumstantial evidence for the purpose of proving the question of fraud itself, the duty of the court is to see that such evidence has at least a natural and reasonable tendency to support the proposition, and that it is of such a character as to warrant an inference of the fact to be proved, and that it amounts to more than a basis for conjecture or speculation.⁴⁸ "Upon a question of fraud of this nature the evidence must necessarily take a pretty wide range, and may embrace all those facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions."⁴⁹

§ 2135. Latitude and scope of proof—Illustrations and meanings.

On a charge that a purchase was made in bad faith and with

- ⁴⁶ *Butler v. Watkins*, 13 Wall. (U. S.) 456; *Lincoln v. Claflin*, 7 Wall. (U. S.) 132; *New York & C. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877; *Mack v. Jones*, 31 Fed. 189; *Snodgrass v. Branch Bank*, 25 Ala. 161; *Warren v. Gabriel*, 51 Ala. 235; *Cook v. Perry*, 43 Mich. 623, 627, 5 N. W. 1054; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Erfort v. Consalus*, 47 Mo. 209; *Mosby v. Commission Co.*, 91 Mo. App. 500; *Manheimer v. Harrington*, 20 Mo. App. 297; *Stewart v. Fenner*, 81 Pa. St. 177; *Walt Fraud*, § 282; *Wharton Ev.*, § 33; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; *Robinson v. Woodmansee*, 80 Ga. 249, 4 S. E. 497; *Vigus v. O'Bannon*, 118 Ill. 334, 8 N. E. 778; *Galdry v. Lyons*, 29 La. Ann. 4; *Dunn v. Insurance Co.*, 104 La. Ann. 31, 28 So. 932; *Davis v. Calvert*, 5 Gall & J. (Md.) 269; *Curtis v. Moore*, 20 93; *Ross v. Miner*, 64 Mich. 204; N. W. 185; *Stewart v. Severance*, Mo. 322; *Hopkins v. Sievert*, 58 201; *Knight v. Houghtalling*, 85 Car. 17; *Zerbe v. Miller*, 16 Pa. 488; *Garrigues v. Harris*, 17 Pa. 344; *Stauffer v. Young*, 39 Pa. 455; *Craig's Appeal*, 77 Pa. St. 4; *Cover v. Manaway*, 115 Pa. St. 8; *Atl. 393*; *Heath v. Slocum*, 115 St. 549, 9 Atl. 259; *Glessner v. 1* *terson*, 164 Pa. St. 224, 30 Atl. 3; *Hirsh v. Wenger*, 182 Pa. St. 246; *Atl. 135*; *Van Sciver Co. v. McPherson*, 199 Pa. St. 331.
- ⁴⁷ *Woods v. Gummert*, 67 Pa. 136.
- ⁴⁸ *Battles v. Laudenslager*, 84 St. 446; *Mack v. Jones*, 31 Fed. 189.
- ⁴⁹ *Smalley v. Hale*, 37 Mo. 1 See § 184.

fraudulent intent as against creditors, it was held that "a large latitude of inquiry should be permitted as to the circumstances surrounding the transaction, the conduct of the parties before and after the alleged purchase, the actual consideration, and the means of the vendee; for only in that way can the fraud, if any there be in the transaction, be exposed."⁵⁰ This rule has been carried to the extent of holding that in a case involving a charge of fraud that evidence is admissible proving acts done before any rights of the complainant had supervened, which tended to illustrate the conduct of the parties and develop the truth of their relations.⁵¹ The meaning of the rule permitting this great liberality in the range of evidence is thus explained by the Supreme Court of Pennsylvania: "That every circumstance in the condition and relation of the parties, and every act and declaration of the person charged with the fraud, shall be competent evidence, if in the opinion of the judicial mind it bears such a relation to the transaction under investigation as in its nature is calculated to persuade the jury that the allegation of fraud is or is not well founded."⁵²

§ 2136. **Proof by circumstances.**—Many courts recognize the rule that fraud cannot generally be proved by direct testimony of witnesses who speak from their own knowledge of a fraudulent intent; the reason of this is found in the fact that parties intending to commit a fraud do not call witnesses to the transaction and seldom proclaim their intent. Hence, the recognized rule is that fraud may be proved by surrounding facts and circumstances, and that in determining the question of fraud a jury may consider all the facts and circumstances surrounding the case as shown by the evidence.⁵³ Fraud is seldom if ever proved by positive evidence; it is generally established by circumstances and presumptions which arise from the conduct of the parties.⁵⁴ "In the examination of questions of fraud courts will look into all the circumstances; and, while express and positive proof is not required, yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to estab-

⁵⁰ *Douglass v. Hill*, 29 Kans. 527; ⁵¹ *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70.
⁵² *Castle v. Bullard*, 23 How. (U. S.) 172.

⁵³ *Lane v. Taylor*, 40 Ind. 495; ⁵⁴ *Craig's Appeal*, 77 Pa. St. 448; *Farmer v. Calvert*, 44 Ind. 209;

⁵⁵ *Stauffer v. Young*, 39 Pa. St. 455; *Brower v. Goodyer*, 88 Ind. 572.
Glessner v. Patterson, 164 Pa. St. 324, 30 Atl. 355.

lish fraud."⁵⁵ The law does not require that it shall be proved by direct evidence, but it may be inferred from circumstances surrounding the transaction.⁵⁶ As held by some courts it may be inferred from strong presumptive circumstances.⁵⁷ Like any other fact, it may be proved by facts and circumstances which satisfy the mind of the jury of its existence; it may be, and generally is, inferred from circumstances, and cannot often be proved in any other way.⁵⁸ The evidence of fraudulent transactions is rarely of a direct or positive character; the reason of this has been said to be that those engaged in such questionable transactions do not court the light of the law. Very slight circumstances, therefore, may, although apparently trivial and unimportant of themselves, afford, when combined together, a convincing and fragable proof of fraudulent intent.⁵⁹

§ 2137. **Proof must establish certain propositions.**—The law does not prescribe no certain or absolute standard either as to the definition of fraud or the quantity of proof which shall be deemed necessary to establish the fact of fraud. But it can say that the proof must reach some degree of certainty, and to this end certain principles may be stated. Thus, to establish actionable fraud the proof must sufficiently show the following propositions: (1) the fraud must be material; it must "relate distinctly and directly to the contract and affect its very essence and substance; (2) the standard of materiality requires that the proof show that the contract or engagement would not have been entered into if the fraud had not been practiced; but if the proof is such as to show or make it probable that the same thing would have been done in the same way substantially so in absence of the fraud charged, then it is not material; (3) the misrepresentations or false statements must be made with the design and purpose to impose upon the opposite party and to induce him to act in the premises; (4) that the complaining party relied upon the representations or statements made; (5) that the representations and statements were such, or were made under such circumstances, that the injured party had a right to rely upon

⁵⁵ Waddingham v. Loker, 44 Mo. 132. Hough v. Dickinson, 58 Mich. 89; N. W. 809; Ferris v. McQueen, Mich. 367, 54 N. W. 164; Haines v. Hayden, 95 Mich. 332, 54 N. W. 190.

⁵⁶ Stanfield v. Stiltz, 93 Ind. 249.

⁵⁷ McDaniel v. Baca, 2 Cal. 326; Greenleaf Ev., § 428; 1 Story Eq. 190.

⁵⁸ Hopkins v. Sievert, 58 Mo. 190. Albert v. Besel, 88 Mo. 150; McDaniel v. Commission Co., 91 Mo. App. 190.

⁵⁹ O'Donnell v. Segar, 25 Mich. 367; v. Commission Co., 91 Mo. App. 190.

them in full belief of their truthfulness; (6) that the complaining party has been injured as a result of the fraudulent transaction charged."⁶⁰

§ 2138. Proof must show plaintiff damaged.—In order to constitute actionable fraud the complaining party must have suffered some injury. The rule, therefore, is that to entitle a party to recover damages for a fraud or false representation it is essential that the proof show that the complainant has been injured by the alleged fraud.⁶¹ The rule has been stated as follows: "Fraud without damage or damage without fraud will not sustain the action for deceit; and a false and fraudulent representation made by one party to induce a contract entered into by the other is not actionable unless the party to whom it was made believed the representation to be true and acted upon the faith of it to his damage."⁶² On this principle it has been held that a person who, either by fraud or by representations which are false and fraudulent, obtains from another a sum of money which is rightfully due him, is not liable either in a civil action for fraud or in a criminal prosecution for obtaining the money under false pretenses. And in an action for a fraud or a criminal prosecution the defendant may

⁶⁰ *McAleer v. Horsey*, 35 Md. 439; *Buschman v. Codd*, 52 Md. 202; *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 581, 14 Atl. 673; *Baltimore &c. R. Co. v. Canton Co.*, 70 Md. 405, 17 Atl. 394; *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099; *Young v. Covell*, 8 Johns. (N. Y.) 23; *Lord v. Goddard*, 13 How. (U. S.) 198, 211; *Pasley v. Freeman*, 3 Term R. 51; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247; *Lincoln v. Ragsdale*, 9 Ind. App. 555, 37 N. E. 25; *Haycraft v. Creasy*, 2 East 92; *Anderson v. McPike*, 86 Mo. 293; *Taylor v. Guest*, 58 N. Y. 262; *Allen v. Addington*, 7 Wend. (N. Y.) 9; *Addington v. Allen*, 11 Wend. (N. Y.) 374; *Oberlander v. Spiess*, 45 N. Y. 175; *Lefler v. Field*, 52 N. Y. 621; *Morgan v. Skiddy*, 62 N. Y. 319; *Therasson v. People*, 82 N. Y. 238; *Tindle v.*

Birkett, 171 N. Y. 520, 64 N. E. 210; *Kain v. Rinker*, 1 Ind. App. 86, 27 N. E. 328; *Denny v. Woods*, 2 Ind. App. 301, 28 N. E. 443; *Lincoln v. Ragsdale*, 9 Ind. App. 555, 37 N. E. 25; *Evans v. Bicknell*, 6 Ves. Jr. 174, 186; *Hayorsft v. Creasy*, 2 East 92; *Pasley v. Freeman*, 3 Term R. 51; *Scott v. Lara*, Peake 296; *Eyre v. Dunsford*, 1 East 318, 327; *Burton v. Loyd*, 3 Esp. 207; *Hamar v. Alexander*, 5 Bos. & P. 241; *Bigelow Frauds*, 87.

⁶¹ *Fuller v. Hodgdon*, 25 Me. 243; *Brown v. Blunt*, 72 Me. 415; *Commonwealth v. McDuffy*, 126 Mass. 467; *McAleer v. Horsey*, 35 Md. 431, 453; *McCann v. Preston*, 79 Md. 223, 28 Atl. 1102.

⁶² *Taylor v. Guest*, 58 N. Y. 262, 266.

prove that the complainant was indebted to him in the sum equal or greater than, the amount of money thus obtained. As stated in one case: "A false representation, by which a man may be charged into his duty, is not within the statute."⁶³

§ 2139. Defendant not benefited.—In order to sustain the charge of fraud it is not necessary to prove that the defendant was directly benefited by the alleged perpetration. It is sufficient if the plaintiff was damaged by the fraud of the defendant. This principle has been stated thus: "In the complicated transactions of trade, fraud appears in such manifold and protean guise that we are not disposed to lay it down as a rule of law that no action can be maintained for an intentionally false affirmation, causing damage to a reasonably prudent plaintiff, unless it appears that the defendant had an intention in causing it. Doubtless there may be cases where satisfactory proof may be presented that the defendant had thus intentionally deceived the plaintiff to his injury and loss, when it might be impossible to show that he himself was benefited thereby, or that he colluded with others who were."⁶⁴ The rule as gathered from an Illinois case is thus stated: "If a person damages another by false representations made with intent to deceive, knowing the same to be true, he will be liable to the party so injured in an action for deceit, notwithstanding he may derive no benefit by the deceit and did not collude with the party benefited. The fraud and the scienter constitute the ground of the action."⁶⁵

§ 2140. Fraud amounting to a crime—Degree of proof.—The rule as established and followed in many early cases, was that where fraud or other tort which, amounting to a crime, was involved in a civil action the degree of proof required was the same as in a criminal case, and that the fact must be established beyond reasonable doubt.⁶⁶ The gradual change from this rule is

⁶³ *People v. Thomas*, 3 Hill (N. Y.) 169; *Commonwealth v. McDuffy*, 126 Mass. 467; *People v. Getchell*, 6 Mich. 496; *Commonwealth v. Henry*, 22 Pa. St. 253; *Commonwealth v. Thompson*, 3 Pa. L. J. 250; *People v. Griffin*, 2 Barb. (N. Y.) 427; *Rex v. Williams*, 7 Car. & P. 354.
⁶⁴ *Brown v. Blunt*, 72 Me. 415; *Pas- ley v. Freeman*, 3 Term R. (D. C.) 51.
⁶⁵ *Endsley v. Johns*, 120 Ill. 40; *N. E.* 247.
⁶⁶ *McConnel v. Delaware & Co.*, 18 Ill. 228; *Sprague v. D.* 48 Ill. 142; *Harblson v. Shoo* Ill. 141; *Oliver v. Oliver*, 110 Ill. 119; *Germania &c. Ins. Co.*

illustrated by the decisions of the Ohio Supreme Court. In one of the earlier cases the court said of Mr. Greenleaf's rule requiring proof beyond reasonable doubt that "the rule laid down by that writer may not be technically correct, but it certainly is not far out of the way. My understanding upon this subject is that in all cases, whether civil or criminal, the jury must be satisfied, must be convinced, that the fact is as they find it to be. And how can they be satisfied and convinced so long as doubts exist in their minds as to the truth of such fact?"⁸⁷ In the next case in order of time the court recognized that the rule requiring proof beyond a reasonable doubt had been applied in cases which involved enormous, or at least odious, crimes, such as murder, arson, robbery, perjury and larceny, but declined to apply the rule in a case where the charge amounted to a misdemeanor only.⁸⁸ In the next case, recognizing the rule in the former case, the court expressly held that in a civil action based on fraud which does not amount to a criminal offense the evidence need not be such as to exclude all reasonable doubt, and that only a preponderance of evidence was required.⁸⁹ In speaking of the former cases on this subject one court said: "The plain tendency of these cases, however, is to apply the rule of preponderance of proof in all issues in civil cases. . . . But in a controversy between man and man, affecting nothing but a claim, or a defense to damages, and involving nothing but pecuniary or property interests, the reason of the rule wholly fails, and the parties should be on an equality as to the quantum of proof required to establish any material fact."⁹⁰ The modern and certainly the more

- Klewer, 129 Ill. 599, 612, 22 N. E. 489; Grimes v. Hilliary, 150 Ill. 141, 142, 36 N. E. 977; Shepherd v. Royce, 71 Ill. App. 321; Roberts v. Woods, 82 Ill. App. 630; Barton v. Thompson, 46 Iowa 30; Thayer v. Boyle, 30 Me. 475; Kane v. Hibernia Ins. Co., 38 N. J. L. 441; Woodbeck v. Keller, 6 Cow. (N. Y.) 118; Clark v. Dibble, 16 Wend. (N. Y.) 601; Steinman v. McWilliams, 6 Pa. St. 170; Coulter v. Stuart, 2 Yerg. (Tenn.) 225; Byrket v. Monohon, 7 Blackf. (Ind.) 83; Thurtell v. Beaumont, 8 T. B. Moore 612, 1 Bing. 339; Chalmers v. Shackell, 6 Car. & P. 475; 2 Greenleaf Ev., § 418; 1 Taylor Ev. (5th ed.), 97a.
- ⁸⁷ Lexington Ins. Co. v. Paver, 16 Ohio 324.
- ⁸⁸ Lyon v. Fleahmann, 34 Ohio St. 151; Shaul v. Norman, 34 Ohio St. 157.
- ⁸⁹ Strader v. Mullane, 17 Ohio St. 624; Jones v. Greaves, 26 Ohio St. 2; Gordon v. Parmelee 15 Gray (Mass.) 413; Wunderlich v. Palatine Ins. Co., 115 Wis. 509, 92 N. W. 264.
- ⁹⁰ Bell v. McGinness, 40 Ohio St.

reasonable rule is that even where the fraud or tort charged in a civil action is the subject of indictment, and for which the perpetrator might be prosecuted, yet in a civil action such fraud or tort is not required to be proved by a preponderance of the evidence as against other existing fact.⁷¹ While the rule is now recognized that a preponderance of evidence is all that is required in such cases, many of the leading cases on the subject still insist on the rule that in a civil action evidence should be required to establish grave charges than to establish those which are trifling or indifferent.⁷²

§ 2141. **Proof of similar acts or frauds.**—Fraud, as to its proof and mitigation, is generally a matter of intention, and to support a charge

- 204; *Kolling v. Bennett*, 18 Ohio C. C. 425; *Deveaux v. Clemens*, 17 Ohio C. C. 33.
- ⁷¹ *First Nat. Bank v. Sanford*, 83 Ill. App. 58; *Ætna Ins. Co. v. Johnson*, 74 Ky. 587; *Munson v. Atwood*, 30 Conn. 102; *Hall v. Brown*, 30 Conn. 551; *Mead v. Husted*, 52 Conn. 53; *Fay v. Reynolds*, 60 Conn. 217, 21 Atl. 418; *Bissell v. Wert*, 35 Ind. 54; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636; *Welch v. Jugenheimer*, 56 Iowa 11, 8 N. W. 673; *Wightman v. Western &c. Ins. Co.*, 8 Rob. (La.) 442; *Behrens v. Ins. Co.*, 58 Iowa 26, 11 N. W. 719; *Schmidt v. New York &c. Ins. Co.*, 1 Gray (Mass.) 529; *Gordon v. Parmelee*, 15 Gray (Mass.) 416; *Hoffman v. Insurance Co.*, 1 La. Ann. 216; *Ellis v. Buzzell*, 60 Me. 209; *Decker v. Somerset &c. Ins. Co.*, 66 Me. 406, 408; *Campbell v. Burns*, 94 Me. 127, 46 Atl. 812; *Roberge v. Burnham*, 124 Mass. 277; *Elliott v. Van Buren*, 33 Mich. 50, 51; *Watkins v. Wallace*, 19 Mich. 57; *Peoples v. Evening News*, 51 Mich. 11, 16 N. W. 691; *Burr v. Willson*, 22 Minn. 206; *Thoreson v. Northwestern &c. Ins. Co.*, 29 Minn. 107, 12 N. W. 154; *Rothschild v. American Ins. Co.*, 62 Mo. 356; *Marshall v. Thames Ins. Co.*, 43 Mo. 586; *Allen v. Allen*, 101 N. Y. 658, E. 341; *People v. Briggs*, 114 N. Y. 56, 64, 20 N. E. 820; *Kane v. Bernia Ins. Co.*, 39 N. J. L. 1; *Jones v. Greaves*, 26 Ohio St. 2; *Don v. Fleahmann*, 34 Ohio St. 1; *Bell v. McGinness*, 40 Ohio St. 1; *Robertson v. Deming*, 52 Ohio St. 44 N. E. 1146; *Matthews v. Hurst*, 9 N. H. 146, 150; *Folsom v. Brainerd*, 25 N. H. 114; *Traphagen v. Hees*, 44 N. J. Eq. 21, 12 Atl. 1; *Manning v. Columbian Lodge &c. N. J. Eq. 338*, 38 Atl. 444, 45 1092; *Hills v. Goodyear*, 4 (Tenn.) 233; *McBee v. Bowma* Tenn. 132, 14 S. W. 481; *Brad* Bliss, 35 Vt. 326; *Blaeser v. waukee &c. Ins. Co.*, 37 Wis. 1; *Hartwig v. Chicago &c. R. Co.* Wis. 358, 5 N. W. 865; *Whitn* Clifford, 57 Wis. 156, 14 N. W. 1; *Dohmen v. Niagara &c. Ins. Co.* Wis. 38, 52, 71 N. W. 69; *Wunde* v. *Palatine Ins. Co.*, 115 Wis. 50 N. W. 264; *Klipstein v. Rasc* 117 Wis. 248, 94 N. W. 63; *Sec* Home Ins. Co., 1 Dillon (U. S.) 1; *Huchberger v. Merchants' &c. Co.*, 4 Bis. (U. S.) 265.
- ⁷² *Decker v. Somerset Ins. Co.* Me. 406; *Lyon v. Fleahmann* Ohio St. 151.

of fraud the fraudulent intent must be made to appear, and any evidence which tends to prove the existence of an intent to defraud is competent. In certain classes of cases to substantiate the charge of fraud it is not only necessary to prove the falsity of the statements made by the person perpetrating the fraud, but it is equally essential to prove his knowledge of their falsity. In order to make this proof it has been held that similar statements or representations made to third persons at about the same time may be given in evidence for the purpose of showing that the statements or representations were known to be false. One court stated the rule as follows: "When the false representations have been successful the fraudulent intent may be proved from other sources. Among the sort of evidence tending to that effect is the proof that the same party, about the same time, made use of false representations to others, with the fraudulent intent."⁷⁸ On this subject the Maryland court said: "Where fraud is the gist of the action or subject of inquiry, great latitude of investigation is always allowed; fraudulent conduct, acts and declarations of the defendant of a similar

⁷⁸ *Cragin v. Tarr*, 32 Me. 55; 24 Vt. 525; *Eastman v. Premo*, 49 Hutchinson v. Chadbourne, 35 Me. Vt. 355; *Castle v. Bullard*, 23 How. 189; *Hawes v. Dingley*, 17 Me. 341; (U. S.) 172; *Butler v. Watkins*, 13 Aldrich v. Warren, 16 Me. 465; Mc- Wall. (U. S.) 456; *Lincoln v. Claf-* Kenney v. Dingley, 4 Me. 172; lin, 7 Wall. (U. S.) 132; *New York* Nichols v. Baker, 75 Me. 334; *Howe* &c. Ins. Co. v. Armstrong, 117 U. S. v. Reed, 12 Me. 515; *Cook v. Perry*, 591, 6 Sup. Ct. 877; *Mudsill Min.* 43 Mich. 623, 5 N. W. 1054; *Gardner* Co. v. Watrous, 61 Fed. 163; *Bot-* v. Preston, 2 Day (Conn.) 205; tomley v. United States, 1 Story (U. S.) 135; *Haines v. Hayden*, 95 Mich. 332, 54 S.) 135; *Knight v. Heath*, 23 N. H. N. W. 911; *McAleer v. Horsey*, 35 410; *Hovey v. Grant*, 52 N. H. 569; Md. 439, 461; *Stubly v. Beachboard*, Blalock v. Randall, 76 Ill. 224; *Loeb* 68 Mich. 401, 36 N. W. 192; *Benham* v. Flash, 65 Ala. 526; *Edwards v.* v. Cary, 11 Wend. (N. Y.) 83; Warner, 35 Conn. 517; *Clark v. Rein-* French v. Ryan, 104 Mich. 625, 635, iger, 66 Iowa 507, 26 N. W. 16; Booth v. Powers, 56 N. Y. 22; *Brink* 62 N. W. 1016; *Jackson v. Timmer-* v. Black, 77 N. Car. 59; *Stewart v.* man, 12 Wend. (N. Y.) 299; *Win-* Fenner, 81 Pa. St. 177; *Pierce v.* borne v. Lassiter, 89 N. Car. 1; *Stev-* Hoffman, 24 Vt. 525; *Bancroft v.* ens v. Vancleve, 4 Wash. (U. S.) Heringhi, 54 Cal. 120; *Moline-Mil-* 262; *Hersey v. Benedict*, 15 Hun (N. burn Co. v. Franklin, 37 Minn. 137, Y.) 232; *Allison v. Matthieu*, 3 33 N. W. 323; *Bernheim v. Dibrell*, Johns. (N. Y.) 235; *People v. Sea-* 66 Miss. 199, 5 So. 693; *Bradley v.* man, 107 Mich. 348, 65 N. W. 203; Lowry v. Pinson, 2 Bailey (S. Car.) Obear, 10 N. H. 477; *Adams v. Ken-* 324; *Summers v. Howland*, 49 Tenn. ney, 59 N. H. 133; *Irving v. Motly*, (2 Baxt.) 407; *Pierce v. Hoffman*, 7 Bing. 543.

character, at or about the same time, to or toward third parties, are admissible to show *quo animo* of the particular transaction. It may be proved by third parties, and a fortiori by the cross examination of the defendant himself, and from them the jury have the right to infer fraud in the transaction complained of."⁷⁴ "Wherever the intent or guilty knowledge of a party is a material ingredient in the issue in the case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act."⁷⁵

§ 2142. **Rule denied or limited.**—In other jurisdictions the admission of such evidence is denied, and it is held that proof of the fact that a person had committed other like frauds is not admissible for the purpose of showing his bad character, and hence increasing the probability that he might have perpetrated the fraud in question. As stated in one case, in speaking of such evidence: "But this evidence is not introduced for the purpose of proving the character of the parties to these conspiracies, but the fact that they did conspire to defraud all persons by acts similar to those that are the subject of inquiry in the particular case, and thence to raise an inference that the particular subject matter was but a part of the same conspiracy. We can see no bearings that the evidence had except to prove that respondent a man who had cheated others and from this circumstance raise an inference that he defrauded and intended to defraud the petitioner."⁷⁶ The rule in New York, as early stated, was as follows: "On questions of intent to defraud, other acts similar to the one charged, done at or about the same time or when the same motive to offend may reasonably be supposed to have existed as that which is in issue, or admissible with a view to the *quo animo*. The case of *McAleer v. Horsey* is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge."⁷⁷ In a later case the court of appeals, referring to the earlier case, said: "The transactions must be so connected in point of time, and so

⁷⁴ *McAleer v. Horsey*, 35 Md. 439; *Parrish v. Thurston*, 87 Ind. 437.

⁷⁵ *Bottomley v. United States*, 1 Story (U. S.) 135; *New York & Co. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877. See § 163.

⁷⁶ *Edwards v. Warner*, 35 Conn. 614; *Knotwell v. Blanchard*, 517.

⁷⁷ *Cary v. Hotelling*, 1 Hill (N. Y.) 317.

ilar in their other relations, that the same motive may reasonably be imputed to them all. It is not necessary, however, that the means of accomplishing each fraud should be the same."⁷⁸

§ 2143. **Massachusetts rule.**—The rule in Massachusetts on the admissibility of similar acts is somewhat restricted. To make such evidence admissible in that jurisdiction it seems that the transactions must be so connected that each was done in the furtherance of a common purpose, and that the different transactions were simply parts of one common design. Before evidence of the other transactions is admissible there must be some proof connecting the alleged fraud claimed to have been practiced upon the plaintiff and the other transactions sought to be proved. As stated by the court in one case: "The transaction proposed to be proved for the purpose of showing the fraud which is the subject of the controversy, must be shown by some evidence, direct or circumstantial, to be so connected with it as to make it apparent that the defendant had a common purpose in both; but if the transaction is distinct and with no connection of design, it is not admissible."⁷⁹ The rule is thus stated in a very late case: "As bearing upon the intent with which the defendant obtained the goods, it was competent for the government to show, if it could, that the goods were obtained by the defendant pursuant to a general or common plan or scheme of fraud on his part. And for the purpose of showing such a plan or scheme it was competent for the government to introduce testimony tending to show that at or about the same time he fraudulently obtained goods from other parties by the same or similar pretenses which he appropriated to his own use and for which he did not pay. The different transactions must be connected with the one in question as parts of a general or common scheme or plan to defraud in order to justify their admission as evidence. But

⁷⁸ *Hall v. Naylor*, 18 N. Y. 588; *Allen* (Mass.) 172; *Wiggin v. Day*, *Miller v. Barber*, 66 N. Y. 558; 9 *Gray* (Mass.) 97; *Williams v. Robbins*, 15 *Gray* (Mass.) 590; *Haskins v. Boyd*, 164 N. Y. 234, 58 N. E. 118; *v. Warren*, 115 Mass. 514; *Horton v. People v. Molineux*, 168 N. Y. 264, 61 N. E. 286; *Van Kleek v. Leroy*, 4 *Abb. N. Cas.* (N. Y.) 431. *Commonwealth v. Robinson*, 146

⁷⁹ *Jordan v. Osgood*, 109 Mass. 457; *Mass.* 571, 16 N. E. 452; *Fowle v. Rowley v. Bigelow*, 12 *Pick.* (Mass.) *Child*, 164 Mass. 210, 41 N. E. 291; 307; *Taylor v. Robinson*, 2 *Allen* *Brownell v. Briggs*, 173 Mass. 529, (Mass.) 562; *Lynde v. McGregor*, 13 54 N. E. 251.

when so connected the evidence of fraud which they furnish is competent as bearing upon the intent with which the goods were obtained in any one of the transactions embraced in the general plot or scheme."⁸⁰ The same rule obtains in some other jurisdictions.⁸¹

§ 2144. **Badges of frauds.**—The law recognizes that there may be what is termed badges or signs of fraud; that is, that a given transaction may be shown to be impressed with certain characteristics indicating in a greater or less degree to prove a fraudulent design. Badges or signs of fraud have been said to be "inferences drawn from experience, from the customary conduct of mankind, which is generally marked by selfishness, and distrust of his fellows."⁸² And a badge of fraud has been defined to be "a fact calculated to throw suspicion on the transaction, and calls for explanation."⁸³ As further defined by the Supreme Court of Alabama, "those badges of fraud do not, in themselves, or per se constitute fraud, but are rather signs or indications from which its existence may be properly inferred as a matter of inference. They are more or less strong or weak according to their nature or number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human ingenuity."⁸⁴ Or as said by the same court: "They do not constitute elements of fraud, but merely circumstances from which it may be inferred."⁸⁵ The Indiana Supreme Court said: "Badges of fraud do not afford grounds of inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent. The party against whom they are adduced is at liberty to explain them as he can, but if sufficient in number and importance and not explained, they will supply substantial grounds for pronouncing a transaction void upon the ground of fraud."⁸⁶ While the law may consider certain circumstances as badges of fraud it cannot be assumed as a matter of law that they are fraud per se, and they should usually be submitted to the jury in order that they may determine the character of

⁸⁰ *Commonwealth v. Lubinsky*, 182 Mass. 142, 64 N. E. 966.

⁸¹ *Terrell v. Green*, 11 Ala. 374. See § 2166.

⁸² *Edwards v. Warner*, 35 Conn. 517; *Knotwell v. Blanchard*, 41 Conn. 614; *State v. Vinson*, 63 N. Car. 335; *State v. Shuford*, 69 N. Car. 486; *Withrow v. Biggerstaff*, 87 N. Car. 176; *Malton v. Nesbit*, 1 Car. & P. 70.

⁸³ *Peebles v. Horton*, 64 N. Car. 374.

⁸⁴ *Shealy v. Edwards*, 75 Ala. 374.

⁸⁵ *Thames v. Rembert*, 63 Ala. 374.

⁸⁶ *Sherman v. Hogland*, 73 N. Car. 472; *Jaeger v. Kelley*, 52 N. Y. 472.

transaction.⁸⁷ In some jurisdictions it is held that the proof of the existence of these badges makes out a *prima facie* case of fraud, sufficient at least to shift the burden of proof.⁸⁸

§ 2145. **Badges of fraud—Illustrations.**—"Whenever fraud is the matter in issue, any unusual clause is an instrument, any unusual method of transacting the business, apparently done with the view for effect and to give to the transaction an air of honesty, is of itself a badge of fraud."⁸⁹ And it has been held that fraud "may be presumed from the circumstances and condition of the parties contracting." And in the same case it was stated that fraud "may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and such as no honest and fair man would accept on the other."⁹⁰ On this subject the Supreme Court of Virginia said: "Certain circumstances are often referred to as indicia of fraud, because they are usually found in cases where fraud exists. Even a single one of them may be sufficient to stamp the transaction as fraudulent. When several are found in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of fraudulent intent."⁹¹ So it has been held that certain combinations of several badges of fraud will be sufficient to raise a presumption of fraudulent intent and require the adverse party to show the good faith of the transaction.⁹² It is a badge of fraud for an insolvent debtor to sell or mortgage his entire property pending an action against him,⁹³ so, for an insolvent debtor pending a suit against him to sell or otherwise dispose of his property in an unusual manner differing from the ordinary mode in which such business is generally transacted and to the extent that suspicion would be aroused

⁸⁷ *King v. Russell*, 40 Tex. 124.

⁸⁸ *Hichman v. Trout*, 83 Va. 478,

⁸⁹ *Kendall v. Fitts*, 2 Foster (N. H.) 17; *Kirtland v. Snow*, 20 Conn.

3 S. E. 131.

23, 28; *Mills v. Warner*, 19 Vt. 609; *Hutchins v. Gilchrist*, 23 Vt. 82; *Allen v. Wheeler*, 4 Gray (Mass.) 123.

⁹⁰ *Reiger v. Davis*, 67 N. Car. 185; *Tredwell v. Graham*, 88 N. Car. 208; *McCanless v. Flinchum*, 98 N. Car.

⁹¹ *Baldwin v. Whitcomb*, 71 Mo. 651; *Comstock v. Rayford*, 12 Sm. & M. (Miss.) 369; *Tywne's Case*, 3 Coke 81; *Bump Fraud. Conv.* 650.

358, 4 S. E. 359; *Brown v. Mitchell*, 102 N. Car. 347; *Jackson v. Harby*, 70 Tex. 410, 8 S. W. 71; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

⁹² *Hoffer v. Gladden*, 75 Ga. 532.

⁹³ *King v. Cohorn*, 6 Yerg. (Tenn.) 74.

party as to intent in the transaction is not conclusive; but is to be taken and considered with all the other evidence in the case.⁹⁹ Such direct negative testimony, as a matter of law, will not necessarily outweigh the evidence of facts and circumstances tending to prove such intent.¹⁰⁰ On the weight to be given such evidence the Supreme Court of Michigan say: "Intention is generally proved by circumstances, because usually there is no other mode of proof. But when the only person who knows the fact is accessible as a witness, his answer must necessarily be more direct evidence than any other; and if there is any reason to suspect his candor, the jury may make all the allowances called for by his position and demeanor."¹⁰¹

§ 2147. *Party may testify as to intent—Limitations.*—This rule is not without its limitations, and there are certain classes of cases in which a party may not deny that his intention was different from the result of his acts. In some cases the law conclusively presumes that certain acts were done in bad faith, and the party will not be permitted to rebut this legal presumption by his own statement that he intended the contrary. The rule is limited to cases where there is no legal presumption of fraud.¹⁰² Nor can a party testify to his intention as against the plain and unambiguous terms of a contract.¹⁰³

rison, 176 Mass. 83, 57 N. E. 326; *People*, 60 N. Y. 221; *Bayliss v. Beebe v. Knapp*, 28 Mich. 53; *Brown v. Blanchard*, 39 Mich. 790; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. 46; *Bedford v. Penny*, 58 Mich. 424, 25 N. W. 381; *Angell v. Pickard*, 61 Mich. 561, 28 N. W. 680; *Garrett v. Mannheimelmer*, 24 Minn. 193; *State v. Mason*, 24 Mo. App. 321; *Norris v. Morrill*, 40 N. H. 395; *Clark v. Marshall*, 62 N. H. 498; *Lally v. Emery*, 54 Hun (N. Y.) 517; *Pope v. Hart*, 35 Barb. (N. Y.) 630, 636; *Forbes v. Waller*, 25 N. Y. 430; *McKown v. Hunter*, 30 N. Y. 625; *Bedell v. Chase*, 34 N. Y. 386; *Thurston v. Cornell*, 38 N. Y. 281; *Kenyon v. People*, 26 N. Y. 203; *Foster v. Cronkhite*, 35 N. Y. 139; *Dillon v. Anderson*, 43 N. Y. 231; *Waugh v. Fielding*, 48 N. Y. 681; *Kerrains v. People*, 60 N. Y. 221; *Bayliss v. Cockcroft*, 81 N. Y. 363, 368; *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. 174; *Davis v. Marvine*, 160 N. Y. 269, 54 N. E. 704; *Stearns v. Gosse*, 58 Vt. 38, 3 Atl. 193; *Wilson v. Noonan*, 35 Wis. 321, 355; *Plank v. Grimm*, 62 Wis. 251, 22 N. W. 470; *Anderson v. Wehe*, 62 Wis. 401, 402, 22 N. W. 584; 1 Wharton Ev., § 508.

⁹⁹ *Griffin v. Marquardt*, 21 N. Y. 121; *McKown v. Hunter*, 30 N. Y. 625; *Wilson v. Noonan*, 35 Wis. 321, 355; *Royce v. Gazan*, 76 Ga. 80.

¹⁰⁰ *Anderson v. Wehe*, 62 Wis. 401, 22 N. W. 504.

¹⁰¹ *Watkins v. Wallace*, 19 Mich. 57.

¹⁰² *Ecker v. McAllister*, 45 Md. 390, 309; *Phelps v. George's Creek & Co. R. Co.*, 60 Md. 536; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507.

¹⁰³ *Dillon v. Anderson*, 43 N. Y. 231.

§ 2148. **Fraudulent concealment.**—Fraud may be established by proof showing that in a business transaction a person has concealed facts which materially affected the subject matter of the contract. In general the mere failure to disclose a certain condition or a state of facts within the knowledge of one party to the transaction is not fraudulent.¹⁰⁴ To make the act fraudulent there must be concealment. The proof must show, in order to make it fraudulent, that the concealment was either, (1) passive, that is a withholding of the truth when it was the duty of the party to speak; or, (2) active, that is, asserting or representing that which is untrue in order to conceal the real condition of the subject matter of the controversy. In order to make the passive concealment a fraud the duty must exist of disclosing the fact known to the one party and not to the other; this duty must arise in some way from the circumstances of the transaction, either from the relation of the parties, or the circumstances of the sale.

¹⁰⁴ *Juzan v. Toulmin*, 9 Ala. 662; *Otis v. Raymond*, 3 Conn. 413; *Dean v. Morey*, 33 Iowa 120; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; *Bean v. Herrick*, 12 Me. 262; *Potts v. Chapin*, 133 Mass. 276; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66; *Dambmann v. Schulting*, 75 N. Y. 55, 62; *People's Bank v. Bogart*, 81 N. Y. 101; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *Kintzing v. McElrath*, 5 Pa. St. 467; *Neill v. Shamburg*, 158 Pa. St. 263, 27 Atl. 992; *Thompson v. Morris*, 5 Jones L. (N. Car.) 151.

¹⁰⁵ *Griel v. Lomax*, 89 Ala. 420, 6 So. 741; *Warren v. Schainwald*, 62 Cal. 56; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16; *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Caldwell v. Davis*, 10 Colo. 481, 15 Pac. 696; *Hemingway v. Coleman*, 49 Conn. 390; *Capital Bank v. Rutherford*, 70 Ga. 57; *Poullain v. Poullain*, 76 Ga. 420; *Hopkins v. Watt*, 13 Ill. 298; *Mason v. Bauman*, 62 Ill. 76; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Tolman v. Smith*, 43 Ill. App. 562;

Firestone v. Werner, 1 Ind. 293, 27 N. E. 623; *Gee v. Mosier*, Iowa 318, 27 N. W. 268; *Greene v. Peeso*, 92 Iowa 261, 60 N. W. 12; *Purslow v. Jackson*, 93 Iowa 69; *Kruson v. Kruson*, 1 (Ky.) 183; *Singleton v. Kennebec B. Mon.* (Ky.) 222; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; *v. Arberry*, 2 J. J. Marsh. (Ky.) 297; *Prentiss v. Russ*, 16 Me. 297; *Franklin Bank v. Cooper*, 36 Me. 179; *French v. Vining*, 102 Minn. 132; *Marsh v. Webber*, 13 Minn. 132; *Gray v. Emmons*, 7 Mich. 132; *Tompkins v. Hollister*, 60 Mich. 27 N. W. 651; *Finegan v. The People*, 92 Mich. 173, 52 N. W. 619; *Adams v. Cates*, 24 Mo. 223; *Henry v. Benton*, 57 Mo. 531; *Henry v. Delzell*, 21 Mo. App. 679; *Mason v. Truesdale*, 57 Mo. App. 679; *Gruber v. Baker*, 20 Nev. 453, 23 Nev. 858; *Stevens v. Fuller*, 8 N. H. 858; *Hanson v. Edgerly*, 29 N. H. 858; *Porter v. Woodruff*, 36 N. J. Eq. 858; *Howell v. Baker*, 4 Johns. Ch. (Y.) 118; *Nickley v. Thomas*, 43 Barb. (N. Y.) 652; *Morris v.*

This obligation to disclose will be found to arise from something in the act or conduct of the vendor in connection with the sale—doing something or saying something, which, for want of disclosure, is false and deceptive.”¹⁰⁶ This rule was applied where a principal required his agent, whom he knew to be dishonest, to give bond for his fidelity, and failed to reveal to the surety his knowledge of the agent’s dishonesty; this was held to be such fraud of the guarantor as would prevent the principal from recovering an action on the bond.¹⁰⁷

Fraudulent Conveyance.

§ 2149. **Burden—Presumption of honesty.**—The burden rests upon the party who assails the good faith of a transaction or conveyance to show that it was fraudulent by either direct or circumstantial evidence. In the absence of evidence to the contrary the law presumes that every man performs his business transactions in good faith and for an honest purpose; and any one who assails the transaction or alleges that it was done in bad faith or for a dishonest and fraudulent purpose has the burden of showing the fraud or bad faith.¹⁰⁸

long, 16 Hun (N. Y.) 570; Miller v. Curtis, 59 N. Y. Super. Ct. 503; Case v. Edney, (N. Car.) 4 Ired. L. 93; Brown v. Gray, 6 Jones L. (N. Car.) 103; Lunn v. Shermer, 93 N. Car. 164; Hadley v. Clinton & Co., 13 Ohio St. 502; Goodale v. Hunt, 8 Am. L. Rec. 624, 6 Ohio Dec. (Reprint) 897; Cornelius v. Molloy, 7 Pa. St. 293; Rockafellow v. Baker, 41 Pa. St. 319; Neill v. Shamburg, 158 Pa. St. 263, 27 Atl. 992; Hough v. Evans, 4 McCord L. (S. Car.) 169; Cardwell v. McClelland, 3 Sneed (Tenn.) 150; Smith v. Click, 4 Humph. (Tenn.) 186; Wintz v. Morrison, 17 Tex. 372; Paddock v. Strobbridge, 29 Vt. 470; Graham v. Stiles, 38 Vt. 578; Maynard v. Maynard, 49 Vt. 297; Rison v. Newberry, 90 Va. 513, 18 S. E. 916; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Stewart v. Wyoming Cat-
tle & Co., 128 U. S. 383, 9 Sup. Ct. 101; Loewer v. Harris, 57 Fed. 368; Randolph v. Allen, 73 Fed. 23.
¹⁰⁶ Hadley v. Clinton & Co., 13 Ohio St. 502.
¹⁰⁷ Dinsmore v. Tidball, 34 Ohio St. 411; Smith v. Josselyn, 40 Ohio St. 409.
¹⁰⁸ Railroad Co. v. Varnell, 98 U. S. 479; Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538; Prewitt v. Wilson, 103 U. S. 22; Gulf & C. R. Co. v. Johnson, 54 Fed. (U. S.) 474; Wilson v. Fuller, 9 Kans. 176, 187; Diefendorf v. Oliver, 8 Kans. 365; Cooke v. Cooke, 43 Md. 522, 533; Hatch v. Bayley, 12 Cush. (Mass.) 27; Stewart v. Thomas, 15 Gray (Mass.) 171; Elliott v. Stoddard, 98 Mass. 145; Baughman v. Penn, 33 Kans. 504, 6 Pac. 890; Walker v. Collins, 50 Fed. 737; Walker v. Collins, 59 Fed. 70. See § 2130.

§ 2150. **Proof must overcome presumption of honesty.**—It has been held that the proof of fraud must be sufficient to overcome the presumption that all transactions are conducted honestly and without fraud. Hence where fraud is charged the proof should not be sufficient to establish an innocent act, but to overcome the presumption of honesty. Chief Justice Shaw, speaking for the Massachusetts Supreme Court, said: "We think it not contrary to any principle of law for the judge to inform the jury that, as the charge of fraud is a charge against a presumption of fact, perhaps of a slight one, yet the jury in order to be satisfied might require some stronger evidence than would suffice to prove the acknowledgment of an obligation or the delivery of a chattel."¹⁰⁹

§ 2151. **Burden of proof—Prima facie case.**—The authorities agree on the proposition that the burden is upon the person alleging a conveyance as fraudulent to establish the fraud. There is conflict in the decisions of the various courts as to what shall constitute a prima facie case. In some jurisdictions it is held that the proof of fraud of the grantor is sufficient to establish a prima facie case; but must be met by the grantee by evidence that he is a purchaser in good faith, for value.¹¹⁰ But in other jurisdictions it is held that the burden is on the creditor or the complainant to show the fraudulent design of the grantor and either notice or knowledge of and participation in such intent on the part of the grantee.¹¹¹ It seems

¹⁰⁹ *Hatch v. Bayley*, 12 Cush. 278; *lenwider v. Roberts*, 4 Dev. & Car. 278; *Brown v. Texas Co.*, 64 Tex. 396.

¹¹⁰ *Partelo v. Harris*, 26 Conn. 57; *Knower v. Cadden & Co.*, 57 Ill. 202, 17 Atl. 580; *Trumbull v. I.* 62 Conn. 448, 26 Atl. 350; *Sch* v. Walsh, 120 Ill. 403, 11 N. Haberer v. Walzer, 109 Ill. App. Adams v. Foley, 4 Iowa 44; v. Flanagan, 79 Ill. App. 296; mer v. McMullen, 102 Ill. App. Fifield v. Gaston, 12 Iowa 218; mond v. Couse, 39 Iowa 442; v. Cooke, 43 Md. 522, 524; Fu Brewster, 53 Md. 358; Smith tison, 84 Md. 341, 35 Atl. 963; v. Eggleston, 14 Mass. 245; v. Hall, 12 Pick. (Mass.) 89

¹¹¹ *Hamilton v. Blackwell*, 60 Ala. 545; *Gordon v. Tweedy*, 71 Ala. 202; *Miller v. Fraley*, 21 Ark. 22; *Richards v. Vaccaro*, 67 Miss. 516, 7 So. 506; *Ott v. Smith*, 68 Miss. 773, 10 So. 70; *Starin v. Kelly*, 88 N. Y. 418; *Worthy v. Caddell*, 76 N. Car. 82; *Rogers v. Hall*, 4 Watts (Pa.) 359; *Clark v. Depew*, 25 Pa. St. 509; *Lloyd v. Lynch*, 28 Pa. St. 419; *Ful-*

the rule, as held by some courts, that where a conveyance is made by an insolvent in the satisfaction of an antecedent debt, the burden of proof is upon the grantee to show that the consideration was both valuable and adequate.¹¹²

§ 2152. Intent—A question of fact.—Under a statute the Indiana Supreme Court has held that the question of fraudulent intent could not be one of legal inference or presumption, but it is a question of fact to be found from the facts and circumstances of the case.¹¹³ A conveyance is not to be adjudged fraudulent even as against creditors where the proof shows that it was founded on a valuable consideration. But facts and circumstances, in addition to the want of a valuable consideration, must be alleged and proved by the party seeking to avoid the conveyance; nor does proof of the fact of a want of consideration cast the burden of proving good faith upon the grantee, but the attacking creditor must prove not only the want of consideration but the indebtedness, the fact that the grantor, the debtor, has not means and property remaining sufficient to pay his debts; or that he is insolvent, and such like facts and circumstances as would be sufficient to prove the fraud.¹¹⁴ When it appears that an adequate consideration was paid for the conveyance in order to overthrow it on the ground of fraud, the burden is upon the creditor or the party attacking it to prove an intent in the mind of the grantor to cheat and defraud or to hinder and delay his creditors.¹¹⁵ In proving the fraud charged it is proper to show the dealings and declarations of the grantor subsequent to the time of the conveyance in question as tending to prove the fraud charged in the conveyance.¹¹⁶

§ 2153. Intent of grantor—Knowledge of grantee.—As a general rule, but not always, the question of the fraudulent character of

tum v. Green, 21 N. J. Eq. 364; Bank v. Northrup, 22 N. J. Eq. 58; Insurance Co. v. Tooker, 35 N. J. Eq. 408; Kruse v. Moore, 8 Ore. 158; Mehlhop v. Pettibone, 54 Wis. 652.

¹¹² Hodges v. Coleman, 76 Ala. 103; Pollak v. Searcy, 84 Ala. 259, 4 So. 137; Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 8 So. 137; Morrison v. Morris, 85 Ala. 196, 4 So. 667; Page v. Francis, 97 Ala. 379, 11 So. 136; Caldwell v. Pollak, 91 Ala. 353, 8 So.

546; Miller v. Fowan, 108 Ala. 98, 100, 19 So. 9.

¹¹³ Pence v. Croan, 51 Ind. 336; Bishop v. State, 83 Ind. 67; Phelps v. Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

¹¹⁴ Pence v. Croan, 51 Ind. 336; Sherman v. Hogland, 54 Ind. 578; Bishop v. State, 83 Ind. 67.

¹¹⁵ Haston v. Castner, 31 N. J. Eq. 697.

¹¹⁶ Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

the conveyance depends upon the intent of the grantor and not the intent of the grantee.¹¹⁷ Where a deed, absolute on its face, tacked for fraud the burden is upon the complainant to prove by preponderance of the evidence the fraudulent intent of the grantor also the knowledge of that intent on the part of the grantee.¹¹⁸ If the vendor's intention to defraud his creditors is not sufficient to invalidate the conveyance in the absence of all proof showing that the vendee either had knowledge of, or participated in, the fraud.¹¹⁹ To avoid a conveyance made on an adequate consideration, it is not sufficient to show that the grantor intended to defraud his creditors. It is sufficient as against such a conveyance the proof must show that the grantee participated in the fraudulent intent of the grantor.¹²⁰ If the evidence shows that the grantee participated in the fraud, and accepted the conveyance for the purpose of enabling his grantor to conceal or defraud his creditors, he holds the land as trustee of the creditors.¹²¹

§ 2154. **Fraud of vendor—Burden on vendee.**—The presumption of law is that the vendee has rightfully acquired possession of the property by a valid conveyance. And when it is made to appear that the proof that the vendor made the sale with the fraudulent intent to hinder or delay his creditors, the burden is then cast upon the vendee as between him and a creditor attacking the conveyance, to prove that he paid a sufficient consideration for the property in question. A mere proof of payment of a valuable consideration alone will not defeat the action of the creditor where it appears from all the facts and circumstances that the vendee purchased in bad faith or with knowledge of the fraudulent intent of the vendor.¹²² But the rule long established

¹¹⁷ *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 505; *Bump Fraud. Conv.* 279.

¹¹⁸ *Reiger v. Davis*, 67 N. Car. 185; *Savage v. Knight*, 92 N. Car. 493; *Beasley v. Bray*, 98 N. Car. 266, 3 S. E. 266; *Haynes v. Rogers*, 111 N. Car. 228, 16 S. E. 416; *Roberts v. Buckley*, 145 N. Y. 215, 39 N. E. 966.

¹¹⁹ *Anderson v. Hooks*, 9 Ala. 704; *Tompkins v. Nichols*, 53 Ala. 197; *Walker v. Collins*, 50 Fed. 737.

¹²⁰ *Lassiter v. Davis*, 64 N. Car. 498; *Johnston v. Field*, 62 Ind. Bank &c. v. Carter, 89 Ind. Jewett v. Meech, 101 Ind. 289; *nahan v. McCord*, 116 Ind. 67, E. 177; *Scott v. Davis*, 117 Ind. 20 N. E. 139; *Hays v. Montgo-* 118 Ind. 91, 20 N. E. 646.

¹²¹ *Eve v. Louis*, 91 Ind. 457; *v. Crull*, 112 Ind. 318, 14 N. E. Blair v. Smith, 114 Ind. 114, E. 817.

¹²² *Jones v. Simpson*, 116 U. S. 6 Sup. Ct. 538; *Ellinger v. Crow* Md. 361; *Goodman v. Winelan*

in New York and other jurisdictions is that a voluntary conveyance by one indebted at the time is *prima facie* only and not conclusively fraudulent, and that the burden of proof to show the good faith of the transaction is upon the party claiming under the conveyance.¹²³ But when it appears that the transaction itself is unfair or is *prima facie* shown to be illegal, the presumption of good faith and legality in ordinary business transactions are no longer presumed and the burden is upon the opposite party to show the good faith of the transaction.¹²⁴

§ 2155. *Debtor's insolvency—Grantee's knowledge.*—The rule is now almost universally conceded that a failing debtor may prefer a creditor, except as otherwise prohibited by the bankrupt act. But it

- Md. 449; *Adoue v. Spencer*, 62 N. J. Eq. 782, 49 Atl. 10; *Brown v. Mitchell*, 102 N. Car. 347, 9 S. E. 702; *Hardy v. Simpson*, 13 Ired. L. (N. Car.) 132; *Pennington v. Seal*, 49 Miss. 518; *Clark v. Depew*, 25 Pa. St. 509; *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Blakeney v. Kirkley*, 2 Nott & M. (S. Car.) 544; *Spence v. Dunlap*, 6 Lea (Tenn.) 457.
- ¹²³ *Harrell v. Mitchell*, 61 Ala. 270; *McKeown v. Allen*, 37 Fla. 490, 20 So. 556; *Booher v. Worrill*, 57 Ga. 235; *Emerson v. Bemis*, 69 Ill. 537; *Fanning v. Russell*, 94 Ill. 386; *Bittinger v. Kasten*, 111 Ill. 260; *Taylor v. Eubanks*, 3 A. K. Marsh. (Ky.) 239; *Worthington v. Shipley*, 5 Gill (Md.) 449; *Williams v. Banks*, 11 Md. 198; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Potter v. McDowell*, 31 Mo. 62; *Jackson v. Town*, 4 Cow. (N. Y.) 599; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Van Wyck v. Seward*, 6 Paige Ch. (N. Y.) 62; *Bank &c. v. Housman*, 6 Paige Ch. (N. Y.) 526; *Holden v. Burnham*, 63 N. Y. 74; *Jenkins v. Clement*, 1 Harper Eq. (S. Car.) 72; *Jacks v. Tunno*, 3 Des. (S. Car.) 1; *Burkey v. Self*, 4 Sneed (Tenn.) 121; *Pratt v. Curtis*, 2 Lowell (U. S.) 87; *Elwell v. Walker*, 52 Iowa 256, 3 N. W. 64; *Strong v. Lawrence*, 58 Iowa 55, 12 N. W. 74; *Salmon v. Bennett*, 1 Conn. 525; *Thacher v. Phinney*, 7 Allen (Mass.) 146; *Lerow v. Wilmarth*, 9 Allen (Mass.) 382; *French v. Holmes*, 67 Me. 186; *Pomeroy v. Bailey*, 43 N. H. 118; *Stevens v. Robinson*, 72 Me. 381; *Gardiner Sav. Institution v. Emerson*, 91 Me. 535, 40 Atl. 551; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Sewall v. Baxter*, 2 Md. Ch. 447; *Winchester v. Charter*, 12 Allen (Mass.) 606; *Herschfeldt v. George*, 6 Mich. 456; *Young v. White*, 25 Miss. 146; *Wilson v. Kohlheim*, 46 Miss. 346; *Pennington v. Seal*, 49 Miss. 518; *Cock v. Oakley*, 50 Miss. 628; *Walsh v. Ketchum*, 84 Mo. 427; *Fehlig v. Busch*, 165 Mo. 144, 65 S. W. 542; *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616; *Cook v. Johnson*, 12 N. J. Eq. 51; *Crumbaugh v. Kugler*, 2 Ohio St. 374; *Hardy v. Simpson*, 13 Ired. L. (N. Car.) 132; *Blakeney v. Kirkley*, 2 Nott & M. (S. Car.) 544; *Reynolds v. Lansford*, 16 Tex. 286; *Wiswell v. Jarvis*, 9 Fed. 84; *Edwards v. Entwisle*, 2 Mack. (U. S.) 43.
- ¹²⁴ *Richards v. Vaccaro*, 67 Miss. 516, 7 So. 506; *Bigelow Fraud*, 130, 132; *Wharton Ev.*, §§ 366, 1248.

is not within the scope of this chapter to enter upon that subject. The only purpose here is to state the rule as it has been held. Neither proof of the fact that the grantee knew that the grantor was indebted to other persons, nor proof of the fact that the grantor was insolvent is regarded as sufficient evidence to establish the fraudulent intent either on the part of the grantor or the grantee.¹²⁵ Insolvency may be proved by a return of nullam et non solvum, and such fact may be proved in other ways.¹²⁶ It has been held that where a person is heavily indebted and conveys all his property without consideration, the presumption of fraud is irresistible.¹²⁷

§ 2156. Inferences of fraud—Prima facie proof of intent. The rule as to the quantum of evidence necessary to establish a fraudulent conveyance has been stated as follows: "Fraud may be legal, inferred from the facts and circumstances of the case, when such facts and circumstances are of such a character as to lead a reasonable person to the conclusion that the conveyance was made with the intent to hinder, delay or defraud creditors. When the facts and circumstances in any case are such as to make a prima facie case of fraudulent intent, they are to be taken as conclusive evidence of intent, unless rebutted by other facts and circumstances in the case. Although a deed be made for a valuable and adequate consideration, yet if the intent with which the grantor made be fraudulent, the deed will be void, if the grantee had notice of such intent."¹²⁸

§ 2157. Debtor's want of other property—Pleading and proof. A creditor seeking to set aside a conveyance of his debtor as fraudulent must allege in his complaint and prove on the trial that the debtor did not possess other property subject to execution at the time of the conveyance sufficient for the payment of the debt, and that at the time of the commencement of the action to set aside such

¹²⁵ Gage v. Chesebro, 49 Wis. 486, 585; Rose v. Brown, 11 W. Va. 5 N. W. 486; Norwegian &c. Co. v. 134; Martin v. Rexroad, 15 W. Va. 512; Gashorn v. Snodgrass, 37 N. W. 825; Mendleson v. Paschen, 71 Wis. 591, Va. 717; Harden v. Wagner, 37 N. W. 815; Erdall v. Atwood, 79 Va. 356; Claflin v. Foley, 22 W. Va. 1, 47 N. W. 1124. 434; Hudgins v. Kemp, 20 Ho.

¹²⁶ Guyer v. Figgins, 37 Iowa 517. S.) 45; Wright v. Hencock, 3

¹²⁷ Judson v. Lyford, 84 Cal. 505, (Va.) 521; Briscoe v. Claflin, 24 Pac. 286. Rand. (Va.) 213; Spence v. Ba-

¹²⁸ Livesay v. Beard, 22 W. Va. 6 Gratt. (Va.) 444.

veyance such debtor did not have sufficient other property subject to execution to pay his existing indebtedness. The creditor can only complain when he satisfactorily proves that the debtor did not have other property subject to execution sufficient to pay his debts.¹²⁹ But in such a case the creditor is not required to show that the debtor was actually insolvent at the time he executed the conveyance.¹³⁰

§ 2158. **Voluntary conveyance—Prima facie case.**—Where a conveyance is attacked as fraudulent, and when the proof shows that the conveyance was voluntary, or that the consideration was love and affection, and when it further appears from the proof that the grantor was indebted at the time of making such conveyance a prima facie case is established and the burden is upon the party claiming under the deed to prove affirmatively, sufficient facts and circumstances to repel the presumption of fraud thus raised.¹³¹ The rule was thus stated by one court: "When a voluntary conveyance is attacked as fraudulent by an existing creditor, the burden is on the opposite party to show by proof the condition of grantor's affairs at the time, the amount of his indebtedness, and such other facts and circumstances as will tend to rebut the presumption of fraud."¹³² The rule in some jurisdictions is that proof of an actual fraudulent design is not required to set aside a voluntary conveyance as against existing creditors.¹³³ "The presumption of an intent to delay, hinder and defraud

¹²⁹ *Ewing v. Patterson*, 35 Ind. Md. 198; *Ellinger v. Crowl*, 17 Md. 326; *Sherman v. Hogland*, 54 Ind. 361; *Young v. White*, 25 Miss. 146; 578; *Eagan v. Downing*, 55 Ind. 65; *Cook v. Johnson*, 12 N. J. Eq. 51; *Evans v. Hamilton*, 56 Ind. 34; *Boyd v. Vickery*, 138 Ind. 276, 37 N. E. 972; *Emerson v. Opp*, 139 Ind. 27, 38 N. E. 330.

¹³¹ *Sewall v. Baxter*, 2 Md. Ch. 447; *Bullet v. Worthington*, 3 Md. Ch. 99; *Williams v. Banks*, 11 Md. 198; *Bertrand v. Elder*, 23 Ark. 494.

¹³² *First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743.

¹³³ *Salmon v. Bennett*, 1 Conn. 525; *Fellows v. Smith*, 40 Mich. 689; *Catching v. Manlove*, 39 Miss. 655; *Hindes v. Longworth*, 11 Wheat. (U. S.) 199; *Barkley v. Tapp*, 87 Ind. 25; *York v. Rockwood*, 132 Ind. 353, 31 N. E. 1110; *Roberts v. Farmers' &c. Bank*, 136 Ind. 154, 36 N. E. 128;

¹³⁰ *McKeown v. Allen*, 37 Fla. 490, 20 So. 556; *Williams v. Banks*, 11

creditors, arising from a voluntary conveyance by a person who is indebted, is not conclusive, for such a conveyance is fraudulent where it necessarily delays, hinders and defrauds them. . . . indebtedness, therefore, is only one circumstance from which an inference from an intent to defraud may be drawn and must be considered in connection with the donor's estate."¹⁸⁴

§ 2159. Voluntary conveyance—Presumption of fraud.—The adjudicated cases are not in harmony as to how far a voluntary conveyance will be presumed fraudulent as against an existing creditor. Some of the earlier cases held that a voluntary conveyance made by a party who is largely indebted at the time is presumed to be fraudulent as against such existing indebtedness and that no evidence can be admitted to repel this legal presumption of fraud. Neither the amount of the debt, the extent of the property conveyed, nor the circumstances of the party can affect or overcome this presumption of the law.¹⁸⁵ The rule for determining what amount of proof will come to repel the presumption of fraud in case of voluntary conveyance is stated as follows: "By proving the pecuniary circumstances and conditions of the grantor, or him who pays for and procures the grant from others, his business and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplating insolvency, and that a reasonable ability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party, is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome."¹⁸⁶

§ 2160. Voluntary conveyance—Grantee's knowledge of insolvency.—Where a creditor seeks to set aside a conveyance as fraudulent

Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; *First Nat. Bank v. Smith*, 149 Ind. 443, 49 N. E. 376.

¹⁸⁴ *Bump Fraud. Conv.* 275; *Bettinger v. Kasten*, 111 Ill. 260; *Lyne v. Bank &c.*, 5 J. J. Marsh. (Ky.) 545; *Lloyd v. Fulton*, 91 U. S. 479.

¹⁸⁵ *Reade v. Livingstone*, 3 Johns. Ch. (N. Y.) 481; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229; *Gwyer v. Fig-*

gins, 37 Iowa 517; *Black v. Sa-*
46 N. Car. 67; *Hunter v. Wa-*
Gratt. (Va.) 26; *Willson v.*
anan, 7 Gratt. (Va.) 334.

¹⁸⁶ *Dunlap v. Hawkins*, 59
342, 347; *Sexton v. Weaton*, 8 V.
(U. S.) 229; *Kehr v. Smith*, 20
(U. S.) 31; *Jones v. Clifton*, 1
S. 225.

the proof shows that such conveyance was made without consideration, he is not required to prove that the grantee had knowledge of the fraudulent purpose of the grantor, or that he participated in the fraud. As against such creditor the grantee is not a purchaser in good faith.¹³⁷ This rule is carried to the extent of holding that a voluntary grantee ignorant of the grantor's fraudulent intent, cannot hold the conveyance as against subsequent creditors.¹³⁸

§ 2161. *Conveyance by insolvent to relatives.*—Where the proof shows that an insolvent, or a person largely indebted conveys all, or practically all, of his property to a near relative, or to one without property, on an inadequate consideration, or for a consideration expressed but neither paid nor secured, and remains in possession of the property, these facts are sufficient to raise the presumption of fraud.¹³⁹ It is held in some jurisdictions that a conveyance by an insolvent of all his property to a near relative is prima facie or presumptively fraudulent.¹⁴⁰ In other jurisdictions it is held that the fact that the conveyance is made to a relative does not render the conveyance presumptively fraudulent, but that it subjects the transaction to close scrutiny.¹⁴¹ But, where a conveyance is attacked as fraudulent on the ground of the confidential relations existing between the parties, in order to raise a presumption of fraud, the proof must show the facts upon which such confidential relation is predicated.¹⁴²

¹³⁷ *Lee v. Figg*, 37 Cal. 328; *Bishop v. State*, 83 Ind. 67; *Meredith v. Citizens' &c. Bank*, 92 Ind. 343; *Barkley v. Tapp*, 87 Ind. 25; *McAninch v. Dennis*, 123 Ind. 21, 22 N. E. 881; *Gilliland v. Jones*, 144 Ind. 662, 43 N. E. 939; *York v. Rockwood*, 132 Ind. 358, 31 N. E. 1110; *Roberts v. Farmers' &c. Bank*, 136 Ind. 154, 36 N. E. 128; *Milburn v. Phillips*, 136 Ind. 680, 34 N. E. 983; *Bump Fraud. Conv.* 267, 268; *May Fraud. Conv.*, § 45.

¹³⁸ *Gilliland v. Jones*, 144 Ind. 662, 43 N. E. 949.

¹³⁹ *Ringgold v. Waggoner*, 14 Ark. 69; *Massie v. Enyart*, 32 Ark. 251; *Lewis v. Linscott*, 37 Kans. 379; *Almond v. Gairdner*, 76 Ga. 699; *Mar-*

tin v. Kennedy, 83 Ky. 335; *Gregg v. Lee*, 37 La. Ann. 164; *Benson v. Benson*, 70 Md. 253, 16 Atl. 657; *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440; *Moore v. Roe*, 35 N. J. Eq. 90; *Hawkins v. Alston*, 4 Ired. Eq. (N. Car.) 137; *Peebles v. Horton*, 64 N. Car. 374; *Reiger v. Davis*, 67 N. Car. 185; *Zerbe v. Miller*, 16 Pa. St. 488; *Lloyd v. Williams*, 21 Pa. St. 327; *King v. Russell*, 40 Tex. 124; *Knight v. Capito*, 23 W. Va. 639; *Fisher v. Shelver*, 53 Wis. 493, 10 N. W. 681.

¹⁴⁰ *Thomas v. Beck*, 39 Conn. 241.

¹⁴¹ *Bannister v. Phelps*, 81 Wis. 256, 51 N. W. 417.

¹⁴² *Jones v. Jones*, 137 N. Y. 610, 33 N. E. 479.

§ 2162. **Voluntary conveyance to child—Proof of fraud.**—It was held in an early United States case that a voluntary conveyance from a parent to a child would not be deemed fraudulent when it appeared that the grantor was in prosperous circumstances and unembarrassed; that the conveyance to the child was a reasonable provision according to his state and condition in life, and that the property remaining was sufficient for payment of the grantor's debts. That while the absence of a valuable consideration might be a badge of fraud, yet it was only presumptive and not conclusive evidence of that fact. "The question of fraud must depend on all the circumstances of the case, looking to the state and condition of the grantor, the extent of the property conveyed and the direct tendency of the conveyance respecting the claims of the creditors." It has been held that a voluntary conveyance to a child when the parent was indebted, was evidence of fraud on the creditors of the grantor; but the force of such evidence was overcome by showing that the debts were small, and that at the time of the conveyance the father had more than sufficient property subject to execution to pay all his debts.¹⁴⁴ But such a conveyance may be void, though no fraud was really intended.¹⁴⁵

§ 2163. **Inadequate consideration.**—Where a conveyance is alleged to be fraudulent it is proper to inquire into the consideration. The amount and nature of the consideration, the manner of payment or security, may tend to throw light on the good faith of the transaction or aid in exposing the fraud. The fact that a grantor, who is greatly indebted, conveys his property for a consideration less than its value is recognized as a badge of fraud.¹⁴⁶ And where

¹⁴⁴ *Bertrand v. Elder*, 23 Ark. 494; *Salmon v. Bennett*, 1 Conn. 525; *Hinde v. Longworth*, 11 Wheat. (U. S.) 199, 213; *Enders v. Williams*, 1 Metc. (Ky.) 346, 347; *Duhme & Co. v. Young*, 3 Bush (Ky.) 343; *Grant v. Ward*, 64 Me. 239.

¹⁴⁵ *Brice v. Myers*, 5 Ohio 121; *Humbert v. Methodist &c. Church*, Wright (Ohio) 213; *Miller v. Wilson*, 15 Ohio 108; *Crumbaugh v. Kugler*, 2 Ohio St. 373.

¹⁴⁶ *Godell v. Taylor*, Wright (Ohio) 82; *Bank v. Miller*, 9 Ohio C. C. 111.

¹⁴⁶ *Borland v. Mayo*, 8 Ala. 10; *Hill v. Corcoran*, 15 Colo. 270, Pac. 171; *Washband v. Washband*, 27 Conn. 424; *Barrow v. Bailey*, Fla. 9; *Loring v. Dunning*, 16 F. 119; *Draper v. Draper*, 68 Ill. 1; *Stevens v. Dillman*, 86 Ill. 233, 23; *Bickler v. Kendall*, 66 Iowa 703, N. W. 518; *Lowry v. Howard*, Ind. 170; *Schram v. Taylor*, 51 Kan. 547, 33 Pac. 315; *Fuller v. Brewster*, 53 Md. 358; *Ganong v. Green*, Mich. 1, 38 N. W. 661; *Robinson Robards*, 15 Mo. 459; *Curd v. Lac*

appears from the proof that the consideration was grossly inadequate, this with other circumstances may become a controlling force on the question of fraud.¹⁴⁷ And when the inadequacy is very gross, or, as sometimes stated, when the disparity between the value of the property and the price paid is so great as to shock the conscience, fraud may be inferred without other proof.¹⁴⁸ On this subject the Supreme Court of Missouri said: "It is a rule, in considering such cases, that, while a slight inadequacy of price alone is very weak evidence, if the inadequacy is gross it becomes a badge of fraud which may be considered by a chancellor, and becomes of controlling force when coupled with other circumstances tending to prove fraud."¹⁴⁹

§ 2164. Possession unchanged.—Effect and burden of proof.

Where conveyance is charged to be fraudulent the question of the change of possession must be considered in connection with other facts in the case. So the situation of parties, their relation to each other, the kind and character of the property, its susceptibility of an actual change. Where the proof shows there was no actual or continued change of possession the burden of proof is then cast upon the purchaser to show that the sale was made in good faith

land, 49 Mo. 451, 454; Ames v. Gilmore, 59 Mo. 537, 549; Nelson & Co. v. Vossmeier, 25 Mo. App. 578; McCannless v. Flinchum, 89 N. Car. 373; Shober v. Wheeler, 113 N. Car. 370, 18 S. E. 328; Jacobs v. Totty, 76 Tex. 343, 13 S. W. 372.

¹⁴⁷ Boyd v. Ellis, 11 Iowa 97; Dodson v. Cooper, 50 Kans. 680, 32 Pac. 370; Baltimore v. Williams, 6 Md. 235; Ross v. Crutsinger, 7 Mo. 245, 249; Kuykendall v. McDonald, 15 Mo. 416; Ames v. Gilmore, 59 Mo. 537; Hamet v. Dundass, 4 Pa. St. 178; Bryant v. Kelton, 1 Tex. 415; Livesay v. Beard, 22 W. Va. 585.

¹⁴⁸ Gordon v. Tweedy, 71 Ala. 202; Reeves v. Sherwood, 45 Ark. 520; Argenti v. San Francisco, 6 Cal. 677; Johnston & Co. v. Cibula, 62 Iowa 697, 13 N. W. 418; Taylor v. Eckford, 11 Sm. & M. (Miss.) 21;

Foster v. Pugh, 12 Sm. & M. (Miss.) 416; Wynne v. Mason, 72 Miss. 424, 18 So. 422; Hoboken & Co. Bank v. Beckman, 33 N. J. Eq. 53; Clinton & Co. Bank v. Cummins, 38 N. J. Eq. 191; Clinton Hill & Co. v. Strieby, 52 N. J. Eq. 576, 29 Atl. 589; Sandman v. Seaman, 84 Hun (N. Y.) 337; Fullenwider v. Roberts, 4 Dev. & B. L. (N. Car.) 278; Hamet v. Dundass, 4 Pa. St. 178; Bryant v. Kelton, 1 Tex. 415; Church v. Chapin, 35 Vt. 223; Livesay v. Beard, 22 W. Va. 585; Hope v. Valley City & Co., 25 W. Va. 789; Wright v. Standard, 2 Brock. (U. S.) 311; Humes v. Scruggs, 94 U. S. 22; Smith v. New York & Co. Ins. Co., 57 Fed. 133.

¹⁴⁹ Ames v. Gilmore, 59 Mo. 537; Curd v. Lackland, 49 Mo. 451; Hamet v. Dundass, 4 Pa. St. 178.

and without any intent to defraud. In such case the grantee establish his right to the property by a fair preponderance of evidence, and where no change of possession is shown the proof preponderate in favor of the bona fides of the transaction and absence of the intent to defraud.¹⁵⁰ So the debtor's fraudulent is sufficiently proved by showing that he remained in possession of the land after conveyance without a contract and without in any way accounting for the use of the land.¹⁵¹ One class of cases holds that the proof of the retention of the possession and the appearance of title by the seller is in itself proof of fraud as against existing creditors, and that the presumption raised by such proof is conclusive on the question of fraud and admits of no explanation or contradiction. Another, and perhaps larger, class holds that proof of retention of possession or title is presumptive or prima facie evidence only of fraud and may be explained or rebutted. But in the absence of any satisfactory explanation it becomes conclusive.¹⁵² It seems to be the rule that when the proof shows that the purchaser paid full value for the property, this is sufficient to overcome the presumption of fraud arising from the fact that possession was retained by the grantor.¹⁵³

§ 2165. Subsequent creditor.—Where a subsequent creditor is a creditor who becomes such after a conveyance made by a debtor, seeks to set aside such conveyance as fraudulent, the burden is upon him to prove the fraudulent intent on the part of the grantor at the time of the execution of the conveyance to hinder, delay or defraud creditors by means of the conveyance.¹⁵⁴

¹⁵⁰ *Davis v. Zimmerman*, 40 Mich. 24; *Kipp v. Lamoreaux*, 81 Mich. 299, 45 N. W. 1002; *Jansen v. McQueen*, 105 Mich. 199, 63 N. W. 73; *Pennington v. Flock*, 93 Ind. 378; *Higgins v. Spahr*, 145 Ind. 167, 43 N. E. 11.

¹⁵¹ *Peck v. Land*, 2 Ga. 1; *Perkins v. Patten*, 10 Ga. 241; *Sidensparker v. Sidensparker*, 52 Me. 481; *King v. Moon*, 42 Mo. 551; *Davis v. Turner*, 4 Gratt. (Va.) 422; *Curd v. Miller*, 7 Gratt. (Va.) 185; *Livesay v. Beard*, 22 W. Va. 585; *Peck v. Land*, 2 Ga. 1.

¹⁵² The vast numbers of cases imposing these two classes are collected in the Am. and Eng. Encyc. of Law, Vol. 14 (2d ed.), at pages 359 and 361, respectively, and it is a work of supererogation to repeat all of them here.

¹⁵³ *Norwegian Plow Co. v. Thorn*, 71 Wis. 529, 37 N. W. 296; *James v. Van Duyn*, 45 Wis. 339; *Kalk v. Fielding*, 50 Wis. 296; *Semmens v. Walte*, Wis. 675, 13 N. W. 241.

¹⁵⁴ *Hagerman v. Buchanan*, J. Eq. 292; *Ridgeway v. Under*

§ 2166. **Proof of badges of fraud.**—A case of fraudulent conveyance may be sufficiently made by proving certain badges or indicia of fraud. While the proof of one or more of these does not necessarily prove the fraud charged, it may be sufficient to make a *prima facie* case and entitle the complainant to a recovery in the absence of any proof to the contrary. Where quite a number of badges of fraud are found to exist in a case they may amount to such certainty that a jury may readily and properly infer the fraud charged. In one case the following badges of fraud were proved: Gross inadequacy of price; no security taken for the purchase money; unusual length of credit for the deferred instalments; bonds taken payable at long periods; the conveyance made in payment of alleged indebtedness of father to son residing together as members of the family; indebtedness and insolvency of the grantor which were well known to the son; threats and pendency of suits; secrecy and concealment of the action; keeping the deed unacknowledged and unrecorded for over a year, the grantor remaining in possession; the acknowledgment of the deed by a kinsman who was requested to keep the matter private; the fact that the grantee was the son of the grantor. In passing on the effect of the proof of these badges of fraud, the court said: "Surely these facts make so strong a *prima facie* case of fraud as to put on the grantee, not only in behalf of common fairness, but in self-vindication, the burden of repelling the conclusion to which they irresistibly lead, that of fraudulent design by the grantor, fully known to and participated in by the grantee. Such, we say, is the irresistible inference from the facts established; and to repel such inference there was need of the most indisputable proof of the good faith of the transaction."¹⁵⁵ Among the badges of fraud usually discovered in fraudulent conveyance cases are the following: Failure to record the deed within a reasonable time; indebtedness and embarrassment of the grantor; want of other property of the grantor sufficient to pay his indebtedness;

4 Wash. (U. S.) 129; Beeckman v. Montgomery, 1 McCart. (N. J.) 106; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Pomeroy v. Bailey, 43 N. H. 118; Nicholas v. Ward, 1 Head (Tenn.) 323; Raymond v. Cook, 31 Tex. 373.

¹⁵⁵ Hickman v. Trout, 83 Va. 478, 3 S. E. 131; Jackson v. Harby, 70 Tex.

410, 8 S. W. 71; Lewy v. Fischl, 65 Tex. 311; Ellis v. Valentine, 65 Tex. 532; Allen v. Carpenter, 66 Tex. 138, 18 S. W. 347; Oppenheimer v. Half, 68 Tex. 409, 4 S. W. 562; Pilling v. Otis, 13 Wis. 495; Shealy v. Edwards, 75 Ala. 411; Allen v. Wheeler, 4 Gray (Mass.) 123.

inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of the deed; conveyance to insolvent or failing debtor to a near relative.¹⁵⁶ Inability of to show payment of consideration for conveyance from his father. Inability to produce records or memoranda of accounts, where consideration was the payment of antecedent debts;¹⁵⁸ so loose, correct, or false statements of the consideration.¹⁵⁹ And a separate unrecorded instrument giving a lien where the deed itself states the consideration was paid.¹⁶⁰

Duress.

§ 2167. **Definition.**—Duress is said to be an “unlawful constraint exercised upon a man whereby he is forced to do some act against his will. It may be either duress of imprisonment, where the person is deprived of his liberty in order to force him to compliance, or by violence, beating, or other actual injury; or duress per modum threatum consisting in threats of imprisonment or great physical injury or death.¹⁶² Duress may also include the same injuries, threats, or restraint exercised upon the man’s wife, child or parent. As decided by the Iowa Supreme Court it must be “an actual or threatened violence or restraint of a man’s person, contrary to law, to compel him to enter into a contract or to discharge one.”¹⁶³ The Iowa court in a later case said: “Duress in the making of a contract exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him, or of unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence, and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest,

¹⁵⁶ *Brown v. Mitchell*, 102 N. Car. 347, 9 S. E. 702; *Bump Fraud. Conv.* 158.

¹⁵⁷ *Godell v. Taylor, Wright* (Ohio) 82.

¹⁵⁸ *Hubbard v. Allen*, 59 Ala. 283; *Brinks v. Helise*, 84 Pa. St. 246, 253.

¹⁵⁹ *Moore v. Roe*, 35 N. J. Eq. 90; *Brackett v. Wait*, 6 Vt. 411.

¹⁶⁰ *Summers v. Howland*, 2 Baxt. (Tenn.) 407. See §§ 2144, 2145.

¹⁶² *Black Law Dict.*, “Duress”; *Blackstone Comm.*, 130, 131, 137; 1 *Stephen Comm.* 137; 2 *Comm.* 453; 1 *Greenleaf Ev.*, 82.

¹⁶³ 4 *Blackstone Comm.* 3; *Stephen Comm.* 83; *Robinson Gould*, 11 Cush. (Mass.) 55, 56.

¹⁶⁴ *King v. Williams*, 65 Iowa 21 N. W. 502; *Sieber v. Weid*, 21 N. W. 502; *Sieber v. Weid*, 21 N. W. 502.

¹⁶⁵ *King v. Williams*, 65 Iowa 21 N. W. 502; *Sieber v. Weid*, 21 N. W. 502; *Sieber v. Weid*, 21 N. W. 502.

ever, must be wrongful and unlawful, and apparently about to be enforced."¹⁶⁴ "Duress by menace, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty."¹⁶⁵

§ 2168. **Duress—Common law.**—Duress by the common law was divided into two classes, (1) duress per minas (by threat); (2) duress of imprisonment. To constitute duress per minas the evidence must show that the party was in fear of loss of life, or mayhem, or loss of limbs, or other remediless harm to the person. To support duress by imprisonment a party must prove that he was unlawfully restrained of his liberty until he would execute the instrument or pay the money.¹⁶⁶ If a person is unlawfully restrained of his liberty until he executes an instrument or pays money by force of the instrument, as the only means of setting him free, this is such duress as will avoid the instrument or sustain a recovery of the money paid.¹⁶⁷ But mere threats of imprisonment are held insufficient to amount to duress in the absence of any actual prosecution or steps to that end.¹⁶⁸

§ 2169. **Defense is personal.**—The general rule is that the defense of duress is personal and can only be available to the person who was wrongfully or unlawfully influenced or coerced. The rule was stated by Bacon as follows: "The duress that will avoid a deed must be done to the party himself, therefore if A and B enter into an obligation by reason of duress done to A, B shall not avoid his obligation, though A may, because he shall not avoid it by duress to a stranger. But a son shall avoid his deed by duress to his father, so shall the father his deed by reason of duress to his son."¹⁶⁹

¹⁶⁴ Kennedy v. Roberts, 105 Iowa 521, 75 N. W. 363.

¹⁶⁵ Robinson v. Gould, 11 Cush. (Mass.) 55.

¹⁶⁶ Mundy v. Whittemore, 15 Neb. 647, 19 N. W. 694; Sieber v. Weiden, 17 Neb. 582, 24 N. W. 215; 2 Greenleaf Ev., §§ 301, 302.

¹⁶⁷ Buchanan v. Sahlein, 9 Mo. App. 552.

¹⁶⁸ Harmon v. Harmon, 61 Me. 227; Buchanan v. Sahlein, 9 Mo. App. 552.

¹⁶⁹ 1 Parson Cont. 395, note g; 2 Bacon Abr. "Duress"; Bordentown v. Wallace, 50 N. J. L. 13, 11 Atl. 267; Robinson v. Gould, 11 Cush. (Mass.) 55; McClintick v. Cummins, 3 McLean (U. S.) 158; Schee v. McQuilken, 59 Ind. 269; Tucker v. State, 72 Ind. 242; Mantel v. Gibbs, 1 B. & G. 64; Huscombe v. Standing, 4 Cro. Jac. 187; Wayne v. Sands, 1 Freeman 351. For exceptions see next section.

§ 2170. **Exceptions to the rule that defense is personal.**—That the defense of duress is personal and can only be pleaded by the party who was wrongfully and unlawfully influenced, is subject to certain exceptions. The most familiar instances of such exceptions are: (1) husband and wife; (2) parent and child; (3) principal and surety. The general rule as to husband and wife is that each may avoid a contract made to relieve the other from duress. And it has been held that a wife may avoid a contract executed by her under threats of the imprisonment of the husband; and whether the threat is of lawful or unlawful imprisonment the same rule applies to parent and child.¹⁷¹ Thus, where a son executed an instrument in consideration that a son should not be prosecuted for perjury and under threat that if not so executed he would be so prosecuted, it was held voidable and relief was granted the father.¹⁷² A father may avoid an instrument executed by him under a threat to procure the arrest and imprisonment of his child under a false and criminal charge, and upon reasonable grounds to believe that the threat would be executed.¹⁷³ It has been held

¹⁷⁰ Robinson v. Gould, 11 Cush. (Mass.) 55; Harris v. Carmody, 131 Mass. 51; Harman v. Harmon, 61 Me. 222; Giddings v. Iowa Sav. Bank, 104 Iowa 676, 74 N. W. 21; Gohegan v. Leach, 24 Iowa 509; Beindorff v. Kaufman, 41 Neb. 824, 60 N. W. 101; Mundy v. Whittemore, 15 Neb. 647, 19 N. W. 694; Heaton v. Norton Co. &c. Bank, 59 Kans. 281, 52 Pac. 876; Miller v. Minor &c. Co., 98 Mich. 163, 57 N. W. 101; National Bank v. Croco, 46 Kans. 620, 26 Pac. 939; Thompson v. Niggley, 53 Kans. 664, 35 Pac. 290; Tapley v. Tapley, 10 Minn. 448; Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555; Bayly v. Clare, 1 B. & G. 275; Bentley v. Robson, 117 Mich. 691, 76 N. W. 146; McClintick v. Cummins, 3 McLean (U. S.) 158.

¹⁷¹ Adams v. Irving &c. Bank, 116 N. Y. 606, 23 N. E. 7; Eadie v. Slimmon, 26 N. Y. 9; Peyser v. Mayor &c., 70 N. Y. 497, 501; Osborn v.

Robbins, 36 N. Y. 365; Schoen Lissauer, 36 Hun (N. Y.) 16; Gersoll v. Roe, 65 Barb. (N. Y.) 357; Weiser v. Welch, 112 Mich. 70 N. W. 438; Bodine v. Morley, N. J. Eq. 426.

¹⁷² Bryant v. Peck, 154 Mass. 28 N. E. 678; Harris v. Cambridge, 131 Mass. 51; Bradley v. Irving, Ill. App. 85; Meech v. Lee, 82 Ill. 274, 46 N. W. 383; Foley v. C. 14 R. I. 618; Pinckston v. Brown, Jones Eq. (N. Car.) 494; Turner v. Edwards, 18 Mo. App. 676; C. v. Lookout Bank, 5 Lea (N. J.) 232; Earle v. Norfolk &c. Co., J. Eq. 188; McClintick v. Curran, 3 McLean (U. S.) 158.

¹⁷³ Cribbs v. Sowle, 87 Mich. 49 N. W. 587; Green v. Scrantom, Iowa 461; Schultz v. Catlin, 70 N. W. 611, 47 N. W. 946; Schultz v. Robertson, 46 Wis. 313, 1 N. W. 1; Meech v. Lee, 82 Mich. 274, 46 N. W. 383.

a surety may defend on the ground of duress of his principal.¹⁷⁴ But it has been held that if the surety knew of the imprisonment of the principal and that it was legal and was not used for an illegal purpose, and signed the note to discharge the principal from lawful custody, he was not entitled to relief.¹⁷⁵ Nor can creditors and officers avail themselves of the duress of the debtor.¹⁷⁶

§ 2171. **Contract avoided by duress—Pleading.**—It is the universally recognized rule that a contract obtained by duress is voidable. But the defense of duress, to be available, must be interposed to an action on the contract. It is an affirmative defense and before any evidence can be offered to defeat the contract on such ground it must be specially pleaded.¹⁷⁷ If the cancellation of the instrument is sought on the grounds of duress it may be presented by cross-bill.¹⁷⁸ In an early Vermont case it was held that in an action of assumpsit duress could be given in evidence under the general issue.¹⁷⁹ Under a special statute it was held in Massachusetts that duress could be proved without pleading in an action for possession of land held unlawfully and against the right of the plaintiff.¹⁸⁰

¹⁷⁴ *Coffelt v. Wise*, 62 Ind. 451; *Wilkerson v. Hood*, 65 Mo. App. 491; *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931; *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9; *Plummer v. People*, 16 Ill. 358; *Jones v. Turner*, 5 Litt. (Ky.) 147; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

¹⁷⁵ *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9; *Gibson v. Patterson*, 75 Ga. 549; *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931; *Plummer v. People*, 16 Ill. 358; *Huggins v. People*, 39 Ill. 241; *Peacock v. People*, 83 Ill. 331; *Bowman v. Hiller*, 130 Mass. 153; *Wamsley v. Darragh*, '14 Misc. (N. Y.) 566; *Miller v. Miller*, 68 Pa. St. 476; *Archer v. Commonwealth*, 10 Gratt. (Va.) 627; *Snyder v. Braden*, 58 Ind. 143; *Miller v. Coats*, 2 Hun (N. Y.) 156; *United States v. Child*, 12 Wall. (U. S.) 232; *French v. Shoemaker*, 14 Wall. (U. S.)

314; *United States v. Huckabee*, 16 Wall. (U. S.) 414; *Silliman v. United States*, 11 Otto (U. S.) 465.

¹⁷⁶ *Lewis v. Bannister*, 16 Gray (Mass.) 500; *Marion Distilling Co. v. Ellis*, 63 Mo. App. 17.

¹⁷⁷ *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599; *Union Bank & Co. v. Ridgely*, 1 Har. & G. (Md.) 324; *Inhabitants of Worcester v. Eaton*, 13 Mass. 371; *Harris v. Carmody*, 131 Mass. 51; *Rau v. Von Zedlitz*, 132 Mass. 164; *Bordentown v. Wallace*, 50 N. J. L. 13, 11 Atl. 267; *McVane v. Williams*, 50 Conn. 548; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

¹⁷⁸ *Rau v. Von Zedlitz*, 132 Mass. 164.

¹⁷⁹ *Hinesburgh v. Sumner*, 9 Vt. 23.

¹⁸⁰ *Harris v. Carmody*, 131 Mass. 51.

§ 2172. **Pleading specific facts.**—Duress, like fraud, is made up of distinct facts, and, as in the case of pleading fraud, these facts must be pleaded specifically. The facts must be averred so that the court may determine as a matter of law whether or not they amount to legal coercion.¹⁸¹ On this subject the Supreme Court of New York said: "The court must see from the facts stated, in such a case, that the payment was in fact compulsory, and compelled by duress of the goods of the party making payment. Whether the payment is compulsory in such a sense as brings the party within the rule of law applicable to such cases is a question of law for the court, upon stated or conceded acts."¹⁸² It has been held a sufficient pleading of the specific facts where it was alleged in substance that there was a conspiracy to defraud the defendant which was accomplished by threats and by putting him in fear to an extent which constrained him to sign the contract.¹⁸³

§ 2173. **Burden of proof.**—Where duress is pleaded and a party seeks to escape liability on that ground the burden is upon him to prove the duress charged; the presumption of law is that the contract or instrument, the execution of which was claimed to have been procured by duress, was the voluntary act of the party. In order to overcome this presumption the person asserting the duress must satisfy a jury by a preponderance of the proof that the instrument was executed, or the act done under threats that overcame his will and act in the premises when he would not otherwise have done so.¹⁸⁴ As stated by the Supreme Court of Indiana "Did appellant turn over the property and money and execute the written agreement while under duress or coercion as alleged? This she was required to establish by a preponderance of the evidence. Otherwise she must necessarily fail to recover."¹⁸⁵ It is not sufficient

¹⁸¹ *Cheek v. Tilley*, 31 Ind. 121; 59; *Peacock v. People*, 83 Ill. 331; *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276; *Buchanan v. Sahlein*, 9 Mo. App. 552; *Turley v. Edwards*, 18 Mo. App. 676; *Kerr v. Simmons*, 82 Mo. 269, 275; *Gates v. Dundon*, 42 N. Y. St. 660, 18 N. Y. 149, 46 N. Y. St. 757, 19 N. Y. S. 390; *Harrington v. New York*, 40 Misc. (N. Y.) 165; *Ryan v. New York*, 40 Misc. (N. Y.) 228; *Parmentier v. Pater*, 13 Ore. 121, 9 Pac. 59; *Peacock v. People*, 83 Ill. 331; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297; *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684.

¹⁸² *Commercial Bank &c. v. Rochester*, 41 Barb. (N. Y.) 341.

¹⁸³ *Butterfield v. Davenport*, 84 Ind. 590.

¹⁸⁴ *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321.

¹⁸⁵ *Stanley v. Dunn*, 143 Ind. 498, 42 N. E. 908.

to prove merely that the threats were made; it is also incumbent upon the person complaining to show that they constrained his will and induced the promise.¹⁸⁶ But the same amount or an equal degree of evidence is not required in all classes of cases. It has been held that: "much less force or putting in fear by the husband would amount to coercion which would avoid the deed of the wife, than would be sufficient coming from a stranger."¹⁸⁷ The fact of duress may be established by direct or circumstantial evidence; but the law will not permit solemn contracts to be avoided merely because the complainant may have made them under duress.¹⁸⁸

§ 2174. *Prima facie case.*—The rule is that the defense of duress is made out when the proof shows that the will of the person threatened was overcome by restraint and the danger of personal injury; and the reason for executing the instrument or paying the money was his fear of danger and the desire to get away, rather than to liquidate a demand for money.¹⁸⁹ It is sufficient proof of duress when the evidence shows that degree of constraint or danger either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness.¹⁹⁰ "At common law, as a general rule, the defense of duress *per minas* must be sustained by proof of threats which create a reasonable fear of loss of life, or of great bodily harm, or of imprisonment, of the person to whom the threats are made."¹⁹¹

§ 2175. *Degree of restraint—Recent rule.*—It is no longer necessary that there be threat of life or limb or of mayhem to constitute a case of duress *per minas*; or that a person cannot avoid a contract on the ground that it was procured through fear of illegal imprisonment. The rule established by the more recent, as well as the great weight of authorities, is that where the proof shows that a person

¹⁸⁶ *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Gates v. Dundon*, 42 N. Y. St. 660, 18 N. Y. S. 149; *Wilkerson v. Bishop*, 7 Coldw. (Tenn.) 24.

¹⁸⁷ *Cheek v. Tilley*, 31 Ind. 121.

¹⁸⁸ *Wilkerson v. Bishop*, 7 Coldw. (Tenn.) 24; *Rollings v. Cate*, 1 Helsk. (Tenn.) 97.

¹⁸⁹ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560; *McPherson v. Cox*, 86 N. Y. 472; *United States v. Huckabee*, 16 Wall. (U. S.) 414.

¹⁹⁰ *French v. Shoemaker*, 14 Wall. (U. S.) 314; *United States v. Huckabee*, 16 Wall. (U. S.) 414.

¹⁹¹ *Harris v. Carmody*, 131 Mass. 51.

paid money or executed a contract or other instrument under the pressure of actual or threatened personal restraint or harm, or an actual or threatened seizure or interference with his property of serious import to him; and that he could escape from the injury only by making such payment or executing the instrument, he will be entitled in a proper action to recover the money or avoid the instrument.¹⁹²

§ 2176. **Instances of menaces—Modern rule.**—The earlier as well as text writers recognize that there are four instances of threats or menaces for which a person may avoid his own contract: (1) for fear of loss of life; (2) of loss of member; (3) of marriage; (4) of imprisonment.¹⁹³ The later writers and authorities now hold that an injury, much less than those contemplated in the enumerated instances, may be sufficient to constitute duress; but while the earlier authorities hold that a much less degree of personal injury than formerly will justify a man in yielding, they still hold that the proof must show that there was an apparent danger.¹⁹⁴ "The modern doctrine of duress is established where actual or threatened violence or restraint contrary to law compels one to enter into or discharge a contract. It is duress where there is a fear of imprisonment or death by threats."¹⁹⁵

§ 2177. **Threats.**—In a large number of cases, perhaps a majority, where duress has been either the ground of defense or the ground of action for avoiding a contract, the duress complained of consisted of threats. Under the earlier cases the rule established was that proof must show that the threats were sufficient to create a fear of some grievous wrong, such as death or great bodily

¹⁹² *Brumagim v. Tillinghast*, 18 Cal. 265; *Tapley v. Tapley*, 10 Minn. 448; *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276; *Mayor v. Lefferman*, 4 Gill (Md.) 425, 45 Am. Dec. 156, note; *Radich v. Hutchins*, 95 U. S. 210.

¹⁹³ *Walbridge v. Arnold*, 21 Conn. 424; *Harmon v. Harmon*, 61 Me. 222; *Foss v. Hildreth*, 10 Allen (Mass.) 76; *Edwards v. Handley*, Hard. (Ky.) 602; *Richards v. Vanderpoel*, 1 Daly (N. Y.) 71; *Mead v. Smith*, 7 Ired. Eq. (N. C.) 1; *James v. Roberts*, 18 Ohio 1; *Brown v. Peck*, 2 Wis. 192; *v. Pierce*, 7 Wall. (U. S.) 1; *United States v. Huckabee*, 10 (U. S.) 414, 431.

¹⁹⁴ *Harmon v. Harmon*, 61 Me. 222; *1 Parson Cont.* 393; *2 Greenleaf* § 301.

¹⁹⁵ *Bouvier Law Dict.*, "Duress"; *Cribbs v. Sowle*, 87 Mich. 340, W. 587.

or unlawful imprisonment. It was the rule also that if the threat was of an injury for which full and adequate compensation could be expected from the law, it would not be such duress as would avoid a contract. The rule is now that the duress may consist of threats, if in connection with all the facts and circumstances such as the condition of mind, age and sex of the party they are in fact sufficient to overcome the will and cause the party to act where he otherwise would not have acted, and the contract or instrument so executed may be avoided.¹⁹⁶ It has been held that violent threats of imprisonment or of force wrongfully used by another may produce that condition of mind which renders him incompetent to contract of his own free will.¹⁹⁷ The rule has been carried to the extent of holding that money paid involuntarily and unjustly under threats of an attachment of property may be recovered back.¹⁹⁸ And it has been held that any threat, even of slight injury, will be sufficient to avoid a contract. On this subject the Supreme Court of Oregon said: "Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous, because they are so unfortunately constituted."¹⁹⁹ And some courts now hold that it is not necessary that the fear induced by the threats must be such as would impel

¹⁹⁶ *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596; *Bank &c. v. Butler*, 48 Mich. 192, 12 N. W. 36; *Clark v. Pease*, 41 N. H. 414; *Barry v. Equitable &c. Society*, 59 N. Y. 587.

¹⁹⁷ *De Martin v. Phelan*, 115 Cal. 538, 47 Pac. 356; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714; *Fuller v. Roberts*, 35 Fla. 110, 17 So. 359; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587; *Cable v. Foley*, 45 Minn. 421, 47 N. W. 1135; *Phillips v. Henry*, 160 Pa. St. 24, 28 Atl. 477; *Ernest M. Munn, The*, 61 Fed. 694; *Gregor v. Hyde*, 62 Fed. 107.

¹⁹⁸ *Betts v. Reading*, 93 Mich. 77,

52 N. W. 940; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217; *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103; *Weber v. Kirkendall*, 39 Neb. 193, 57 N. W. 1026; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Van Dyke v. Wood*, 60 App. Div. (N. Y.) 208, 70 N. Y. S. 324; *Insurance Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116; *Bennett v. Luby*, 112 Wis. 118, 88 N. W. 37; *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694; *Loneragan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684; *Atkinson v. Allen*, 71 Fed. 53, 17 C. C. A. 570; *Meyer, In re*, 106 Fed. 828.

¹⁹⁹ *Parmentier v. Pater*, 13 Ore. 121, 9 Pac. 59.

of the person against whom the threats were made. The Supreme Court of Michigan in commenting on the above rules said: "these rules do not seem to have any regard to the condition of mind of the person acted upon by the threats, or to take into consideration the age, disposition or intellect of the person so threatened; and leaves the old, the ignorant, the weak and the timid to the mercy of the bully or the scoundrel who operated upon their fears to extort money from them. Truly, to such an action against the defendant, who, without semblance of any legal or moral claim, has scared money out of an old man cannot well be assigned any defense of the policy of the law that it was the duty of the injured party to have resorted to the courts in the first place. He withstood the threat of being taken there until proceedings were actually begun, to defend himself from the extortion. Nor, in my opinion, is it the true policy of the law to make an arbitrary and yielding rule in such cases, to apply to all alike, without regard to sex, or condition of mind. Weak and cowardly people, and old and ignorant persons, are the ones that need the protection of the courts; they are the ones usually operated upon and influenced by threats and menaces."²¹¹

§ 2181. **Duress by imprisonment.**—The rule as determined in some of the earlier cases is that a mere threat, or fear of imprisonment, was not sufficient to amount to duress, nor could it be sufficient ground to avoid an instrument procured through mere fear of illegal imprisonment.²¹² The cases, however, are based upon the rule that actual illegal imprisonment is sufficient ground for avoiding any instrument or contract executed by the party who procured his release from such unlawful imprisonment.²¹³ As d

²¹¹ *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587; *Baldwin v. Hutchison*, 8 Ind. App. 454, 35 N. E. 711; *Jordan v. Elliott*, 15 Cent. L. J. (Mo.) 232. *Fisher v. Shattuck*, 17 Pick. (Mass.) 58; *Hullhorst v. Schell*, 15 Neb. 57, 17 N. W. 259; *Sant*

²¹² See, § 213 notes.

²¹³ *Hatter v. Greenlee*, 1 Port. (Ala.) 222; *Durr v. Howard*, 6 Ark. 461; *Walbridge v. Arnold*, 21 Conn. 424; *Taylor v. Cottrell*, 16 Ill. 93; *Bradley v. Irish*, 42 Ill. App. 85; *Brooks v. Berryhill*, 20 Ind. 97; *Whitefield v. Longfellow*, 13 Me. 146; *Watkins v. Baird*, 6 Mass. 506; *Sornborger*, 26 Neb. 295, 41 1102; *McCormick v. Miller*, 5 644, 74 N. W. 1061; *Richard Duncan*, 3 N. H. 508; *Severa* 71; *Kimball*, 8 N. H. 386; *Stro* Grannis, 26 Barb. (N. Y.) 122; *ards v. Vanderpoel*, 1 Daly (71; *Foshay v. Ferguson*, 5 H

by the Supreme Court of Texas: "Duress which avoids a contract is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation or danger; or, when the arrest, though made under legal authority, is for an unlawful purpose, or from threats calculated to excite fear of some grievous injury to one's person or property."²¹⁴

§ 2182. **Lawful imprisonment.**—The courts differ on the question as to whether or not lawful imprisonment can constitute duress. One class of cases holds that it cannot.²¹⁵ The fear of imprisonment or threats of imprisonment from a lawful prosecution cannot be regarded as duress.²¹⁶ A promise to pay a debt made by a person under legal arrest cannot be avoided on the ground of duress.²¹⁷ Another class of cases holds that where an arrest is made under a regular and valid process for the fraudulent purpose of obtaining payment of a fictitious or unjust claim, and the prisoner is put under fear and is excited by threats, and money is paid, or an instrument executed as the only means of immediate relief, it may be avoided.²¹⁸ Another class of cases limits this rule of duress by threats of imprisonment to threats of illegal imprisonment and that the imprisonment must be immediate and not a threat of prosecution. In Vermont the rule has been carried still farther and

Watts (Pa.) 165, 167; Meek v. Atkinson, 1 Bailey L. (S. Car.) 84, 19 Am. Dec. 653; Devlin v. United States, 12 Ct. Cl. (U. S.) 266. To the cases of Hatter v. Greenlee, 28 Am. Dec. 370, at p. 374, and, Mayor &c. v. Lefferman, 45 Am. Dec. 145, at p. 153, are copious and valuable notes collecting vast numbers of cases and giving the rules under all the phases of duress.

²¹⁴ Landa v. Obert, 45 Tex. 539, 547; Phelps v. Zuschlag, 34 Tex. 371, 380; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. 1102; Landa v. Obert, 45 Tex. 539; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Obert v. Landa, 59 Tex. 475.

²¹⁵ Taylor v. Cottrell, 16 Ill. 93; Schommer v. Farwell, 56 Ill. 542; Heaps v. Dunham, 95 Ill. 583; Comp-

ton v. Bunker Hill Bank, 96 Ill. 301; Eddy v. Herrin, 17 Me. 338; Watkins v. Baird, 6 Mass. 506; Mundy v. Whittemore, 15 Neb. 647, 19 N. W. 694; McCormick v. Miller, 54 Neb. 644, 74 N. W. 1061; Nealley v. Greenough, 25 N. H. 325; Clark v. Turnbull, 47 N. J. L. 265.

²¹⁶ Landa v. Obert, 45 Tex. 539; Nealley v. Greenough, 25 N. H. 325; Bordentown v. Wallace, 50 N. J. L. 13, 11 Atl. 267; Parson Cont. 394; Metcalf Cont. 24.

²¹⁷ Walker v. Larkin, 127 Ind. 100, 26 N. E. 684; Bowker v. Lowell, 49 Me. 429; Shephard v. Watrous, 3 Cal. (N. Y.) 166.

²¹⁸ Schommer v. Farwell, 56 Ill. 542; Heckman v. Swartz, 50 Wis. 267, 6 N. W. 891.

stated by that court thus:²¹⁹ "But if there is a want of good in making the claim, and the party is exacting what was not posed to be a right, and there be duress, or any undue advantage taken of the parties' situation, or if, under the terror of illegal legal proceedings, fraudulently instituted, money has been paid by the party paying it may recover it back in this form of action."²²⁰ The United States Supreme Court stated the rule thus: "Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment. If the person arrested executes a contract or pays money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received."²²¹ The Supreme Court of New Hampshire say: "In order to avoid the act on the ground of menaces of imprisonment, it must appear that the menace was of an unlawful imprisonment, and that the party was put in fear of imprisonment by the menaces, and induced by reason of the fear to do the act."²²²

§ 2183. **Threats of lawful imprisonment.**—Where the defendant showed that threats of criminal prosecution were used to procure the execution of a note for an amount actually due, it was held sufficient proof of duress.²²⁴ The threat of an arrest upon a legal warrant and upon a criminal charge to compel the payment of a mere debt may constitute unlawful duress.²²⁵ So it has been said that a contract made under imprisonment under a legal process issued for a just cause is not void, but that it will avoid a contract if such imprisonment is unlawfully obtained to obtain the contract.²²⁶ An instrument executed from a

²¹⁹ *Whitefield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338; *Harmon v. Harmon*, 61 Me. 222; *Taylor v. Jaques*, 106 Mass. 291; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154.

²²⁰ *Sartwell v. Horton*, 28 Vt. 370.

²²¹ *Brown v. Pierce*, 7 Wall. (U. S.) 205.

²²² *Alexander v. Pierce*, 10 N. H. 494; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80.

²²⁴ *Taylor v. Jaques*, 106 Mass. 291; *Schoener v. Lissauer*, 36 Hun (N. Y.) 100, 102; *Adams v. Irving*, 116 N. Y. 606, 23 N. E. 7.

²²⁵ *Hackett v. King*, 6 Mass. 58.

²²⁶ *Morse v. Woodworth*, 155 Mass. 233, 251, 27 N. E. 1010, 29 N. E. 567; *Walbridge v. Arnold*, 144 Mass. 300, 14 N. E. 567; *Richardson v. Dunham*, 508 N. H. 508; *Foshay v. Ferguson*.

grounded fear of illegal imprisonment may be avoided on the ground of duress.²²⁷ The Supreme Court of New York say: "We think that when threats of lawful prosecution are purposely resorted to for the purpose of overcoming the will of the party threatened, by intimidating or terrifying him, they amount to such duress or passion as will avoid a contract thereby obtained."²²⁸ If the evidence shows that the threats of imprisonment used to obtain the contract or money were such as would naturally overcome the mind and will of an ordinary person, and did overcome the will of the complaining person, he may avoid the settlement, and the question of the liability to imprisonment is immaterial.²²⁹ As stated by the Supreme Court of Maine: "There must be imprisonment or a fear of it sufficient to overcome the will of a man of ordinary firmness and constancy. Coke says it is the fear of imprisonment 'that sufficeth to avoid a bond or deed.'²³⁰ "If an innocent person, upon being threatened with criminal prosecution or false imprisonment, entertains well grounded fears that such threats will be carried into execution, and being reasonably influenced thereby, executes a contract, or pays money by reason thereof, the law will protect him; but if a person is guilty of a crime, and upon being threatened with a criminal prosecution therefor, pays money in order to suppress such prosecution, and thus protects himself from punishment, there is no principle upon which he can claim protection from the courts, such a transaction being itself criminal."²³¹

Hill (N. Y.) 154; *Miller v. Miller*, 68 Pa. St. 486; *United States v. Huckabee*, 16 Wall. (U. S.) 414, 431.

²²⁷ *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; *Baldwin v. Hutchison*, 8 Ind. App. 454, 35 N. E. 711.

²²⁸ *Haynes v. Rudd*, 30 Hun (N. Y.) 237; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7; *National Bank v. Croco*, 46 Kans. 620, 26 Pac. 939; *Thompson v. Niggley*, 53 Kans. 664, 35 Pac. 290; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7; *Seiber v. Price*, 26 Mich. 518, 522; *Miller v. Minor & Co.*, 98 Mich. 163, 57 N. W. 101; *Davis v. Luster*, 64 Mo. 43; *Taylor v. Jaques*, 106

Mass. 291; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Johnson v. Zuschlag*, 34 Tex. 371; *Foley v. Greene*, 14 R. I. 618; *Sharon v. Gager*, 46 Conn. 189; *Bane v. Detrick*, 52 Ill. 19; *Fay v. Oatley*, 6 Wis. 45; *Hartford & Co. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651.

²²⁹ *Hartford & Co. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *McCormick & Co. Machine Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727.

²³⁰ *Harmon v. Harmon*, 61 Me. 222.

²³¹ *Darling v. Hines*, 5 Ind. App. 319, 32 N. E. 109.

§ 2184. **Duress of goods.**—Duress of goods exists, “where the owner is compelled to submit to an extortion in order to obtain possession of them from one who detains them without lawful title or excuse.” It is not sufficient answer in such cases to say that the injured party could recover his property in an action of replevin. The complainant might have such an immediate want of his property that an action of replevin would not avail him.²²² “Duress may be of the property as well as of the person, and may be by means of threats of violence to the person, or destruction to the property of the party, as by actual violence upon his person or property. These threats may be as effective to work up fears to the extent of the duress, which excuses acts done under its power, whether the threatening or compelling force is not immediately present at the doing of the acts, as where the acts are done in the actual presence of the compelling force.”²²³ As held by the Supreme Court of North Carolina in a very early case: “Duress of goods will avoid a contract where an unjust and unreasonable advantage is taken of a man’s necessities, by getting his goods into his possession, and then leaving no other speedy means left of getting them back again but by giving a note or bond. Or where a man’s necessities may be so great as to admit of the ordinary process of law to afford him relief. It is now generally conceded and many of the cases hold that such may be duress of goods. By this is meant that an officer or other party may so levy upon or seize and hold the property of a person and thereby compel him to execute a bond or other instrument or to pay money in order to obtain the release of such property, so that the execution of the instrument or the payment of the money under such pressure must be brought to bear upon the person executing the instrument or paying the money as to interfere in some way with the free enjoyment of his rights of person or of property.”

²²² Wilkerson v. Hood, 65 Mo. App. 491; Claflin v. McDonough, 33 Mo. 412; Fout v. Giraldin, 64 Mo. App. 165; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Astley v. Reynolds, 2 Str. 915.

²²³ Waller v. Parker, 5 Coldw. (Tenn.) 476.

²²⁴ Collins v. Westbury, 2 Bay (S. Car.) 211; Sasportas v. Jennings, 1 Bay (S. Car.) 470; Spaulds v. Bar-

rett, 57 Ill. 289; Chase v. Dwyer, 1 Me. 134; Nelson v. Suddarth, 1 Va. & M. (Va.) 350; Rollings v. 1 Heisk. (Tenn.) 97.

²²² Bradford v. Chicago, 25 Ill. 420; Elston v. Chicago, 40 Ill. 420; Stover v. Mitchell, 45 Ill. 213; portas v. Jennings, 1 Bay (S. 470; Collins v. Westbury, 2 Bay (S. Car.) 211; Nelson v. Suddard, 1 Hen. & M. (Va.) 350; Foshay v.

The payment is not compulsory unless made to relieve the person or property from an actual and existing duress imposed upon him by the party to whom the money is paid.²²⁶ It is the rule, however, that a party is not bound to wait until his property is levied upon; he has a right to assume that an officer will enforce the process when he makes a demand for the property. A payment under such circumstances is held compulsory.²²⁷

guson, 5 Hill (N. Y.) 154; Rollins v. ²²⁷ First Nat. Bank v. Watkins, 21 Lashus, 74 Me. 218; Chandler v. Mich. 483; Atwell v. Zeluff, 26 Mich. Sanger, 114 Mass. 364; James v. 118; McKee v. Campbell, 27 Mich. Roberts, 18 Ohio 548. 497.

²²⁶ Elston v. Chicago, 40 Ill. 514;
Falls v. Cairo, 58 Ill. 403.

CHAPTER CVI.

HEIRS, DEVISEES AND LEGATEES.

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Heirs.

§ 2185. *Scope of chapter.*—The object of this chapter is to give the rules of proof in cases where it is necessary to show the identity of heirs, devisees and legatees. It is not the purpose here to give the rules of proof, except incidentally, on the substantive law of descent and distribution, settlement of estates, or pedigree in general. But the chapter will be confined to the evidence of heirship, the identity of persons, corporations, associations and societies, where such facts are put in issue as to the foundation of some claim of right, and where the establishment of such right depends on the proof of the identity of such heirs, devisees or legatees.

§ 2186. *Presumptions.*—The presumption of law is that a person dying intestate has left heirs capable of succeeding to his estate. This presumption that the estate of such person is transmitted to others by the law of descent, is so strong that it can only be overcome by positive proof of the want of persons capable of taking the estate under the laws of descent and distribution.¹ And where the proof

¹ *Harvey v. Thornton*, 14 Ill. 217; 466; *University of North Carolina Pile v. McBratney*, 15 Ill. 314; *City of Chicago v. Major*, 18 Ill. 349; *v. Harrison*, 90 N. Car. 385; *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205. *Fell v. Young*, 63 Ill. 106; *Hollingsworth v. Barbour*, 4 Pet. (U. S.)

shows that an intestate died without issue or lineal heirs, the presumption of collateral heirs still prevails. But it is held that of the fact of there being no known heirs might raise a presumption of the failure of the inheritable blood; but such proof should be direct and positive, shown to be founded upon inquiry, admissions, personal family knowledge or the declarations of those to whom the property descended. It has been doubted if mere hearsay reputation of the failure of heirs will overcome the legal presumption.² And the presumption was held to be so conclusive that it was not overcome by proof of the fact that neighbors and acquaintances of an intestate, who had known him for many years, did not know that there were in fact persons capable of taking his estate under the law.³ The law presumes that every child is the offspring of a lawful union of its parents, and in the absence of any negative evidence no further proof of marriage is necessary.⁴

§ 2187. Presumptions on proof of death.—Where a person is proved to be dead the law does not presume that he left no children or descendants.⁵ And where there is proof of death of the person under whom the claim is made there must be some additional proof, either direct or presumptive, that such person left no children or other descendants, as it will not be presumed that he died childless and the burden is on the party alleging such fact to prove it.⁶ Where an unmarried person is presumed to be dead by reason of absence without having been heard from, and where the unmarried person continued when last heard from, the presumption of his death coexists with it the presumption that he died without issue.⁷

§ 2188. Burden of proof.—Where a person claims a right of possession of certain property by reason of his being the lawful heir under a statute of descent, from a deceased ancestor or collateral

² *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205.

³ *Dandt v. Musick*, 9 Mo. App. 169; *Garrity's Estate*, *Myrick's Prob.* 180; *Hurdle v. Stockley*, 6 *Houst. (Del.)* 447; *Hollingsworth v. Barbour*, 4 *Pet. (U. S.)* 466.

⁴ *McClaskey v. Barr*, 47 *Fed.* 154; *Strode v. Magowan*, 2 *Bush (Ky.)* 621, 627; *Lawson Presum. Ev.*, 107.

⁵ *Hammond v. Inloes*, 4 *Md.*

⁶ *Shriver v. State*, 65 *Md.* Atl. 679; *Still v. Hutto*, 48 *S.* 415, 26 *S. E.* 713.

⁷ *Shown v. McMackin*, 9 *(Tenn.)* 601; *Rowe v. Haslam*, 15 *W. Bl.* 404; *Doe v. Griffin*, 15 *293.*

kindred, the burden of proof is upon him to establish every fact necessary to entitle him to recover under the law. Under this rule the plaintiff must establish the fact that he is the person legally entitled to the property in dispute as such heir by proof of his relationship, and that there are no other persons in equal or close degree of consanguinity who are entitled to share with him in such property.⁸ The rule is that the heir-at-law when suing as a plaintiff in ejectment, must prove his descent from the ancestor from whom he claimed, and that he must show that all the intermediate heirs are dead without issue; and "in order to show the death of all nearer heirs it is necessary to negative the coming into existence of those who would be such." It seems to be clear that in the absence of proof of the non-existence of issue, as a distinct species of fact from that of death, the proof of heirship would be defective.⁹ It has been held in Louisiana that the claimants are only required to prove that they are the legal heirs of the ancestors, and that they will then be considered his only heirs unless it is shown that others exist.¹⁰

§ 2189. **Burden of proof—Collateral kindred.**—In general, in cases where the claim arises by virtue of the death of collateral kindred, it is not sufficient to prove the death only of such collateral kindred; but there must also be some negative proof of the absence or want of issue; the plaintiff must remove every possibility of title in another before he can recover, in ejectment, against the person in possession.¹¹ The rule where one claims as heir by collateral descent has been aptly stated as follows: "It was incumbent upon the lessors of the plaintiff claiming, as they do by collateral descent, to show who was last legally seised of the land in controversy, and then to prove his death, without issue; and next to prove all the different links in the chain of descent, which will show that the person last seised and the claimants descended from some common ancestor, together with the extinction of all those lines of descent which claim in preference to the lessors of the plaintiff. They must prove the marriages, births and deaths, and the identity of persons

⁸ *Anson v. Stein*, 6 Iowa 150;

Skinner v. Fulton, 39 Ill. 484; *Mor-*

rill v. Otis, 12 N. H. 466; *Sheehan's*

Estate, 139 Pa. St. 168, 20 Atl. 1003.

⁹ *Sprigg v. Moale*, 28 Md. 497; *Kel-*

so v. Stigar, 75 Md. 376, 24 Atl. 18.

¹⁰ *Celis v. Oriol*, 6 La. (O. S.) 406.

¹¹ *Hammond v. Inloes*, 4 Md. 138,

175; *Sprigg v. Moale*, 28 Md. 497;

Richards v. Richards, 15 East 294.

necessary to fix title upon themselves to the exclusion of others would have, if in existence, a better title to the land sought to be covered."¹² Where a father claimed title to property as the heir of a deceased son, it was held that the burden of proof was upon the father to prove not only the death of the son, but also that he died without issue.¹³ The rule stated in Louisiana is that "it suffices to deny that there are heirs in the descending line; and this denial, being a negative fact, no proof need be given of it. It is for the adverse party to show that there were some, and then their death must be proved by the claimants. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years have elapsed since the birth; in which case death is presumed, and no proof is required before."¹⁴ But it is also held in this state that "collateral claimants claiming an estate are bound to show that the lineal heirs have ceased to exist."¹⁵

§ 2190. Questions of law or fact.—The relationship which certain persons bear to each other or to a deceased person is a question of fact to be determined by the court or jury trying the case. The relationship may be proved by showing in some way that the parties seeking to establish the relationship were descendants from a common ancestor. When the degrees of consanguinity in which the parties stood to the deceased have been proved, it then becomes a matter of law to be determined by the court which of the parties are the heirs-at-law of such decedent; but this proposition is an inference to be made from facts proved.¹⁶ As stated in an early case, "when the relation or connection existing between the decedent and the living claimant, is shown, the law determines whether the latter or the former is the heir. Hence, the proof of relationship is more properly to be confined to the existing relations, as when the claimants were children, brothers, etc. The rights vested in the connection are easily determined by the law."¹⁷ It was

¹² *Sprigg v. Moale*, 28 Md. 497, La. Ann. 476; *Marcos v. Bar*, 505; *Shriver v. State*, 65 Md. 278, 4 La. 265.

Atl. 679; *Posey v. Hanson*, 10 App. Cas. (D. C.) 496, 504.

¹³ *Stinchfield v. Emerson*, 52 Me. 465; *Hayward v. Ormsbee*, 7 Wis. 111.

¹⁴ *Bernardine v. L'Espinasse*, 6 La. (N. S.) 96; *Miller v. McElwee*, 12

¹⁵ *Hooter v. Tippet*, 12 (La.) 390; *Owens v. Mitchell*, (N. S.) 668.

¹⁶ *Morrill v. Otis*, 12 N. H. 46.

¹⁷ *Taylor v. Whiting*, 4 Mon.

364; *Banks v. Johnson*, 4 (Ky.) 649.

error for a court to leave it to the jury to decide who were the heirs of a deceased person as that was a question of law for the determination of the court.¹⁸

§ 2191. Prima facie proof.—It is sufficient prima facie evidence of marriage and of the legitimacy of children, where the proof shows that the parents or grandparents lived together as husband and wife for many years, or until the death of one of them, that they brought up a family of several children, among whom were the complainants or the father or mother of the complainants; and that among the members of the family, the relatives generally and the intimate family acquaintances, the complainant had always been recognized and treated as a child. Under such a state of facts the burden of proof is cast upon the defendant to overcome this prima facie case of legitimacy.¹⁹ On claims arising under conflicting rights of heirship there need be no presumption of marriage.²⁰

§ 2192. Heirship—Pleading.—In pleading heirship, or the right to an inheritance, conclusions are not permitted. It is not sufficient to allege that the plaintiff was one of the heirs of the ancestor, or that the plaintiffs are the "only heirs" of the intestate, as these are held to be but conclusions of the pleader. In such cases the death of the ancestor, through whom the claim is made, should be averred; the number and names of the children left by him, if any; after the death of any such children, and whether or not any of such children have died leaving descendants, and naming them; together with averments of any other person or persons, naming them, showing the relation they bore to the ancestors. The pleading should also contain an allegation that there were no other relations of the intestate that were entitled to take the estate by descent in preference to the plaintiffs. When such allegations are denied sufficient proof must be made of every fact as alleged.²¹

¹⁸ *Bradford v. Erwin*, 34 N. Car. 291; *Ernull v. Whitford*, 48 N. Car. 474. ²⁰ *Rogers v. Park*, 4 Humph. (Tenn.) 480.

²¹ *Larue v. Hays*, 7 Bush (Ky.) 50; *Montgomery v. White*, (Ky.) 11 S. W. 10; *Gardner v. Kelso*, 80 Ala. 497, 2 So. 680. *Illinois Land &c. Co. v. Bonner*, 75 Ill. 315; *Metheny v. Bohn*, 160 Ill. 263, 32 N. E. 380; *Zachmann v. Zachmann*, 201 Ill. 380, 66 N. E. 256.

§ 2193. **Heirship—Proof of facts.**—In proof of heirship, other cases, it is not competent for witnesses to state conclusions. It is not within the province of the witness to state that the claimant is an heir of a certain decedent;²² but he may state the relationship of the parties. According to Mr. Greenleaf, it is necessary to establish two propositions: (1) the relationship of the claimant to a common ancestry; (2) that there are no other descendants of the same ancestry who are entitled to share in the estate.²³ It is not sufficient to prove that the claimants are the children and grandchildren of the decedent; nor is it sufficient to prove that they are the only children who survive the ancestor. It would only be sufficient to prove that the claimants were the only children that the decedent ever had, or that if he had other children they had died, leaving no children or husbands or wives; and upon such proof the court would declare these claimants to be the only heirs.²⁴

§ 2194. **Heir—Meaning.**—In the states which have adopted the civil law the word heir applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The term testamentary heir is applied to the person who is called to the universal succession by a will; the term heir-at-law or heir by intestacy is the next of kin by blood, in case of intestacy.²⁵ Heir-at-law common law is defined to be "he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestors." It is also defined in another case, "an heir is the person upon whom the law casts the inheritance," and the word is so used in the ordinary statute unless there is something in the statute itself which indicates it to have been used in some other sense.²⁷ A definition of the

²² Currie v. Fowler, 5 Marsh. (Ky.) 145; Larue v. Hays, 7 Bush (Ky.) 50; Skinner v. Fulton, 39 Ill. 484; Morrill v. Otis, 12 N. H. 466; Birney v. Hann, 3 A. K. Marsh. (Ky.) 332; Taylor v. Whiting, 4 Mon. (Ky.) 364; Banks v. Johnson, 4 Marsh. (Ky.) 649.

²³ Greenleaf Ev., § 354; Anson v. Stein, 6 Iowa 150; Skinner v. Fulton, 39 Ill. 484; Morrill v. Otis, 12 N. H. 466.

²⁴ Skinner v. Fulton, 39 Ill. 484.

²⁵ Brown Civil Law 344; Conflict of Laws 508; Meador v. Winnebago Co., 181 Ill. 504 E. 949.

²⁶ Bouvier Law Dict.; Meador v. Winnebago Co., 181 Ill. 504 N. E. 949; Adams v. Ackley, 168 Ill. 632, 48 N. E. 454; McKim v. Stewart, 5 Kans. 384; O'Brien v. Bugbee, 46 Kans. 1, 26 Pac. Aspdien's Estate, 2 Wallace J. S. 368, 437.

²⁷ State v. Engle, 21 N. J. E.

"heir" taken from the opinion in a Louisiana case is as follows: "The term heir has several significations. Sometimes it refers to one who has formally accepted a succession, and taken possession thereof; sometimes to one who is called to succeed, but still retains the faculty of accepting or removing, and it is frequently used as applied to one who has formally renounced. Hence, the use of the word heir in itself is of but little moment. It is the object and intent manifested by its use that is the material thing."²⁸ Another common law definition is, "one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God, to lands, tenements or hereditaments, being an estate of inheritance."²⁹ And another by a California court: "An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance."³⁰ "The word heir or heirs is wholly technical, meaning the person or persons who may by law inherit. The words 'heirs of the body' are equally technical, meaning such of the issue or offspring as may by law inherit."³¹ Where a testator made gifts to the heirs of a deceased niece, it was held that the legacy vested as a class gift, per stirpes in the persons who were her heirs at the time of the testator's death, without regard to whether they answered that description at the time of her decease.³² When the testator by his will designates a particular class or description of persons upon whom he bestows gifts, the proper persons who are entitled to receive such gifts must be ascertained by the law of the place where the will is made and the testator was domiciled.³³ The word "heirs," unexplained by the context, was held to mean the persons appointed by law to succeed to the estate in case of intestacy. When the term is thus used by a testator in his will the presumption is that the word was used in its strict and primary sense, unless the text shows

²⁸ *Mumford v. Bowman*, 26 La. Ann. 413.

²⁹ *Fletcher v. Holmes*, 32 Ind. 497.

³⁰ *Donahue's Estate*, 36 Cal. 329;

Castro v. Tennent, 44 Cal. 253;

Bates v. Howard, 105 Cal. 173, 38

Pac. 715; *Larabee v. Larabee*, 1

Root (Conn.) 555; *Richards v. Mil-*

ler, 62 Ill. 417; *Dodge's Appeal*, 106

Pa. St. 216; *Barclay v. Cameron*, 25

Tex. 232.

³¹ *Black v. Cartmell*, 10 B. Mon. (Ky.) 188; *Waters v. Bishop*, 122

Ind. 516, 24 N. E. 161; *Ruggles v.*

Randall, 70 Conn. 44, 38 Atl. 885.

³² *Gold v. Judson*, 21 Conn. 620;

Ruggles v. Randall, 70 Conn. 44, 38

Atl. 885.

³³ *Richards v. Miller*, 62 Ill. 417;

Story Conflict of Laws, § 479e.

it to have been used in a different sense, and in such case the legal and technical meaning will be followed, and parole of the instructions given by a testator to the person who drew the will as to the testator's meaning of the words "heirs-at-law" is inadmissible.³⁴ Where the term "heirs-at-law" was used in a will it was held that they were such persons as are made so by statute and were the persons upon whom the law casts the estate in case of intestacy.³⁵ Where a devise is made to a class of persons designated as "heirs-at-law," without any other reference or description, the distribution will be made according to the provisions of the statute the same as in cases of intestacy.³⁶ A very general construction of the meaning of the term "legal heirs" is that they are such persons as would take the personal property of the ancestor under the laws of distributions of the domicile of the deceased ancestor.³⁷

§ 2195. Heirship—Declarations of ancestors.—It has long been the recognized rule to admit declarations of ancestors to prove pedigree, marriage and heirship. This is considered by some law writers as an exception to the hearsay rule and that the exception is founded in the necessity for its admissibility. The rule is somewhat analogous to that which admits statements of third persons in proof of reputation of character. Ancestry, relationship and descent are questions which are scarcely susceptible of proof except by what has been said about them by persons in a position to know, not so much of actual kinship one person bore to another, as the kinship which one person said he bore to another, or which one person was reputed to bear to another. But whatever may be the philosophy either of the origin or the growth of the rule it nevertheless exists with certain limitations. The necessity is said to have arisen from the difficulty of proving such facts, many years, and sometimes generations, after they have taken place. Under this rule of necessity a court has been held competent to prove declarations both as to issue and marriage.³⁸

³⁴ *Richards v. Miller*, 62 Ill. 417; *Dodge's Appeal*, 106 Pa. St. 216.

³⁵ *Kelley v. Vidas*, 112 Ill. 24; *Sweet v. Dutton*, 109 Mass.

³⁶ *Richards v. Miller*, 62 Ill. 417; *White v. Stanfield*, 146 Mass. 15 N. E. 919; *Kendall v. Gilman*, 152 Mass. 457, 25 N. E. 838. *Gauch v. St. Louis &c. Ins. Co.*, 8 Ill. 251; *Alexander v. Wallace*, 8 Lea (Tenn.) 569.

³⁷ See § 2082 and notes.

§ 2196. **Declarations of ancestors—Rule stated.**—The rule was stated by Lord Mansfield in an early English case as follows: "In matters of pedigree, it being impossible to prove by living witnesses, the relationship of past generations, the declarations of deceased members of the family are admitted; from the necessity of the thing, the hearsay of the family as to the marriage, births and the like, are admitted."³⁹ Mr. Phillips says as to this rule: "The declarations of a deceased person, as to the fact of his marriage, or to prove that a child was born before or after marriage, are admissible in evidence on a question of pedigree;" and he states further that, "the declarations of deceased members of the family, whether the relations or connections by marriage, are admissible evidence to prove relationships, death or marriage."⁴⁰ The rule extends to written statements as well as to oral declarations. Thus, statements in wills, deeds or other writings may be taken as evidence as to who are the testator's children.⁴¹ And entries proved to be made

* *Berkeley's Peerage Case*, 4 Campb. 401; *Wilson v. Mitchell*, 3 Campb. 393; *Johnson v. Lawson*, 2 Bing. 86; *Vowles v. Young*, 13 Ves. 140; *Monkton v. Attorney-General*, 2 Russ. & Myl. 147; *Doe v. Ridgway*, 4 B. & Ald. 53; *Crease v. Barrett*, 1 C. M. & R. 919; *Doe v. Barton*, 2 M. & R. 28; *Higham v. Ridgway*, 10 East 109, 120; *Davies v. Lowndes*, 1 Bing. N. Cas. 597, 12 L. J. N. S. 506.

"2 Phillips Ev. 284, 287, quoted in *Cope v. Pearce*, 7 Gill (Md.) 247; *Craufurd v. Blackburn*, 17 Md. 49; *Jones v. Jones*, 36 Md. 447; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Cuddy v. Brown*, 78 Ill. 415; *Metheny v. Bohn*, 160 Ill. 263, 43 N. E. 380; *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701; *Chapman v. Chapman*, 2 Day (Conn.) 347; *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205; *Jewell v. Jewell*, 1 How. (U. S.) 219; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780; *White v. Strother*, 11 Ala. 720;

Moffit v. Witherspoon, 10 Ired. L. (N. Car.) 185; *Davidson v. Wallingford*, 88 Tex. 619, 32 S. W. 1030; *Morrill v. Foster*, 33 N. H. 379; *Morrill v. Foster*, 33 N. H. 379; *Raynes v. Raynes*, 54 N. H. 201; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Adie v. Commonwealth*, 25 Gratt. (Va.) 712; *Wise v. Wynn*, 59 Miss. 588; *Alexander v. Chamberlin*, 1 T. & C. (N. Y.) 600; *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Union v. Plainfield*, 39 Conn. 563; *Carnes v. Crandall*, 10 Iowa 377; *Charlotte Hall School v. Greenwell*, 4 Gill & J. (Md.) 407; *Jones v. Jones*, 36 Md. 447; *Wise v. Wynn*, 59 Miss. 588; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Watson v. Brewster*, 1 Pa. St. 381.

"*Pearson v. Pearson*, 46 Cal. 609; *Cowan v. Hite*, 2 A. K. Marsh. (Ky.) 238; *Fuller v. Saxton*, 20 N. J. L. 61; *Camjolle v. Ferrie*, 23 N. Y. 91; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Doe v. Phelps*, 9 Johns. (N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N.

by a deceased parent or a near relative as to a family birth or marriage are admissible in evidence.⁴² But it is held in some jurisdictions that it should be shown that the person making the entry is dead.⁴³

§ 2197. Declarations of ancestors—Limitations.—This rule, to the general rule of evidence, the admissibility of declarations is confined, first to the declarations of persons deceased, for the reason that if living they should be called as witnesses. The exception is generally confined to the declarations of relatives, because they are likely to be acquainted with the pedigree of each other. In some jurisdictions the exception was extended to strangers, before the testimony could be admitted it would be necessary to prove the degree of relationship. But in Tennessee it was held that the declarations are not confined to members of the family, and even public reputation in the community is admissible.⁴⁵

§ 2198. Declarant's relation—How established.—Another objection to this rule is found in the necessity of proving the relationship of the declarant outside of the declaration itself. The difficulty is in admitting the declaration of the fact, and admitting the same to prove the competency of the person making it was a question of fact. Hence, it was held that the relationship of the declarant

Y.) 169; Paxton v. Price, 1 Yeats Wend. (N. Y.) 379; Ro
(Pa.) 500; Shuman v. Shuman, 27 Blakely, 4 Rich. L. (S. Car
Pa. St. 90; Bowser v. Cravener, 56 "Waldron v. Tuttle, 4 N
Pa. St. 132, 142; Scharff v. Keener, Jackson v. Browner, 18 J
64 Pa. St. 376; Carter v. Tinicum Y.) 37; Fosgate v. Herki
&c. Co., 77 Pa. St. 310; Gaines v. &c. Co., 12 Barb. (N.
New Orleans, 6 Wall. (U. S.) 642; Mooers v. Bunker, 29 N.
Fulkerson v. Holmes, 117 U. S. 389, Emerson v. White, 29 N. H.
6 Sup. Ct. 780. "Ford v. Ford, 7 Humph

⁴² Southern &c. Ins. Co. v. Wilkin- 92; Ewell v. State, 6 Yerg
son, 53 Ga. 535; Greenleaf v. Du- 364; Flowers v. Haralson
buque &c. R. Co., 30 Iowa 301; Car- (Tenn.) 494; Carter v. Mor
skadden v. Poorman, 10 Watts (Pa.) 2 Tenn. Ch. 216; Saunders
82; Weaver v. Leiman, 52 Md. 708; 4 Humph. (Tenn.) 516;
Watson v. Brewster, 1 Pa. St. 381. French, 11 Lea (Tenn.)

⁴³ People v. Mayne, 118 Cal. 516, Pearce v. Kyzer, 16 Lea
50 Pac. 654; Leggett v. Boyd, 3 521; Barnet v. Day, 3 Wash
243.

family must be established by some proof independent of the declaration itself before such declaration can be admitted in evidence; but slight evidence for this purpose will be sufficient, as such relationship might be as difficult to prove as the very fact in controversy.⁴⁶ Under the rule requiring the relation to be established by other evidence it was held, in a case where a woman claimed an estate from a man as his widow and heir-at-law, that she was incompetent to make proof of the marriage ceremony, and that it must appear from other evidence that she was actually the wife of the decedent; but if the evidence showed that the parties lived together as husband and wife for some years, in the absence of other evidence, a marriage might be inferred.⁴⁷

§ 2199. **Hearsay, tradition and reputation.**—For the reasons suggested in the preceding sections, so hearsay, tradition, and reputation have all been held admissible to prove the rights of heirs or those claiming an inheritance as descendants or next of kin of a deceased ancestor. But the rule is that the hearsay in such cases must be that of those who may be supposed to have known the facts, handed down from one to another, and the traditions as held “must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections, that they are speaking the truth and that they cannot be mistaken.”⁴⁸ But family tradition of the death of a member is inadmissible unless the declarants be themselves dead.⁴⁹ And other courts hold that such evidence should not be admitted unless the fact to be established is ancient, and in no case if better evidence

⁴⁶ *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780; *Wise v. Wynn*, 59 Miss. 588; *Brown v. Crandall*, 11 Conn. 92; *Union v. Plainfield*, 39 Conn. 563; *Sitler v. Gehr*, 105 Pa. St. 577; *Gehr v. Fisher*, 143 Pa. St. 311, 22 Atl. 859; *Banbury Peerage Case*, 1 S. & S. 153; *Monkton v. Attorney-General*, 2 Russ. & Myl. 147, 511, 514.

⁴⁷ *Amory v. Amory*, 6 Biss. (U. S.) 174.

⁴⁸ *Whitelocke v. Baker*, 13 Ves. 511, 514.

⁴⁹ *Fosgate v. Harkimer & Co.*, 12 Barb. (N. Y.) 352; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *White v. Strother*, 11 Ala. 720; *Baintree v. Higham*, 1 Pick. (Mass.) 245; *Carnes v. Crandall*, 10 Iowa 377; *Jackson v. Browner*, 18 Johns. (N. Y.) 37; *Mooers v. Bunker*, 29 N. H.

420.

can be had.⁵⁰ For these reasons it is held that a person may testify as to his age.⁵¹

§ 2200. **Degrees of kindred—Determination.**—The descent and distribution of property is generally determined in the United States by the statutes of the several states.⁵² Such statutes are supposed to cover every conceivable case on the question of descent. In the methods of computation of degrees of consanguinity most of the states have followed the civil law.⁵³

§ 2201. **Degrees of kindred—Computation.**—The rule for the computation of the next of kin or the degrees of consanguinity

⁵⁰ *Berney v. Hann*, 3 A. K. Marsh. (Ky.) 322; *Higham v. Ridgway*, 10 East 109, 120; *Jackson v. Browner*, 18 Johns. (N. Y.) 37; *Cuddy v. Brown*, 78 Ill. 415; *Harland v. Eastman*, 107 Ill. 835; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322; *Chapman v. Chapman*, 2 Day (Conn.) 347; *People v. Fulton F. Ins. Co.*, 25 Wend. (N. Y.) 205; *Secrist v. Green*, 3 Wall. (U. S.) 744; *Jewell v. Jewell*, 1 How. (U. S.) 219; *Van Sickel v. Gibson*, 40 Mich. 170; *Anderson v. Parker*, 6 Cal. 197; *Stumpf v. Osterhage*, 111 Ill. 82; *North Brookfield v. Warren*, 16 Gray (Mass.) 171; *Stockton v. Williams*, *Walker's Ch.* (Mich.) 120; *Van Sickel v. Gibson*, 40 Mich. 170; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *Morgan v. Purnell*, 4 Hawks. (N. Car.) 95; *Watson v. Brewster*, 1 Pa. St. 381; *American L. Ins. & Co. v. Rosenagle*, 77 Pa. St. 507; *Saunders v. Fuller*, 4 Humph. (Tenn.) 515; *Barnet v. Day*, 3 Wash. (U. S.) 243; *Dussert v. Roe*, 1 Wall. (U. S.) 39; *Webb v. Richardson*, 42 Vt. 465; *Mason v. Fuller*, 45 Vt. 29; *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Chirac v. Reinacker*, 2 Pet. (U. S.) 613; *Secrist v. Green*, 3 Wall. (U. S.) 744.

⁵¹ *Bain v. State*, 61 Ala. 75; *Cherry v. State*, 68 Ala. 29; *Central R. Co. v. Coggin*, 73 Ga. 689; *Hill v. Eldridge*, 126 Mass. 234; *Commonwealth v. Stevenson*, 142 Mass. 466; 8 N. E. 341; *Cheever v. Congdon*, 3 Mich. 296; *State v. Cain*, 9 W. Va. 559.

⁵² *Cox v. Matthews*, 17 Ind. 367; *Cloud v. Bruce*, 61 Ind. 171; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4; *Sheffield v. Lovering*, 12 Mass. 490; *Runey v. Edmands*, 15 Mass. 291; *Penn v. Cox*, 16 Ohio 30; *Drake v. Rogers*, 13 Ohio St. 21; *Swezey v. Willis*, 1 Bradf. (N. Y.) 495.

⁵³ *Hilhouse v. Chester*, 3 Day (Conn.) 166; *Hays v. Thomas*, 1 Ill. 180; *Cloud v. Bruce*, 61 Ind. 171; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4; *Schenck v. Vail*, 24 N. J. Eq. 538; *Clayton v. Drake*, 17 Ohio St. 367; *Swezey v. Willis*, 1 Bradf. (N. Y.) 495; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414; *McDowell v. Addams*, 45 Pa. St. 430; *Martindale v. Kendrick*, 4 Greene (Iowa) 307; *Ben nett v. Toler*, 15 Gratt. (Va.) 625; *Cables v. Prescott*, 67 Me. 582; *Kelsey v. Hardy*, 20 N. H. 479; *Barger v. Hobbs*, 67 Ill. 592; *Kirkendall's Estate*, 43 Wis. 167; *Taylor v. Bray*, 32 N. J. L. 182; *Smith v. Gaines*, 35 N. J. Eq. 65; *Smith v. Gaines*, 36 N. J. Eq. 297.

has been stated as follows: "The next of kin are those who are so determined by the civil law, by which the intestate himself is the terminus a quo the several degrees are numbered. Under that rule the father stands in the first degree, the grandfather and grandson in the second, and in the collateral line the computation is from the intestate up to the common ancestor of the intestate and the person whose relationship is sought after, and then down to that person. According to that rule, the intestate and his brothers are related in the second degree, the intestate and his uncle in the third degree."⁵⁴ The Supreme Court of Georgia has held that the degrees of consanguinity were determined by the rules of the canon law, and stated the rule as follows: "To ascertain the rules of the canon law we have but to refer to the adjudicated cases and authorities in England coming down to us from beyond the date in question, and from these it is impossible to err in the proposition that to ascertain the degree of kindred we must count from the intestate up to the common ancestor one degree for each generation, thence down the collateral line to the contestant; the number of degrees in the longer of these two lines is the degree of kindred between the intestate and the contestant. And by this rule the grandchildren of an aunt are in the third degree, and are heirs-at-law in preference to the great-grandchildren of a brother, who are in the fourth degree."⁵⁵

§ 2202. Degrees of kindred—Illustrations.—Under this mode of computation where the intestate died without issue, but left a mother, brothers and sisters, it was held that the mother was the next of kin to the intestate.⁵⁶ And it was held that the brothers and sisters of a grandmother, the granduncles and grandaunts of the intestate, were nearer of kin to such intestate than the children and grandchildren of granduncles.⁵⁷ So, the grandmother was held entitled to the estate of an intestate as next of kin in preference to uncles and aunts.⁵⁸ So, it was held that the estate of the intestate descended to a great-grandmother as being the next of kin in preference to a

⁵⁴ 2 Kent Comm. 339; *Swezey v. Willis*, 1 Bradf. (N. Y.) 495; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414; *McDowell v. Addams*, 45 Pa. St. 430; *Cables v. Prescott*, 67 Me. 582; *Kelsey v. Hardy*, 20 N. H. 479.

287, 28 S. E. 918; *Ector v. Grant*, 112 Ga. 557, 37 S. E. 984.

⁵⁶ *Hays v. Thomas*, 1 Ill. 180.

⁵⁷ *Clayton v. Drake*, 17 Ohio St. 367.

⁵⁸ *McDowell v. Addams*, 45 Pa. St. 430.

⁵⁹ *Wetter v. Habersham*, 60 Ga. 193, 199; *Short v. Mathis*, 101 Ga.

great aunt or uncle of the same paternal or maternal line, that the grandfather of the intestate is nearer of kin than the great uncle. And that uncles and aunts are in the same degree of consanguinity as nephews and nieces, and all share equally in the intestate's property.⁶¹ Uncles and aunts are all held to be in the same degree of consanguinity without distinction as to the blood of the person from whom the estate descended.⁶² And the same rule was applied to cousins.⁶³ So, under this rule uncles are held to be nearer of kin than cousins.⁶⁴ And that a great uncle of an intestate is in the same degree of consanguinity with a cousin of such intestate as an aunt or an uncle of an intestate is held to be nearer of kin than the children of deceased aunts or uncles.⁶⁶

§ 2203. **Next of kin—English rule.**—The rule in England in many cases, is that by the term "next of kin" the persons who are confined to the nearest in proximity of consanguinity, and the term is not extended or applied to persons who would take by the statute of distributions.⁶⁷ But where it appears from

⁶¹ Cloud v. Bruce, 61 Ind. 171; (N. Car.) 410; Murphy v. Bruce v. Bissell, 119 Ind. 525, 22 N. Ind. 442.
E. 4.

⁶² Sweezy v. Willis, 1 Bradf. (N. Y.) 495; Martindale v. Kendrick, 4 Greene (Iowa) 307; McDowell v. Addams, 45 Pa. St. 430; Bassil v. Loffer, 38 Iowa 451; Cables v. Prescott, 67 Me. 582; Kelsey v. Hardy, 20 N. H. 479; Barger v. Hobbs, 67 Ill. 592; Kirkendall's Estate, 43 Wis. 167.

⁶³ Hurtin v. Proal, 3 Bradf. (N. Y.) 414.

⁶⁴ Deloney v. Walker, 9 Porter (Ala.) 497; Osborne v. Widenhouse, 3 Jones Eq. (N. Car.) 238; Peacock v. Smart, 17 Mo. 402; Hickey v. DeLoach, 1 How. (Miss.) 32; Danner v. Shissler, 31 Pa. St. 289; Miller's Case, 2 Lea (Tenn.) 54; Cozzens v. Joslin, 1 R. I. 122; Jones v. Barnett, 30 Tex. 637; Beebe v. Griffin, 14 N. Y. 235; Ballard v. Hill, 3 Murph.

⁶⁵ Redd v. Clopton, 17 C.

⁶⁶ Page v. Parker, 61

Taylor v. Bray, 32 N.

Speer v. Miller, 37 N. J.

⁶⁷ Smith v. Gaines, 35 N.

Smith v. Gaines, 36 N. J.

⁶⁸ Porter v. Askew, 11

(Md.) 346; Levering v. I.

Md. Ch. 81; Ellicott v.

Md. Ch. 468; Parker v.

H. 460; Montgomery v.

29 Pa. St. 118; Shaffer

Brev. (S. Car.) 160.

⁶⁹ Brandon v. Brandon,

318; Smith v. Campbell,

400; Lucas v. Brandreth,

274; Halton v. Foster, I.

App. 505; Withy v. Man

& F. 215; Gray's Settlement

(1896) 2 Ch. 804; Elmsle

2 Myl. & K. 780; Avison

1 Johns. Ch. (N. Y.) 43;

v. Allen, 6 Allen (Mass.)

of the term or from the context that those are intended who would take under the statute of distribution, it will be so construed.⁶⁸

§ 2204. **Next of kin—American rule.**—The decided cases are not in entire harmony on the construction of the term "next of kin." However, the reason for this will be found in the fact of the use of qualifying words or the context that in some way limits or changes the ordinary meaning of the word. The cases are practically agreed that in the absence of any limitation or qualifying word the term "next of kin" means "nearest of kin," meaning thereby the persons nearest in degree of kinship; and the expressions "next of kin," "nearest of kin," "nearest kindred," and "nearest blood relation," imply the nearest degree of consanguinity.⁶⁹ It has been held to include all relatives of the deceased who were entitled to share in the assets of his estate, under the statute of distribution.⁷⁰ The term "next of kin" does not include relations by marriage, but only relations by blood.⁷¹ The term does not ordinarily include hus-

* *Lowndes v. Stone*, 4 Ves. Jr. (N. Car.) 29; *Redmond v. Burroughs*, 63 N. Car. 242; *David v. 385; Smith v. Campbell*, 19 Ves. Jr. Waters, 11 Ore. 448.
400; *Gray's Settlement*, In re, ⁷⁰ *Warren v. Engelhart*, 13 Neb. (1896) 2 Ch. 805; *Halton v. Foster*, 283, 13 N. W. 401; *Missouri &c. R. Co. v. Baier*, 37 Neb. 250, 55 N. W. 513; *Pinkham v. Blair*, 57 N. H. 226; *Wilkins v. Ordway*, 59 N. H. 378, 382; *Merchants' Ins. Co. v. Hinman*, 4 Abb. Pr. (N. Y.) 312, 15 How. Pr. 182; *Murdock v. Ward*, 67 N. Y. 387; *Slosson v. Lynch*, 43 Barb. (N. Y.) 147; *Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 4; *Seabright v. Seabright*, 28 W. Va. 412, 466.
Ash v. Ash, 33 Beav. 187.

* *Harraden v. Larrabee*, 113 Mass. 430; *Swasey v. Jaques*, 144 Mass. 135, 101 N. E. 758; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. 612; *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7; *Supreme Council Chosen Friends v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 781; *Bennett v. Van Riper*, 47 N. J. Eq. 563, 22 Atl. 1055; *New York Life Ins. Co. v. Hoyt*, 161 N. Y. 1, 55 N. E. 299; *Wright v. Methodist &c. Church, Hoff. Ch.* (N. Y.) 202; *Davenport v. Hassel*, Busb. Eq. 1118.
⁷¹ *Esty v. Clark*, 101 Mass. 36; *Kimball v. Story*, 108 Mass. 382; *Supreme Council Chosen Friends v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 781; *Murdock v. Ward*, 67 N. Y. 387; *Keteltas v. Keteltas*, 72 N. Y. 312; *Slosson v. Lynch*, 43 Barb. (N. Y.) 147; *New York Life Ins. Co. v. Hoyt*, 161 N. Y. 1; 2 *Jarman Wills* (R. & F.) 666; 2 *Willams Exrs.* 1118.

§ 2207. **Descendants.**—Where the word descendant or descendants is used in a will it is held to mean, in its ordinary sense and

- Campbell v. Noble, 110 Ala. 382, 19 So. 28; Watson v. Williamson, 129 Ala. 362, 30 So. 281; Findley v. Hill, 133 Ala. 229, 32 So. 497; Robinson v. Bishop, 23 Ark. 378; Gold v. Judson, 21 Conn. 616; Alfred v. Marks, 49 Conn. 473; Anthony v. Anthony, 55 Conn. 256, 11 Atl. 45; Leake v. Watson, 60 Conn. 498, 21 Atl. 1075; Jackson v. Alsop, 67 Conn. 249, 34 Atl. 1106; Wilkerson v. Clark, 80 Ga. 367, 7 S. E. 319; Baxter v. Winn, 87 Ga. 239, 13 S. E. 634; Butler v. Huestis, 68 Ill. 594; Bland v. Bland, 103 Ill. 11; Griswold v. Hicks, 132 Ill. 404, 24 N. E. 63; Ebey v. Adams, 135 Ill. 80, 25 N. E. 1013; Smith v. Kimbell, 153 Ill. 368, 38 N. E. 1029; Strain v. Sweeny, 163 Ill. 603, 45 N. E. 201; Fishback v. Joesting, 183 Ill. 463, 56 N. E. 62; Gannon v. Peterson, 193 Ill. 372, 62 N. E. 210; Bradsby v. Wallace, 202 Ill. 239, 66 N. E. 1088; Rapp v. Matthias, 25 Ind. 332; Brown v. Harmon, 73 Ind. 412; Shimer v. Mann, 99 Ind. 190; Millett v. Ford, 109 Ind. 159, 8 N. E. 917; Underwood v. Robbins, 117 Ind. 308, 20 N. E. 230; Conger v. Lowe, 124 Ind. 368, 24 N. E. 889; Stevens v. Flannagan, 131 Ind. 122, 30 N. E. 898; Essick v. Caple, 131 Ind. 207, 30 N. E. 900; Tinder v. Tinder, 131 Ind. 381, 30 N. E. 1077; Griffen v. Ulen, 139 Ind. 565, 39 N. E. 254; Granger v. Granger, 147 Ind. 95, 44 N. E. 189; Collins v. Phillips, 91 Iowa 210, 59 N. W. 40; Furenes v. Severtson, 102 Iowa 322, 71 N. W. 196; Turman v. White, 14 B. Mon. 460; Hughes v. Clark, (Ky.) 26 S. W. 187; Tucker v. Tucker, 78 Ky. 503; Brann v. Elzey, 83 Ky. 440; Mitchell v. Simpson, 88 Ky. 126, 10 S. W. 372; Pritchard v. James, 93 Ky. 306, 20 S. W. 216; Hardy v. Wilcox, 58 Md. 180; Albert v. Albert, 68 Md. 352, 12 Atl. 11; Blank's Will, In re, 87 Md. 125, 40 Atl. 268; Ellis v. Essex &c. Bridge, 2 Pick. (Mass.) 243; Haley v. Boston, 108 Mass. 576; Bradlee v. Andrews, 137 Mass. 50; See v. Derr, 57 Mich. 369, 24 N. W. 108; Swenson's Estate, In re, (Minn.) 56 N. W. 1115; Waddell v. Waddell, 99 Mo. 338, 12 S. W. 349; Chew v. Keller, 100 Mo. 362, 13 S. W. 395; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897; Roberts v. Crume, 173 Mo. 572; Wiggin v. Perkins, 64 N. H. 36; Den v. Wortendike, 7 N. J. L. 363; Demarest v. Den, 22 N. J. L. 612; Davis v. Davis, 39 N. J. Eq. 13; Eldridge v. Eldrige, 41 N. J. Eq. 89; Bundy v. Bundy, 38 N. Y. 410; Scott v. Guernsey, 48 N. Y. 106, 122; Lytle v. Beveridge, 58 N. Y. 592; Thurber v. Chambers, 66 N. Y. 42; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Heath v. Hewitt, 127 N. Y. 166, 27 N. E. 959; Norris v. Beyea, 3 Kern. (N. Y.) 273, 280; Johnson v. Brasington, 86 Hun (N. Y.) 108; Terpening v. Skinner, 30 Barb. (N. Y.) 373; Vannorsdall v. Van Deventer, 51 Barb. (N. Y.) 137; Rogers v. Rogers, 3 Wend. (N. Y.) 521; Canfield v. Fallon, 26 Misc. (N. Y.) 345; Bryant v. Deberry, Hayw. (N. Car.) 356; Simms v. Garrot, 1 Dev. & B. Eq. (N. Car.) 393; Payne v. Sayle, 2 Dev. & B. Eq. (N. Car.) 455; Harris v. Philpot, 5 Ired. Eq. (N. Car.) 324; Trexler v. Miller, 6 Ired. Eq. (N. Car.) 248; Hilliard v. Kearney, Busb. Eq. (N. Car.) 221; Knight v. Knight, 3 Jones Eq. (N. Car.) 167; Howell v. Tyler, 9 N. Car. 207; Howell v. Knight, 10

general acceptance, none but lineal descendants. To give it any other construction there must be such a clear indication in the use of the word as to carry the conclusion that the testator intended to use it in a sense different from its ordinary meaning.⁸⁰ In its ordinary use it is held to include children, grandchildren and their children to the remotest degree, and not confined to children alone;⁸¹ but it does not include collateral relations.⁸² And where a devise was to a person for life, and then to his descendants, it was held that collateral kindred could not claim any part of the inheritance as remaindermen.⁸³ The Supreme Court of Georgia held that the word descendants in a will was used in the sense of next kin, or those

N. Car. 254, 6 S. E. 721; *King v. Beck*, 15 Ohio 559; *Bunnell v. Evans*, 26 Ohio St. 409; *McKelvey v. McKelvey*, 43 Ohio St. 213, 1 N. E. 594; *Durfee v. MacNeil*, 58 Ohio St. 238, 50 N. E. 909; *Stewart v. Powers*, 9 Ohio C. C. 143, 6 Ohio C. D. 101; *Smith v. Folwell*, 1 Bin. (Pa.) 546; *Zebach v. Smith*, 3 Bin. (Pa.) 69, 5 Am. Dec. 352; *Eby v. Eby*, 5 Pa. St. 464; *Braden v. Cannon*, 24 Pa. St. 168; *Allen v. Henderson*, 49 Pa. St. 345; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Berg v. Anderson*, 72 Pa. St. 87; *Leech v. Robinson*, 74 Pa. St. 276; *Urich's Appeal*, 86 Pa. St. 386, 27 Am. R. 707; *Warn v. Brown*, 102 Pa. St. 352; *Haverstick's Appeal*, 103 Pa. St. 394, 587; *Muhlenberg's Appeal*, 103 Pa. St. 587; *Criswell v. Grumblin*, 107 Pa. St. 408; *Affolter v. May*, 115 Pa. St. 59, 8 Atl. 20; *Stambaugh's Estate*, 135 Pa. St. 595, 19 Atl. 1058; *Oyster v. Knull*, 137 Pa. St. 448, 452, 20 Atl. 264; *Miller's Estate*, 145 Pa. St. 561, 22 Atl. 1044; *Brasington v. Hanson*, 149 Pa. St. 290, 24 Atl. 344; *Evans's Estate*, 155 Pa. St. 650, 26 Atl. 739; *Richardson's Appeal*, 19 W. N. C. (Pa.) 175; *Holeman v. Fort*, 3 Strob. Eq. (S. Car.) 66; *Cruger v. Heyward*, 2 Desaus. (S. Car.) 94; *Moone v. Henderson*, 4 Desaus. 459;

Lemacks v. Glover, 1 Rich. Eq. (S. Car.) 141; *Bailey v. Patterson*, 3 Rich. Eq. (S. Car.) 156; *Hayne v. Irvine*, 25 S. Car. 289, 293; *Lott v. Thompson*, 36 S. Car. 38; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *Ward v. Saunders*, 3 Sneed (Tenn.) 391; *Loving v. Hunter*, 8 Yerg. (Tenn.) 4; *Aydlett v. Swope*, (Tenn.) 17 S. W. 208; *Arrants v. Crumley*, (Tenn.) 48 S. W. 343; *Read v. Fite*, 8 Humph. (Tenn.) 328; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61; *Boyd v. Robinson*, 93 Tenn. 1, 23 S. W. 72; *Blake v. Stone*, 27 Vt. 475; *Pryor v. Duncan*, 6 Gratt. (Va.) 27; *Self v. Tune*, 6 Munf. (Va.) 470; *Bradley v. Mosby*, 3 Call (Va.) 50; *Reid v. Stuart*, 13 W. Va. 347.

⁸⁰ *Baker v. Baker*, 8 Gray (Mass.) 101; *Barstow v. Goodwin*, 2 Bradf. (N. Y.) 413; *Van Beuren v. Dash*, 30 N. Y. 393.

⁸¹ *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611; *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86; *Ralph v. Garrick*, 11 Ch. D. L. R. 873.

⁸² *Van Beuren v. Dash*, 30 N. Y. 393; *Hamlin v. Osgood*, 1 Redf. (N. Y.) 409; *Baker v. Baker*, 8 Gray (Mass.) 101.

⁸³ *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86.

who would take under the statutes of distribution in that s
The principle controversy that has risen over the use of this
is as to whether or not the term shall be limited to children
or whether it includes all descendants. The Supreme Court
Rhode Island gives the English rule as follows: "The ca
England upon this subject are very unanimous in support
doctrine that the word 'issue,' unconfined by any indicati
intention, includes all descendants, and that indication is re
for the purpose of limiting the sense of that word, restraining
children only."⁸⁵

§ 2208. **Issue.**—Devisees in a will are frequently designated
scribed by the term "issue." The use of this word in its or
and general sense, and in the absence of any indication of int
to the contrary is used with reference to its primary mean
that of legitimate lineal descendants, and includes the idea
scendants generally.⁸⁶ "Standing uncontrolled by the contex
word 'issue' is synonymous with descendants. Therefore, unl
some way limited in its sense, it embraces equally the son a
children."⁸⁷ The Supreme Court of Pennsylvania said: "The
'issue' in a will, prima facie, means the same as heirs of the
lineal descendants indefinitely, and is to be construed as a w
limitation; but the prima facie construction gives way if th
anything on the face of the will to show that the word was int

⁸⁵ Walker v. Walker, 25 Ga. 420.

⁸⁶ Bigelow v. Morong, 103

⁸⁷ Pearce v. Rickard, 18 R. I. 142,
26 Atl. 38; Gammell v. Ernst, 19 R.
I. 292, 33 Atl. 222; Hartwell v. Tefft,
19 R. I. 644, 35 Atl. 882; Thomas v.
Levering, 73 Md. 451, 21 Atl. 367;
Dexter v. Inches, 147 Mass. 324, 17
N. E. 551; Carter v. Bentall, 2 Beav.
551; Pope v. Pope, 14 Beav. 591,
594; Haydon v. Wilshire, 3 Term
R. 372; Bernard v. Montague, 1
Meriv. 422, 434; Slater v. Danger-
field, 15 M. & W. 263; Cook v. Cook,
2 Vernon 545; Hockley v. Mawbey,
1 Ves. Jr. 143, 150; Davenport v.
Hanbury, 3 Ves. Jr. 257; Freeman
v. Parsley, 3 Ves. Jr. 421; Leigh v.
Norbury, 13 Ves. Jr. 340.

287; Hall v. Hall, 140 Mass.
N. E. 700; Dexter v. Inch
Mass. 324, 17 N. E. 551; H
Barnard, 152 Mass. 67, 25 N.
Jackson v. Jackson, 153 Mas
26 N. E. 1112; Weehawken
v. Sisson, 17 N. J. Eq. 475;
v. Drake, 134 N. Y. 220, 32
114; Soper v. Brown, 136 N.
32 N. E. 768; Chwatal v. Sch
148 N. Y. 683, 43 N. E. 166;
v. Stow, 2 Dev. Eq. 509; M
Hepford, 2 Ohio N. P. 365; R
v. Quinliven, 79 Pa. St. 333;
v. Rickard, 18 R. I. 142.

⁸⁸ Weehawken & Co. v. Sis
N. J. Eq. 475, 485.

to have a less extended meaning and to be applied to children only, or, as in this case, to lineal descendants of a particular class in being at a specified time. . . . When, as in the present case, the word is manifestly used as descriptive of the devisees, and is also restricted to such issue as shall be living at a specified time, it is always construed as a word of purchase, embracing all lineal descendants of the person named, in being at the time so specified, unless it clearly appears from the text that the testator intended otherwise."⁸⁸ Where the testator clearly indicates such intention from the context the meaning will be restricted to children.⁸⁹ The word offspring is held to be synonymous with issue and to include lineal descendants to the remotest degree.⁹⁰ Where by a will the issue is to take the share of the deceased parent, it was held that the term was confined to the children of the taker.⁹¹ The Supreme Court of Kentucky held that in common parlance and as used generally the word 'issue' signifies immediate descendants, children.⁹² Courts are not uniform upon holding that issue includes an adopted child.⁹³

§ 2209. Survivor in common calamity—Right of heirs.—In a contest between claimants where their rights depend on the priority or order of death, where several lives are lost in the same disaster,

* *Wistar v. Scott*, 105 Pa. St. 200; *Robbins v. Quinliven*, 79 Pa. St. 333; *Murray v. Bronson*, 1 Dem. Surr. (N. Y.) 217; *Palmer v. Horn*, 84 N. Y. 516; *Palmer v. Dunham*, 125 N. Y. 68, 25 N. E. 1081; *Drake v. Drake*, 134 N. Y. 220, 32 N. E. 114; *Soper v. Brown*, 136 N. Y. 248, 32 N. E. 768; *Chwatal v. Schreiner*, 148 N. Y. 683, 43 N. E. 166; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; *New York &c. Trust Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311; *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112.

* *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556; *Arnold v. Alden*, 173 Ill. 229, 50, 704; *Chwatal v. Schreiner*, 148 N. Y. 683, 43 N. E. 166.

* *Moore v. Moore*, 12 B. Mon. (Ky.) 655.

* *Keegan v. Geraghty*, 101 Ill. 26; *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948; *Sewall v. Roberts*, 115 Mass. 262; *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729; *Jenkins v. Jenkins*, 64 N. H. 407; *New York &c. Trust Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311; *Shafer v. Eneu*, 54 Pa. St. 304; *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882.

* *Weatherhead v. Baskerville*, 11 How. (U. S.) 329.

* *Allen v. Markle*, 36 Pa. St. 117; *Mitchell v. Pittsburg &c. R.*, 165 Pa. St. 645, 31 Atl. 67; *Barber v. Pittsburgh &c. R. Co.*, 166 U. S. 83, 17

there is no presumption as to the order of death; nor is presumption either from age or sex that one survived neither does the law presume that all died at the same time. In such cases the burden of proof is upon the party asserting survivorship of any one of the particular persons whose death is lost; and in the absence of evidence from which the order of death may be inferred all may be considered to have died at the same time; not because of any presumption of law, but because of the failure or impossibility of proving the order of death by asserting it; and in such cases property rights must be determined by the theory that all perished at the same moment.⁹⁴ But in the *York* case the surrogate said: "When two persons are exposed to the same calamity at sea, it does not follow, in my opinion, that the one last seen alive is necessarily or probably the survivor, or that a person escaping from the sinking ship by a life-boat is adjudged to have first perished, because, an instant after the calamity, companions may have been seen on the ship, which immediately upon went down with all on board."⁹⁵ The rule is thus stated by the Florida Supreme Court: "The question of survivorship in a case of a common calamity is the question of fact, in a simple inquiry as to which of two or more individuals survived longer, and that that fact is to be proved as any other fact, either by positive or circumstantial evidence, as the facts of the case might happen to require."⁹⁶ In a South Carolina case it was said: "Where the evidence has traced the parties to a common danger, which proved fatal to both, the last seen alive is heard within the operation of the cause of death must be presumed to be the survivor, unless there be something in the nature of the circumstances to rebut the presumption, or render it inapplicable. The analogy to cases of absence is very strong. The proof, that the death has occurred, stands in the place of lapse of time."

⁹⁴ *Johnson v. Merithew*, 80 Me. Ch. 264. See notes to *Coyne v. Leach*, 111, 116, 13 Atl. 132; *Coyne v. Leach*, 8 Metc. Mass. 371, 41 Atl. 8 Metc. (Mass.) 371; *Newell v. Underwood v. Wing*, 4 Nichols, 75 N. Y. 78; *Smith v. G.* 633; *Wing v. Angra* Croom, 7 Fla. 81, 141; *Russell v. Cas.* 183.
⁹⁵ *Ridgway, Matter of*, Y.) 226.
⁹⁶ *Smith v. Croom*, 7 F. sell v. Hallett, 23 Kans. 627; *Moehring v. Mitchell*, 1 Barb.

employed only as proof that the parties have died. When they died, relatively may be judged of, in this case, as in that, by considering which was last known to be alive."⁹⁷

Devisees and Legatees.

§ 2210. **Ambiguity in name of devisee—Parol evidence to explain.**—In the construction of wills and in the settlement of decedent's estates it frequently becomes necessary to establish by extrinsic proof the identity of devisees or legatees. The method and the quantity of proof to establish such identity is supposed to belong more properly to this chapter than to the chapter on wills. While this procedure necessarily involves to some extent the construction and interpretation of wills for the purpose of ascertaining the intention of the testators, yet such proof becomes necessary by reason of controversies arising between persons, corporations or societies claiming to be the devisees or legatees named or intended by the testators. The legal principle involved in such controversies is the right to introduce parol evidence for the purpose of explaining a latent ambiguity arising from a mistake in the name of a devisee or legatee. It is conceded, almost universally, that a misnomer or mis-description of a devisee or legatee will not invalidate the provision of a will or defeat the intention of the testator, if either from the will itself, or evidence dehors the will, the intention of the testator can be ascertained and the object of his bounty definitely determined. That parol evidence for the purpose of identifying the devisees or legatees is competent and proper is also generally conceded.⁹⁸

⁹⁷ *Pell v. Ball*, Cheves Eq. 99.

⁹⁸ *Trustees &c. v. Peaslee*, 15 N. H. 317; *Connolly v. Pardon*, 1 Paige (N. Y.) 291; *Miller v. Travers*, 8 Bing. N. Cas. 244; *Day v. Trig*, 1 P. Wms. 286; *Thomas v. Thomas*, 6 Term R. 676; *Attorney-General v. Rye*, 7 Taunt. 546; *Selwood v. Mildmay*, 3 Ves. 306; *Parsons v. Parsons*, 1 Ves. Jr. 266; *Storer v. Freeman*, 6 Mass. 435; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; *Tudor v. Terel*, 2 Dana (Ky.) 47, 49; *Breckenridge v. Duncan*, 2 A. K. Marsh. (Ky.) 51; *Haydon v. Ewing*, 1 B.

Mon. (Ky.) 111; *Edward v. Richards*, Wright (Ohio) 597; *Vernor v. Henry*, 3 Watts (Pa.) 385; *Lefevre v. Lefevre*, 2 T. & C. (N. Y.) 341; *Powell v. Biddle*, 2 Dallas (Pa.) 70; *Smith v. Smith*, 4 Paige Ch. (N. Y.) 271; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; *Klein v. Hayck*, 5 Redf. (N. Y.) 210; *Minot v. Boston Asylum &c.*, 7 Metc. (Mass.) 416; *American &c. Society v. Pratt*, 9 Allen (Mass.) 109; *Thayer v. Boston*, 91 Mass. 347; *Hockensmith v. Slusher*, 26 Mo. 237; *Evans v. Hooper*, 3 N. J. Eq. 204; *Covert*

§ 2211. Latent ambiguity—Raised and corrected by parol.

Where a devisee or legatee is misnamed there may be nothing on the face of the will showing such mistake, and the error must be shown by extrinsic evidence. The ambiguity itself must first be raised by extrinsic evidence. The rule in such cases is that extrinsic and parol evidence may be introduced for the purpose of showing the mistake of a testator, and that like evidence may then be offered for the purpose of correcting the mistake and identifying the devisee and legatee intended. This rule applies whether the legatee or devisee is a natural person or a corporation, or religious, or charitable association, and to the subject matter as well as to the beneficiary. For, as said in one of the old books, "if the testator does err in the name, and not in the person, such error shall not hurt." In an old English case it was said by Lord Thurlow that "where a testator uses certain words which prima facie give a clear account, the same fact that enables you to prove that there was a latent ambiguity enables you to prove also what was his real intention." In a Virginia case involving this principle the court said: "It is plain that a latent ambiguity exists and is established by extrinsic evidence. Such ambiguity thus established by evidence dehors the will, may be removed in the same manner by extrinsic evidence."⁹⁹

v. Sebern, 73 Iowa 564, 35 N. W. 636; Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 679; Gordon v. Burris, 141 Mo. 602, 43 S. W. 642; Bradley v. Rees, 113 Ill. 327; Shelton v. Shelton, 1 Wash. (U. S.) 53; Wooten v. Redd, 12 Gratt. (Va.) 196; Senger v. Senger, 81 Va. 687; 1 Jarman Wills 402.

* Hawkins v. Garland, 76 Va. 149; Senger v. Senger, 81 Va. 687; Tudor v. Terrell, 2 Dana (Ky.) 48; Jackson v. Payne, 2 Metc. (Ky.) 570; Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50; Bradhurst v. Field, 135 N. Y. 564, 32 N. E. 113; Connolly v. Pardon, 1 Paige Ch. (N. Y.) 291; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231; Thomas v. Stevens, 4 Johns. Ch. (N. Y.) 607; Klock v. Stevens, 45 N. Y. S. 603; Morgan

v. Burrows, 45 Wis. 211; Patch v. White, 117 U. S. 210, 217, 6 Sup. Ct. 617; Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689; Hannon v. Moulton, 23 Fed. 5; Weatherhead v. Baskerville, 11 How. (U. S.) 328; Allen v. Allen, 18 How. (U. S.) 385; Grimes v. Harmon, 35 Ind. 198; Cruse v. Cunningham, 79 Ind. 402; Black v. Richards, 95 Ind. 184; Skinner v. Harrison, 116 Ind. 139, 18 N. E. 529; Daugherty, Adm., v. Rogers, 119 Ind. 254, 20 N. E. 779; Sturgis v. Ward, 122 Ind. 134, 22 N. E. 996; Groves v. Culp, 132 Ind. 186, 31 N. E. 569; Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631; Vandiver v. Vandiver, (Ala.) 22 So. 154; Spencer v. Higgins, 22 Conn. 521; Pinney v. Newton, 66 Conn. 141, 33 Atl. 591; Rogers v. Rogers, 78 Ga.

§ 2212. **Nature of parol evidence to identify devisee.**—Where parol evidence is admissible for the purpose of identifying devisees or legatees, it is proper to prove the relation existing between the testator and the claimant; that the person claiming the devise was a great favorite with the testator; that it was understood and believed that some provision would be made for the person claiming the devise; or that a great friendship had existed between the testator and the mother of the claimant, and any and all facts which would tend in any manner to aid a court in arriving at the intention of the testator, and in determining whether or not the person claiming the gift was the person intended by the testator.¹⁰⁰

- 688; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Whitcomb v. Rodman*, 156 Ill. 116, 40 N. E. 553; *Cotton v. Smithwick*, 66 Me. 360; *Turner v. Hallowell*, 76 Me. 527; *Stokeley v. Gordon*, 8 Md. 486; *Morse v. Stearns*, 131 Mass. 389; *Love v. Buchanan*, 40 Miss. 758; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Griscom v. Evens*, 40 N. J. L. 402; *Boggs v. Taylor*, 26 Ohio St. 604; *Moreland v. Brady*, 8 Ore. 303; *Morgan v. Burrows*, 45 Wis. 211; *Sherwood v. Sherwood*, 45 Wis. 357; *Chambers v. Watson*, 60 Iowa 339, 14 N. W. 336; *Powell v. Biddle*, 2 Dall. (U. S.) 70; *Pickering v. Pickering*, 50 N. H. 349; *Tilton v. Society*, 60 N. H. 377; *Hinckley v. Thatcher*, 139 Mass. 477, 1 N. E. 840; *Bradwin v. Harpur*, Amb. 374; *Beaumont v. Fell*, 2 P. Wms. 141; *Baugh v. Read*, 1 Ves. Jr. 257; *Hiscocks v. Hiscocks*, 5 M. & W. 363; *Miller v. Travers*, 8 Bing. 244; *Swinburne Wills* 389; *Page Wills*, §§ 538, 817, 818, 819; *Schouler Wills*, §§ 572, 573, 574, 575, 576.
- ¹⁰⁰ *Lines v. Darden*, 5 Fla. 51; *Terpening v. Skinner*, 30 Barb. (N. Y.) 373; *Robertson v. Schemerhorn*, 14 N. Y. St. 304; *Brownfield v. Brownfield*, 12 Pa. St. 136; *Perry v. Hunter*, 2 R. I. 80; *Brainerd v. Cowdrey*, 16 Conn. 10; *Bond's Appeal*, 31 Conn. 183; *Billingslea v. Moore*, 14 Ga. 370; *White v. Holland*, 92 Ga. 216, 18 S. E. 17; *Richards v. Miller*, 62 Ill. 417; *Lomax v. Shinn*, 162 Ill. 124, 44 N. E. 495; *Hawhe v. Chicago &c. R. Co.*, (Ill.) 46 N. E. 240; *Lorrieux v. Keller*, 5 Iowa 196; *Chambers v. Watson*, 60 Iowa 339, 14 N. W. 336; *Donahue v. Denahue*, 54 Kans. 136, 37 Pac. 998; *Smith v. Holden*, 58 Kans. 535, 50 Pac. 447; *Ernst v. Foster*, (Kans.) 49 Pac. 527; *Allen v. Van Meter*, 1 Metc. (Ky.) 264; *Darnall v. Adams*, 13 B. Mon. (Ky.) 273; *Brown v. Thorndike*, 15 Pick. (Mass.) 400; *Brown v. Saltonstall*, 3 Metc. (Mass.) 426; *Waters v. Howard*, 1 Md. Ch. 112; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *Gilliam v. Chancellor*, 43 Miss. 437; *Gregory v. Cowgill*, 19 Mo. 415; *Mersman v. Mersman*, 136 Mo. 244, 37 N. W. 909; *Goodhue v. Clark*, 37 N. H. 525; *Morgan v. Dodge*, 44 N. H. 255; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172, 186; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Dey v. Dey*, 19 N. J. Eq. 137; *Barnard v. Barlow*, 50 N. J. Eq. 131, 24 Atl. 912; *White v. Hicks*, 33 N. Y. 383; *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332; *Terpenning v.*

Evidence of affection and regard of a testator for the devisee as well as manifestations of grief as external manifestations of internal feelings are held proper as reflecting light upon the intention of the testator.¹⁰¹ Another rule stated in a recent case is that the court to strike out what is false in the designation of the devisee and so carry out the intent of the testator, parol testimony is introduced to show the number, the degree and the kinship of the testator's relations, as well as how he regarded them and them."¹⁰²

§ 2213. **Parol evidence—Limitation.**—There are conflicting opinions on the admissibility of parol evidence to show the devisee intended by the testator. The conflict in the cases is apparent perhaps than real. The cases seem to be uniformly in favor of the right to introduce parol evidence for the purpose of showing the devisee intended where the name or designation in the will is incorrect as to all persons and no one appears or claims to be the devisee who answers exactly to the designation of the will. But in a class of cases where there is one person exactly corresponding to the designation in the will and another who claims to be the devisee intended, the weight of authority and the better reasoning is in favor of the effect that parol evidence is inadmissible to substitute one person for the other. The rule was thus stated in an early case: "The modern doctrine is that where a subject of a will satisfies the terms of the will, and to which they are applicable, there is no latent ambiguity. Evidence is not admissible dehors the will from necessity, to explain that which otherwise has no operation. If the rule were held otherwise a testator would feel no security in making a will. His intention, clearly expressed in writing, and the object of his bounty found, in all cases answering the description, might be defeated, and the sta-

Skinner, 30 Barb. (N. Y.) 373; Doe v. Provost, 4 Johns. (N. Y.) 61; ¹⁰¹Gordon v. Burris, 43 S. W. 642.

Wusthoff v. Dracourt, 33 Watts (Pa.) 240; Gilmore's Estate, In re, 154 Pa. St. 523, 26 Atl. 614; Cogdell v. Cogdell, 3 Des. (S. Car.) 346; Jones v. Quattlebaum, 31 S. Car. 606; Gannaway v. Tarpley, 1 Coldw. (Tenn.) 572; Wootton v. Redd, 12 Gratt. (Va.) 196. ¹⁰²Atterbury v. Stafford, Eq. 186, 44 Atl. 16; Smith, 1 Edw. Ch. 1; Henry, 3 Watts (Pa.) 346; Thomas v. Thomas, 6 Lord Camoys v. Blunt, Cas. 778; 1 Jarman seq.

to wills be made practically inoperative."¹⁰³ An illustration of this principle is found in a case where a testator gave a legacy to "The Seaman's Aid Society in the city of Boston" and "The Seaman's Friend Society" of that city claimed the legacy and offered to prove that the testator in his lifetime knew of the existence of that society, was deeply interested in its objects, had contributed to its funds and had expressed a determination to make some provision for it in his will; that the scrivener who wrote the will informed the testator that the name of the society was "The Seaman's Aid Society." And further that the testator did not know there was such a society as "The Seaman's Aid Society," had never contributed to it, and had never indicated any purpose to remember it in his will and that the name was inserted on the suggestion of the scrivener. It was held that the offered evidence was inadmissible, and that the intention of testator thus plainly expressed in favor of a legatee which exactly answered the description, could not be affected by parol evidence and that the society named was entitled to the legacy.¹⁰⁴

§ 2214. Presumptions—Mistake in name of legatee.—Where a mistake or misnomer occurs in the name of the devisee, and two or more persons, neither of whom answers perfectly the description, claim the devise, and there is no exact method of determining the testator's intention, the presumption is said to be that the one nearest of kin to the testator was the one intended.¹⁰⁵ So, the presumption is that a testator intends his own relatives, and not his wife's, where two persons of the same name, equally related to the testator

¹⁰³ *Wusthoff v. Dracourt*, 3 Watts (Pa.) 240; *Green's Appeal*, 42 Pa. St. 25; *Appeal v. Byers*, 98 Pa. St. 479; *Root's Appeal*, 187 Pa. 118, 40 Atl. 818. These cases overrule the case of *Powell v. Biddle*, 2 Dall. (Pa.) 70, and in one of the cases denying the doctrine of *Powell v. Biddle*, 2 Dall. (Pa.) 70, it is said: "If, however, there is a mistake in the description so that no one corresponds to it in all respects, but some one does in many particulars, and no other does who can be intended, such person will take. Or,

if the will be plain and clear on its face, and only becomes doubtful when applied to the subject matter, extrinsic evidence of the intention of the testator may be received; *Appeal v. Byers*, 98 Pa. St. 479.

¹⁰⁴ *Tucker v. Seaman's Aid Society*, 7 Metc. (Mass.) 188; *Minot v. Boston Asylum &c.*, 7 Metc. (Mass.) 416; *American &c. Society v. Pratt*, 9 Allen (Mass.) 109.

¹⁰⁵ *Smith v. Smith*, 4 Paige Ch. (N. Y.) 271; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189, 192; *Gallup v. Wright*, 61 How. Pr. (N. Y.) 286.

and his wife, answer the description of the devisee. The presumption favors the legitimate to the illegitimate kin matters are equal.¹⁰⁷ The burden of proof is on the party asserting the illegitimacy.¹⁰⁸

§ 2215. Devisee—Designation by name and relation. A testator sometimes designates a devisee both by name and by relationship. When it is made to appear that there is no person answering the description, and where it further appears that a part of the devise refers nominally to one person and the remainder to another, it then becomes necessary to determine the intention of the testator. In such cases the rule seems to be that the designation will prevail over the nominal reference. "If a legacy was given by the testator to his brother John, and it turned out in the evidence that he had no brother, whose name was James, there could be no legacy to the latter would be entitled, because the description of the devise in that case would alone be sufficient and the name might be treated as surplusage."¹⁰⁹ The converse of this proposition is that if a legacy be given a person properly named but wrongly described, either by relationship or otherwise, the improper description will not vitiate the devise, but will be rejected as surplusage. In such cases there is a presumption that the testator intended to take whom he best knew and with whom he was most intimate and for whom he had evidenced the greatest affection, and such facts and circumstances may be shown to aid the court in arriving at the intention of the testator.¹¹⁰

§ 2216. Similarity of name—No proof of identity.—Where there is a presumption that a person bearing the name of a son is the son,

¹⁰⁸ Green's Appeal, 42 Pa. St. 25; Root's Estate, 187 Pa. St. 118, 5 L. R. A. 690, 15 L. R. A. 300; Underhill Wills, §§ 595, 626, 632.

¹⁰⁷ Appel v. Byers, 98 Pa. St. 479; Wettach v. Horn, 201 Pa. St. 201, 50 Atl. 1001; Cartwright v. Vawdry, 5 Ves. 530; Dorin v. Dorin, L. R. 7 H. L. 568; Ellis v. Houston, 10 L. R. Chanc. Div. 236; Underhill Wills, §§ 568, 633.

¹⁰⁹ Underhill Wills, §§ 568, 569.

¹⁰⁹ Connolly v. Parson, (N. Y.) 291; Gordon v. Gordon, Mo. 602, 43 S. W. 642; Connolly v. Parson, 43 Pa. St. 102; Garland, 76 Va. 149; v. Allen, 12 Ad. & El. 189; Thomas v. Thomas, 671; Careless v. Carey, 601, 1 Meriv. 384; Wills, 97; 1 Reper Legacy, §

son and heir of an ancestor. The possibility or probability of such being the case must be supported by proof of facts and circumstances showing that he is in fact the son and heir.¹¹¹

§ 2217. Identity of devisee—Determined from context.—Where the name of a devisee in a will is clear and explicit there can be no ambiguity. But an ambiguity arises when it is made to appear that no claimant comes within the full designation of the legatee. And where two or more persons answering in part to the descriptions in the will claim the devise, the court must decide on the construction of the will, and any other proper evidence, which claimant is entitled to the devise. In determining who is the proper devisee the rule is that if the will itself affords sufficient evidence of the person intended, the will alone must be looked to in solving the difficulty. This rule has been stated as follows: "If, however, the context of the will affords sufficient evidence of the identity of the person intended as the legatee, the will alone must be looked to in order to clear up the difficulty and determine the question. But if the context fails, or, after examining the whole will, it still remains uncertain who is the proper person to take, then recourse must be had to parol evidence. In no case, however, is the bequest to be deemed void for uncertainty as to the person, provided the person intended to take can be identified by any competent evidence."¹¹²

§ 2218. Identity of devisee—Parol proof of testator's declarations.—When it is made to appear that there is a mistake in the name of the devisee, it then becomes important to know who the testator intended to be the object of his bounty. For the purpose of ascertaining this intention it is held that parol proof may be given of the testator's declarations at the time of making the will. But declarations made either before or after the time of the execution of the will are held to be incompetent.¹¹³ The declarations of

¹¹¹ *Freeman v. Loftis*, 51 N. Car. ton, 32 N. H. 257, 263; *Goodhue v.* 524. Clark, 37 N. H. 525; *Morgan v.*

¹¹² *Smith v. Smith*, 1 Edw. Ch. (N. Dodge, 44 N. H. 255; *Perkins v.* Y.) 189; *Smith v. Smith*, 4 Paige Mathes, 49 N. H. 107; *Matthews v.* (N. Y.) 271. Crosby, 56 N. H. 21; *Goodale v.*

¹¹³ *Farrar v. Ayres*, 5 Pick. Mooney, 60 N. H. 528; *Smith v.* (Mass.) 404, 409; *Trustees &c. v. Kimball*, 62 N. H. 606; *Doe v. Roe*, Peaslee, 15 N. H. 317; *Tilton v. Til-* 1 Wend. (N. Y.) 541; *Jackson v.*

a testator made after the execution of the will, it has been held, are not admissible as evidence of the facts stated nor to show the intention of the testator.¹¹⁴

§ 2219. Declarations of testator to identify devisee.—The declarations of a testator may be properly admissible in evidence even where there is no latent ambiguity. One limitation on this rule is that the meaning thus sought to be put upon the words used does not contravene their proper and ordinary meaning, but where it is intended only to show the sense in which the words are used. The rule is more aptly stated as follows: "Evidence in the shape of sayings, etc., of the testator may be, in certain cases, adduced to show that he habitually used certain words, even where the description is not equivocal, and provided the sense thus sought to be put upon them does not contravene their ordinary and legitimate meaning; this being distinct from evidence adduced to show in what sense he used the words on the particular occasion of writing the will."¹¹⁵ A testator directed that his remaining lands be divided between "the four boys," and where it was shown by evidence that the testator left seven sons, three of whom were of age and had married and lived away from home, and the other four were minors living at home with their father, the testator, it was held competent to prove by the oral declarations of the testator that he intended the four minor sons, who were then living with him as a part of the family.¹¹⁶

§ 2220. Description applicable to more than one.—The designation of a devisee by a testator is frequently such that no person or object is found who answers the description, but persons appear

Van Vechten, 11 Johns. (N. Y.) 201; Haydon v. Ewing, 1 B. Mon. 234; Walton v. Kendrick, 122 Mo. (Ky.) 111; Whitaker v. Latham, 7 Bing. 628; Thomas v. Thomas, 6 Term R. 671; Duke v. Duchess of Rutland, 2 P. Wms. 215; Harris v. Bishop of Lincoln, 2 P. Wms. 135; Dred Good v. Needs, 2 M. & W. 128, 139; Hodgson v. Hodgson, 2 Vern. 593; Doe d. Allen v. Allen, 12 Ad. & El. 451; Washington & C. Univ., Appeal of, 111 Pa. 572, 3 Atl. 664.

¹¹⁴ Gibson v. Gibson, 24 Mo. 227. 518, 27 S. W. 872; Gordon v. Burris, 141 Mo. 602, 43 S. W. 642.

¹¹⁵ Hawkins Wills 10; Van Nostrand v. Board & C., 59 N. J. Eq. 19. 44 Atl. 472; Duke of Leeds v. Amherst, 9 Jur. 359; Feltham's Trusts, In re, 1 K. & J. 528; some cases deny this rule; Button v. American Tract Society, 23 Vt. 336.

¹¹⁶ Bradley v. Rees, 113 Ill. 327.

who claim the bequest on the ground that they were intended by the testator, but were accidentally or ignorantly misnamed. In such cases it is held that extraneous evidence is admissible to show the testator's intention. The rule has been thus stated: "When the object of the testator's bounty is described in terms which are applicable indifferently to more than one person, evidence is admissible to prove which of the persons was intended."¹¹⁷ The rule as to the quality of such evidence is given as follows: "Where there are two parties claiming a legacy, neither of whom bears the name of the legatee in the will, and it is uncertain which is the one intended by the testator, if either, it must be determined by a consideration of all the language used, and by proof of all the facts and surrounding circumstances."¹¹⁸

§ 2221. **Two claimants—Purpose of parol evidence.**—The parol evidence admissible is for the purpose of bringing the devisee within the intention of the testator; or to apply the bequest to one of two persons who would be entitled but for the other. The evidence is to operate on the devisee, and not to change the testator's intention. The rule more fully stated is as follows: "If the will applies definitely to two or more persons, so that either would be entitled to take it, under the will, but for the existence and claim of the other, then parol evidence is admissible to prove which was intended. When that proof is supplied, the will operates, by its own force and terms, to give the property to that one, as if such person had been the only one named or described. The evidence does not create the gift, but simply directs it. Where the name or description, used in the will, does not designate with precision, any person, but where, when the circumstances come to be proved, so many of them concur to indicate that a particular person was intended, and no similar conclusive circumstances appear, to distinguish and identify any other person, the person, thus shown to be intended, will take."¹¹⁹

¹¹⁷ *Gallup v. Wright*, 61 How. Pr. Beaumont v. Fell, 2 P. Wms. 141; (N. Y.) 286; *Brewster v. McCall*, 15 Wigram Wills 188. Conn. 274; *Tucker v. Seamen's Aid Soc.*, 7 Metc. (Mass.) 205; *Minot v. Boston Asylum &c.*, 7 Metc. (Mass.) 416; *Reynolds v. Whelan*, 16 L. J. (N. S.) Ch. 434; *Button v. American Tract Society*, 23 Vt. 336; *McAllister v. McAllister*, 46 Vt. 272; ¹¹⁸ *Washington &c. Univ.*, Appeal of, 111 Pa. 572, 3 Atl. 664. ¹¹⁹ *Tucker v. Seaman's Aid Society*, 7 Metc. (Mass.) 188; *Osborne v. Varney*, 7 Metc. (Mass.) 301; *Minot v. Boston Asylum &c.*, 7 Metc. (Mass.) 416; *Hinckley v. Thatcher*,

§ 2222. **Devisee—False character given by testator.**—The testator sometimes purposely gives a false character to the devisee or states matters descriptive of the devisee which are not accurate and true. The rule in such cases is that the intention of the testator, if it can be discovered, must prevail and that such false character or untrue statement, in the absence of fraud, will not affect the validity of the legacy or devise. In an English case it was held that "a false character, attributed by a testator to a legatee, would not affect the validity of the legacy, unless the false character had been acquired by a fraud which had deceived the testator; and that, where the testator and legatee had common knowledge of an immoral or criminal act by which the legatee had acquired the false character, the rights of the legatee as such would not be affected,—it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights."¹²⁰

§ 2223. **Misnomer of devisee—Illustrations.**—Where a bequest was made by name to Cornelia Thompson it was held proper to prove that Caroline Thomas was intended.¹²¹ So, a gift to a brother by a wrong christian name, and by the name of a son of the brother, was held to be intended for the brother.¹²² Gifts to nephews by name of "Harmon" and "Joseph" were held intended for nephews whose correct names were Samuel Harbourne and Josiah M., where the evidence showed that Samuel was usually called by his middle name, "Harbourne," and Josiah was usually called "Josie."¹²³ Where a testator named Samuel Powell, son of Samuel Powell, carpenter, as a devisee, it was held proper and competent to show that William Powell was the person intended, though Samuel Powell did actually have a son named Samuel.¹²⁴ In another case Cassandra Emig took

139 Mass. 477, 1 N. E. 840; *Staratton v. Physio-Medical College*, 149 Mass. 505, 21 N. E. 874; *Trustees &c. v. Colgrove*, 4 Hun (N. Y.) 362, 6 T. & C. 614; *Beaumont v. Fell*, 2 P. Wms. 141; *Parsons v. Parsons*, 1 Ves. Jr. 266; *Doe d. Allen v. Allen*, 12 Ad. & El. 451.

¹²⁰ *Giles v. Giles*, 1 Keen 685; *Klein v. Hayck*, 5 Redf. (N. Y.) 210, 213.

¹²¹ *Thomas v. Stevens*, 4 Johns. Ch. (N. Y.) 607.

¹²² *Connolly v. Pardon*, 1 Paige Ch. (N. Y.) 291.

¹²³ *Taylor v. Tolen*, 38 N. J. Eq. 91.

¹²⁴ *Powell v. Biddle*, 2 Dall. (Pa.) 70; the authority of this case has been questioned.

a gift made by the testator to Lavinia Lauer on proof that the testator had mentioned her by her married name at the time he executed the will, and that she was the daughter of his brother, named in the will and satisfied the descriptive part of the document.¹²⁵ Parol evidence was held proper to show that a devise to Samuel G., son of Captain John F. Slaughter, was intended for Samuel G., son of Captain John F. Hawkins.¹²⁶

§ 2224. Devisee named by nickname.—The same rule applies in case of a devise to a person by a nickname as in case of misnomer. The gift will not fail because the name is not real and accurate. The rule is that where the testator names a devisee by any nickname which he himself or others have been accustomed to apply to a particular person, such fact may be shown and the person properly identified.¹²⁷ And a devise to one by the name by which he was commonly known and designated has been held sufficient. Thus where a gift was named to a married woman in her maiden name, it was held proper to show that the testator had always recognized and called her by such maiden name, and the identification was held sufficient.¹²⁸ So where a testator made a gift to his brother "John," it was held proper to show that the testator had always called his brother "Barzali" by the name of "John" and that he was the person intended.¹²⁹

§ 2225. Devisee not named.—It is generally conceded by the authorities that it is not absolutely necessary that the devisee or legatee be named in the will, in order to give effect to the bequest. It is held to be sufficient if the devisee or legatee is so described or

¹²⁵ *Wagner's Appeal*, 43 Pa. St. 102. *Fleming*, 8 Jur. N. S. 1042; *Plunkett*,

¹²⁶ *Hawkins v. Garland*, 76 Va. In re, 11 Ir. Ch. 361; *Drake v. Drake*, 8 H. L. Cas. 172, 29 L. J. Ch. 149.

¹²⁷ *Beatty v. Trustees &c.*, 39 N. J. Eq. 452; *Atterbury v. Stafford*, 58 N. J. Eq. 44 Atl. 160. See generally, on this subject: *Thomas v. Thomas*, 6 Term R. 671; *Hampshire v. Pierce*, 2 Ves. 216; *Doe d. Le Chevalier v. Huthwaite*, 3 B. & A. 632; *Bradshaw v. Bradshaw*, 2 Y. & Coll. 72; *Miller v. Travers*, 8 Bing. 244; *Beaumont v. Fell*, 2 P. Wms. 141, 2 Eq. Cas. Abr. 366; *Fleming v.*

¹²⁸ *Lee v. Pain*, 4 Hare 201, 251.

¹²⁹ *Miller v. Coulter*, 156 Ind. 290, 59 N. E. 853; *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225.

designated in the will that he can be ascertained and And extrinsic evidence is proper to point out the person but such evidence does not create the devisee or legatee entirely competent to point out by proof the person w the description of a legatee, as contained in the will."¹³¹ held sufficient where the testator creates a certain conditio and provides for a legatee who fits either of these; i identity of the legatee may be provided for at the date o the death of the testator, or upon the determination o vening estate, which should only begin at the death of the In a recent Indiana case it appeared that a testatrix pr the person caring for her at and previous to the time of should have her entire estate, provided such person held request to that effect, signed by her. After her death daughter presented such a writing and was held the devi ed.¹³³ There is no rule applicable to devises which r name of the devisees to be mentioned; it is only necessa description of the devisees be by words that are sufficien the persons meant by the testator, and to distinguish the others.¹³⁴

§ 2226. **Scope of the parol proof.**—In determining the the corporation or society intended by the testator, it is prove the corporate existence and the objects and purp incorporation; the knowledge the testator had, his feelin and his relations with, the association; the names by r corporation was known to the testator or to others; tha corporations, associations or societies corresponding to th description given were in existence at the time of the of the will; the family, church and social relations of t as well as every fact and circumstance which would ten

¹³⁰ Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631; Cheney v. Selman, 71 Ga. 384; Hart v. Marks, 4 Bradf. (N. Y.) 161; Stubbs v. Sargon, 2 Keen 255, 15 Eng. Ch. 255; 1 Redfield Wills 274; Beach Wills, p. 148, § 83; Schouler Wills, §§ 573, 584, 586, 592, 593.

¹³¹ Hart v. Marks, 4 Brad. (N. Y.) 161.

¹³² Stubbs v. Sargon, 3 Mylne & C. 507, 14 E. 1 Redfield Wills, p. 275.

¹³³ Dennis v. Holsapple, Ind. 297, 47 N. E. 631.

¹³⁴ Brewster v. McCall, 274; Button v. American Society, 23 Vt. 336; McCall Allister, 46 Vt. 272.

light upon the intention of the testator, and which would aid the court in reaching a conclusion as to the motives and purposes of the testator in using the name or description stated in the will. If any or all of such evidence makes it appear that the corporation claiming the bequest was the one intended by the testator to be the object of his bounty, the courts will hold that the intention was expressed with sufficient certainty.¹³⁵

§ 2227. **Pretermitted children.**—In some jurisdictions it is provided by statute that where the testator fails to name any child, or children, or descendants thereof, as to such child or children not named he shall be deemed to die intestate. Under this statutory provision it has been frequently held that the failure to name a child or descendants must be unintentional; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that they were not forgotten.¹³⁶ It has been held that the statute extends to cases of entire omission of any distributive share, and if a child, or its descendants, is named without a legacy or other provision, it is sufficient to deprive him

¹³⁵ *Preachers' &c. Soc. v. England*, 106 Ill. 125; *Woman's &c. Soc. v. Mead*, 131 Ill. 338, 23 N. E. 603; *Missionary Society v. Cadwell*, 69 Ill. App. 280; *Skinner v. Harrison Tp.*, 116 Ind. 139, 18 N. E. 529; *Hinckley v. Thatcher*, 139 Mass. 477, 1 N. E. 840; *Reilly v. Union Prot. Infirmary*; *Brewster v. McCall*, 15 Conn. 274; *Preston v. Foster*, 75 Conn. 709; *Button v. American Tract Society*, 23 Vt. 336.

¹³⁶ *Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 357; *Bancroft v. Ives*, 3 Gray (Mass.) 367; *Ramsdill v. Wentworth*, 101 Mass. 125; *Hurley v. O'Sullivan*, 137 Mass. 86; *Block v. Block*, 3 Mo. 594; *Guitar v. Gordon*, 17 Mo. 408; *Forbes v. Darling*, 94 Mich. 621, 54 N. E. 385; *Bradley v. Bradley*, 24 Mo. 311; *Beck v. Metz*, 25 Mo. 70; *Pounds v. Dale*, 48 Mo. 270; *McCourtney v. Mathes*, 47 Mo. 533; *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Merrill v. Sanborn*, 2 N. H. 499; *Gage v. Gage*, 29 N. H. 533; *Farnum v. Bryant*, 34 N. H. 9; *Hockensmith v. Slusher*, 26 Mo. 237; *Smith v. Olmstead*, 88 Cal. 582, 26 Pac. 521; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Barker's Estate*, In re, 5 Wash. 390, 31 Pac. 976; *Schneider v. Koester*, 54 Mo. 500; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006; *Hill v. Hill*, 7 Wash. 49, 35 Pac. 360; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Purdy v. Davis*, 13 Wash. 165, 42 Pac. 520; *Lorings v. Marsh*, 6 Wall. (U. S.) 337.

of a share in the estate.¹³⁷ Under such provisions the co to sustain the validity of the will where the intention of is either manifest or appears by implication, and it has that where the mention of one person suggests the name or children or other descendants, by the natural associatio it may be presumed that the testator had in mind suc children and that the omission was intentional.¹³⁸ Where omits the names of some of his children from his will, not thereby invalidated; but the legatees named in the wi to contribute to those not named the amount to which t titled.¹³⁹

§ 2228. **Presumption—Children not named.**—Under t tory provisions where children are not named the lav that such omission was unintentional. The rule on this stated thus: "Where children are not named, the pres that they were unintentionally omitted, and, while thi tion may be rebutted, when the tenor of the will, or any indicates that they were not forgotten, yet it cannot b appear by parol evidence, but it must appear on the t will that the testator remembered them, and, where they expressly named nor alluded to as to show affirmatively were in the testator's mind, such presumption becomes cor A presumption of an intention to disinherit afterborn ch not arise from the fact that children living at the time to the making of the will were disinherited.¹⁴¹ Under th provisions the presumption is that the child was forgo he was named or provision made for him in the will.¹⁴²

§ 2229. **Intention to disinherit must appear.**—The pur statute, it seems, is not to prevent children from being d

¹³⁷ Terry v. Foster, 1 Mass. 146; ¹³⁹ Branton v. Branton, 10 Mass. 569; Trotter v. Trotter, 2 Mass. 570; Church v. Crocker, 3 Mass. 17; ¹⁴⁰ Thomas v. Black, 20 S. W. 657; Bradley croft v. Ives, 3 Gray (Mass.) 367; 24 Mo. 311; Pounds v. Block v. Block, 3 Mo. 594. 270; Wetherall v. Harri ¹⁴¹ Negus v. Negus, 46 Merrill v. Sanborn, 2 N. H. 499; ¹⁴² Pounds v. Dale, 4 Wood v. Drake, 135 Mo. 393, 37 S. 273; Boman v. Boman, W. 109.

but to require that the intention to disinherit them should clearly appear. Consequently, any designation which necessarily applies to testator's children without omitting any of them satisfies this statutory requirement.¹⁴³ "The terms of the will, in order to show the intent of the testator to remember his children or to make provision for them, should, under the statute, be clear, specific, definite and certain. Presumptions of the law are all in favor of the children. These presumptions, in order to disinherit them, or to cut them off with a shilling or other nominal sum, can only be overcome by the use of words plainly indicating that the testator had his children in his mind at the time he made his will. This must appear either by express mention or by necessary implication upon the face of the will itself."¹⁴⁴ It is held by some courts that the actual naming or distinctly referring to the child or children personally should be taken as the only evidence of the testator's intention to provide or not to provide for such child or children, and that his intention to disinherit will not be drawn from any inference or upon any less clear evidence.¹⁴⁵ Thus, in one case where a testator made a bequest of all his property to one person, to the exclusion of "all and every person or persons, be the same relatives or not," it was held that the word relatives did not necessarily embrace the testator's children.¹⁴⁶

§ 2230. Intention to disinherit need not be stated.—Under some statutes it is held that the intention to disinherit need not be expressly stated; but it is sufficient if such intention appears from a construction of the entire will.¹⁴⁷ The question of the intention of a testator to omit from his will a child or children or descendants must be determined from the face of the will. "The correct rule is said to be that the words of the will must show that the testator had the person omitted in his mind, and, having him so in his mind, has omitted him from the provisions of his will."¹⁴⁸ It is held that the declarations of a testator made at a time of erasing a clause

¹⁴³ *Boman v. Boman*, 47 Fed. 849. E. 240; *Lurie v. Radnitzer*, 166 Ill.

¹⁴⁴ *Boman v. Boman*, 49 Fed. 329. 609, 46 N. E. 1116.

¹⁴⁵ *Gage v. Gage*, 29 N. H. 533; ¹⁴⁶ *Garraud's Estate*, 35 Cal. 336, 339; *Steven's Estate*, In re, 83 Cal.

¹⁴⁷ *Hargadine v. Pulte*, 27 Mo. 423. 322, 23 Pac. 379; *Rhoton v. Blevin*,

¹⁴⁸ *Osborn v. Jefferson &c. Bank*, 116 99 Cal. 645, 34 Pac. 514; *Hawhe v. Chicago &c. R. Co.*, 165 Ill. 561, 46 N. E. 240.

in a will, providing for an unborn child, are not admissible to prove his intention to disinherit such child.¹⁴⁹

§ 2231. **Proof of intention to disinherit.**—In many jurisdictions it is held that the will itself is not exclusive on the question of the intention of the testator as to whether the omission of a child was by mistake or design. The failure to mention the child may be shown to be intentional both by the terms of the will and by extrinsic parol evidence. And parol proof of the declarations of the testator may be given for the purpose of showing that such omission was intentional and not occasioned by a mistake or accident.¹⁵⁰ In other states, under statutes slightly varying in terms, it has been held that parol evidence is not admissible.¹⁵¹ The burden of proof on this proposition rests with the party who attempts to establish the intention of the testator.¹⁵² The admissibility or the exclusion of parol evidence to prove the intention of a testator depends on the peculiar wording of the statute. The principle controlling in each case is pointed out by Mr. Page in his work on wills. "Where the statute does not require the testator's intention to exclude his children from his estate, to appear on the face of the will, evidence of testator's

¹⁴⁹ *Lurie v. Radnitzer*, 166 Ill. 609, 46 N. E. 1116.

¹⁵⁰ *Stebbin's Estate*, In re, 94 Cal. 304; *Wilson v. Fosket*, 6 Metc. (Mass.) 400; *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Bancroft v. Ives*, 3 Gray (Mass.) 367; *Converse v. Wales*, 4 Allen (Mass.) 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Ramsdill v. Wentworth*, 106 Mass. 320; *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379; *Peters v. Siders*, 126 Mass. 135; *Goff v. Britton*, 182 Mass. 293, 65 N. E. 379; *Buckley v. Gerard*, 123 Mass. 8; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. 197; *Lorieux v. Keller*, 5 Iowa 196; *Case v. Young*, 3 Minn. 209; *Coulam v. Doull*, 4 Utah 267; *Lorings v. Marsh*, 6 Wall. (U. S.) 350; *Coulam v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253.

¹⁵¹ *Garraud's Estate*, 35 Cal. 336;

Steven's Estate, 83 Cal. 322, 23 Pac. 379; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Chace v. Chace*, 6 R. I. 407; *Boman v. Boman*, 49 Fed. 329; *Gillespie v. Schuman*, 62 Ga. 252; *Kean v. Hofecker*, 2 Harr. (Del.) 103; *Gerrish v. Gerrish*, 8 Ore. 351; *Graham v. Graham*, 23 W. Va. 36; *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Purdy v. Davis*, 13 Wash. 165, 42 Pac. 520; *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385; *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111, 2 Woerner Adm. 870, 871; 1 *Redfield Wills* 529, 540; *Page Wills*, § 294.

¹⁵² *Ramsdill v. Wentworth*, 106 Mass. 320.

intention to provide for his children, or not to do so, may be shown outside the will." The principle against the admission is thus stated: "As these statutes usually apply where the will does not make a provision for such children or show the intent not to provide for them, extrinsic evidence is not admissible, either to show that the omission was intentional, or that the omitted children were otherwise provided for."¹⁵³

§ 2232. **Naming children by association—Illustrations.**—Thus it was held that the mention of the name of a daughter who was dead at the time of the execution of the will implied that her children were not forgotten.¹⁵⁴ The naming of certain grandchildren was held to be a sufficient indication that other brothers and sisters not named were intentionally omitted.¹⁵⁵ So, it has been held that naming of grandchildren was sufficient to exclude the parent.¹⁵⁶ For similar reasons it was held that the naming of a son-in-law was sufficient to show that the testator remembered the daughter.¹⁵⁷ And a bequest to a son-in-law, by name, but not designating the relation, was held to be a naming of the daughter within the meaning of such statute.¹⁵⁸ But in a later New Hampshire case the rule was established that if any child or issue of a child is omitted and is not a legatee or devisee under the will, he would be entitled to his share of the estate; and that the naming of one person, however closely related to another, in the absence of any other statement or explanation, would not be deemed a reference to such other person. Thus, it was held that the naming of a grandson and describing him as such only would not be deemed to be a reference to his father or mother.¹⁵⁹

§ 2233. **Ignorance of devisee—Duty of executor.**—It sometimes happens by reason of distant residence or mistake in name that

¹⁵³ Page Wills, § 294; *Carpenter v. Snow*, 117 Mich. 489, 76 N. W. 98. 37 S. W. 109; *Bancroft v. Ives*, 3 Gray (Mass.) 367.

¹⁵⁴ *Merrill v. Sanborn*, 2 N. H. 499.

¹⁵⁷ *Wilder v. Goss*, 14 Mass. 357,

¹⁵⁵ *Merrill v. Sanborn*, 2 N. H. 499;

359; *Guitar v. Gordon* 17 Mo. 408.

Hockensmith v. Slusher, 26 Mo.

¹⁵⁶ *Hockensmith v. Slusher*, 26 Mo.

237; *Smith v. Sheehan*, 67 N. H.

237; *Woods v. Drake*, 137 Mo. 393,

344, 39 Atl. 332.

37 S. W. 109.

¹⁵⁸ *Wild v. Brewer*, 2 Mass. 570;

¹⁵⁹ *Gage v. Gage*, 29 N. H. 533;

Church v. Crocker, 3 Mass. 17;

Davenport v. Sargent, 63 N. H. 538.

Hockensmith v. Slusher, 26 Mo.

4 Atl. 569; *McIntire v. McIntire*, 64

237; *Woods v. Drake*, 135 Mo. 393,

N. H. 609, 15 Atl. 218.

the devisee is ignorant of his intended devise and cannot, therefore, make application to the executor for payment of the amount due him. In such cases the executor by his silence cannot transfer the fund to other legatees, and it is his duty to pay the legacy or notify the person or persons supposed to be intended as devisee, or to bring an action for the purpose of establishing the identity. The rule on this subject is thus stated by the Supreme Court of New Hampshire: "The executors were fiduciary representatives, holding the estate in trust, and bound to exercise reasonable and impartial care in protecting the rights of all the legatees. For many years they knew that the societies were not aware of the bequests made to them; and it was their duty to give the societies the information which was manifestly needed, and without which the third item of the will could not be executed. It was their duty to pay the legacies, or bring this bill without delay. Their obligation was to execute promptly the entire will of which they were executors, and not to defeat the third item by inaction. They were protected against an unnecessary and oppressive suit brought for a legacy, without such a demand as would give them a reasonable opportunity to perform their duty of payment. But this protection did not authorize them to sacrifice the rights of a legatee by such silence as would prevent a demand being made. By such silence they could not transfer the income of the trust fund from its equitable owners to others who had no title of it."¹⁶⁰

§ 2234. **Corporations as devisees.**—The rule established by the earlier cases and under an old English statute was that corporations were incapable of taking under a will either as a beneficiary or as a trustee.¹⁶¹ Under later statutes a devise to a corporation in trust was upheld, provided the trust itself was not illegal.¹⁶² But at common law, both in England and America, corporations have been held competent to take personal property by bequest.¹⁶³ But in

¹⁶⁰ *Tilton v. American &c. Society*, 60 N. H. 377, 384.

¹⁶¹ *Jarman Wills* 65, (R. & T. 180); *Schouler Wills*, § 24.

¹⁶² *Incorporated Society v. Richards*, 1 D. & War. (Ir.) 258.

¹⁶³ *Phillips Academy v. King*, 12 Mass. 546; *Burbank v. Whitney*, 24 Pick. (Mass.) 146, 151; *McCartee v.*

Orphan Asylum, 9 Cow. (N. Y.) 437; *Thompson v. Swoope*, 24 Pa. St. 474; *Gibson v. McCall*, 1 Rich. L. (S. Car.) 174; *Santa Clara Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183; *American Bible Society v. Marshall*, 15 Ohio St. 537; *Sherwood v. American Bible Society*, 4 Abb. Dec. (N. Y.) 227.

some jurisdictions a devise to a corporation to be valid must be such as the corporation was expressly authorized by its charter to take.¹⁶⁴

§ 2235. **Municipal corporations and counties.**—It has long been the well settled rule, both in England and America, that municipal corporations were capable of receiving gifts by will of either personal property or real estate.¹⁶⁵ And where a bequest is made to a municipal officer, in trust for the city, the beneficial use, title, and possession will become vested at once.¹⁶⁶ But the devise to the corporation, if in trust, must be one within the purposes and objects for which the municipal corporation was created, and for which it exists.¹⁶⁷ And it has been held that municipal corporations may even take and execute charitable trusts where it is within the scope of their power, and for public purposes.¹⁶⁸ This principle has been extended very far. Thus a devise of land outside of the city for the purpose of prospecting for developing coal was held to be valid.¹⁶⁹ So, gifts to a municipal corporation for the purpose of purchasing

¹⁶⁴ *McCartee v. Orphan Asylum*, 9 Cow. (N. Y.) 437; *Ayres v. Methodist &c. Church*, 3 Sandf. (N. Y.) 351; see also, *Williams v. Williams*, 8 N. Y. 525; *Le Couteulx v. Buffalo*, 33 N. Y. 333; *Wetmore v. Parker*, 52 N. Y. 450, 458; *Holland v. Alcock*, 108 N. Y. 544, 16 N. E. 305; *Bird v. Marklee*, 144 N. Y. 544, 39 N. E. 605; *Chapin v. School District &c.*, 35 N. H. 445.

¹⁶⁵ 1 Blackstone Comm. 478; *Perin v. Carey*, 24 How. (U. S.) 465; *McDonough Will Case*, 15 How. (U. S.) 367; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *Girard v. New Orleans*, 2 La. Ann. 897; *Sewall v. Cargill*, 15 Me. 414; *Green v. Hogan*, 153 Mass. 462, 27 N. E. 413; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Lester v. Jackson*, 69 Miss. 887, 11 So. 114; *Chambers v. St. Louis*, 29 Mo. 543; *Concord v. Boscawen*, 17 N. H. 465; *First Cong. Society v. Atwater*, 23 Conn. 34; *Hamden v. Rice*, 24 Conn. 350;

Skinner v. Harrison Tp., 116 Ind. 139, 18 N. E. 259; *Chambers v. St. Louis*, 29 Mo. 543; *Carder v. Commissioners &c.*, 16 Ohio St. 353; *Philadelphia v. Fox*, 64 Pa. St. 169; *Bell Co. v. Alexander*, 22 Tex. 350; *Barkley v. Donnelly*, 112 Mo. 561; *Sheldon v. Stockbridge*, 67 Vt. 299, 31 Atl. 414; *Wood v. Paine*, 66 Fed. 807; 2 Dillon Mun. Corp., § 567.

¹⁶⁶ *Morgan v. Rogers*, 79 Fed. 577; *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172.

¹⁶⁷ *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434; *Quincy v. Attorney-General*, 160 Mass. 431, 35 N. E. 1066; *Newell v. Hancock*, 67 N. H. 244, 35 Atl. 253; *Fosdick v. Hempstead*, 125 N. Y. 581, 26 N. E. 801; *Crane's Will*, In re, 42 N. Y. S. 904.

¹⁶⁸ *Hamden v. Roce*, 24 Conn. 350; *Coggesball v. Pelton*, 7 Johns. Ch. (N. Y.) 292; *Philadelphia v. Fox*, 64 Pa. St. 169.

¹⁶⁹ *Delaney v. Salina*, 34 Kans. 534.

a fire engine.¹⁷⁰ And a gift to a city for the erection and maintenance of a drinking fountain was held valid.¹⁷¹ So it was held that the city might act as the trustee of a fund to be devoted to purchasing and displaying the American flag.¹⁷² But it was held that a municipal corporation could not lawfully support a clergyman.¹⁷³ So devises for schools or for educational purposes were held valid.¹⁷⁴ And for public buildings,¹⁷⁵ and for parks,¹⁷⁶ and for libraries

¹⁷⁰ *Kirk v. King*, 3 Pa. St. 436; *Wright v. Linn*, 9 Pa. St. 433; *Maggill v. Brown*, Fed. Cas. 8952.

¹⁷¹ *Crane's Will*, In re, 42 N. Y. S. 904.

¹⁷² *Sargent v. Cornish*, 54 N. H. 18; *Philadelphia v. Elliott*, 3 Rawle (Pa.) 170.

¹⁷³ *Bullard v. Shirley*, 153 Mass. 559.

¹⁷⁴ *Vidal v. Girard*, 2 How. (U. S.) 127; *Girard v. Philadelphia*, 7 Wall. (U. S.) 1; *Price v. School Directors*, 58 Ill. 452; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Skinner v. Harrison*, 116 Ind. 139, 18 N. E. 259; *French v. Quincy*, 3 Allen (Mass.) 9; *Piper v. Moulton*, 72 Me. 155; *Bangor v. Beal*, 85 Me. 129, 26 Atl. 1112; *Vance*, In re, La. Ann. 2 So. 54; *Girard*, In re, 2 La. Ann. 898; *Hathaway v. Sackett*, 32 Mich. 97; *Trippe v. Frazier*, 4 Har. & J. (Md.) 466; *Dashiell v. Attorney-General*, 5 Har. & J. (Md.) 392; *Barkley v. Donnelly*, (Mo.) 19 S. W. 305; *Chambers v. St. Louis* 29 Mo. 543; *Kelley v. Kennard*, 60 N. H. 1; *Union Cong. Soc. v. West Cong. Soc.*, 55 N. H. 463; *Le Couteux v. Buffalo*, 33 N. Y. 333; *Jackson v. Pike*, 9 Cow. (N. Y.) 69; *Heyward v. Mayor &c.*, 7 N. Y. 314; *Reynolds v. Commissioners*, 5 Ohio 204; *Pickering v. Shotwell*, 10 Pa. St. 23, 27; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824; *Beurhaus v. Watertown*, 94 Wis.

617, 69 N. W. 986; *Perin v. Cary*, 24 How. (U. S.) 465; *Bell County v. Alexander*, 22 Tex. 350; *Castleton v. Langdon*, 19 Vt. 210; *State v. Atkinson*, 24 Vt. 448; *John's Will*, In re, (Ore.) 47 Pac. 341; *Green v. Blackwell*, (N. J. Eq.) 35 Atl. 375; *Attorney-General v. Eastlake*, 11 Hare 205; *Sheldon v. Stockbridge*, 67 Vt. 299, 31 Atl. 414; *Curling v. Curling*, 8 Dana (Ky.) 38; *Tainter v. Clark*, 5 Allen (Mass.) 66; *Second Religion Soc. v. Harriman*, 125 Mass. 321; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604; *Missouri &c. Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Baldwin v. Baldwin*, 7 N. J. Eq. 211; *George v. Braddock*, 45 N. J. Eq. 757; *Franklin v. Armfield*, 34 Tenn. 305; *Clement v. Hyde*, 50 Vt. 716.

¹⁷⁵ *Ayer v. Bangor*, 85 Me. 511; *Stuart v. Easton*, 74 Fed. 854; *Franklin v. Philadelphia*, 13 Pa. C. 241; *Underhill's Will*, In re, 6 Dem. Surr. (N. Y.) 466, 3 N. Y. S. 205; *Button v. Ely*, 46 Hun (N. Y.) 100; *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292.

¹⁷⁶ *Penny v. Croul*, 76 Mich. 471, 43 N. E. 649; *Bartlett*, In re, 163 Mass. 509, 40 N. E. 899; *State v. Schweickardt*, (Mo.) 19 S. W. 47; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839; *Cresson's Appeal*, 30 Pa. St. 437; *Rotch v. Emerson* 105 Mass. 431.

and museums.¹⁷⁷ And gifts for the purpose of public cemeteries or for the care of a private burying lot in connection with a public charity.¹⁷⁸ So gifts to boards of commissioners of counties or to the county by name have been held valid.¹⁷⁹ And school corporations may receive gifts as beneficiaries or trustees.¹⁸⁰

§ 2236. **Unincorporated societies as legatees.**—The courts have never been harmonious on the question of whether or not an unincorporated society could take as a devisee or legatee under the will. The weight of authority, according to the earlier cases, was that such a society had not the capacity to accept a gift either as a beneficiary or as a trustee, on the theory of want of a person to take the legal title.¹⁸¹

¹⁷⁷ *Beurhaus v. Cole*, 94 Wis. 617, Ohio St. 713, 9 Ohio C. C. 599; *Bell Co. v. Alexander*, 22 Tex. 350; *Lawrence Co. v. Leonard*, 83 Pa. St. 206.

¹⁷⁸ *Skinner v. Harrison Tp.*, 116 Ind. 139, 18 N. E. 529; *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557; *First Cong. Society v. Atwater*, 23 Conn. 35; *Hathaway v. Sackett*, 32 Mich. 97; *Maynard v. Woodard*, 36 Mich. 423; *Iseman v. Myres*, 26 Hun (N. Y.) 651.

¹⁷⁹ *Chomley's Case*, 2 Rep. 51a; *Lane v. Cooper*, Moor 104; *Noe's Case*, Winch. 55; *Simpson v. Southwood*, 1 Rol. 254; *Grimes v. Harmon*, 35 Ind. 198; *Johnson v. Mayne*, 4 Iowa 180; *Owens v. Missionary Soc.*, 14 N. Y. 380; *Zelssweiss v. James*, 63 Pa. St. 465; *McIntire v. Zanesville & Co.*, 9 Ohio 203; *Zimmerman v. Anders*, 6 W. & S. (Pa.) 218; *Pickering v. Shotwell*, 10 Pa. St. 23; *Evangelical Assembly's Appeal*, 35 Pa. St. 316; *Bethlehem v. Perseverance Co.*, 81 Pa. St. 445; *State v. Warren*, 28 Md. 338; *Society v. Moll*, 51 Minn. 277; *Lane v. Eaton*, (Minn.) 71 N. W. 1031; *White v. Hall*, 2 Coldw. (Tenn.) 77; *Rhodes v. Rhodes*, 88 Tenn. 637; *Nolte v. Meyer*, 79 Tex. 351; *Heiss v. Murphey*, 40 Wis. 276;

¹⁸⁰ *Brouson v. Strouse*, 57 Conn. 147, 17 Atl. 699; *Ford v. Ford*, 91 Ky. 572, 16 S. W. 451; *Green v. Hogan*, 153 Mass. 462, 27 N. E. 413; *Tierney, In re*, 2 Pa. Dist. Ct. 524; *Fite v. Beasley*, 80 Tenn. 328; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353; *contra, Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906.

¹⁸¹ *Craig v. Secrist*, 54 Ind. 419; *Board & c. v. Rogers*, 55 Ind. 297; *Board & c. v. Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *Moore v. Moore*, 4 Dana (Ky.) 354; *Carder v. Commissioners & c.*, 16 Ohio St. 353, 41

Some cases made a distinction between the capacity of such a society or association to take real estate and an ordinary legacy of personal property or money, holding that it had capacity for the latter but not the former.¹⁸² Another class of cases held that such an association was capable in equity of taking, though incapable at law.¹⁸³ Still it was held in another class of cases that if such an association was a quasi corporation, or a corporation de facto, or an organization of persons having a name by which it could be identified, it was sufficient.¹⁸⁴ It is the rule, as held by many courts, that in case of a gift of property for charitable or religious purposes to an organization or association thereafter to be incorporated, and where such an institution is to be incorporated at a future day, the court may appoint a trustee who will hold the legal title until the institution shall have been incorporated.¹⁸⁵ And the general rule, under the great current of English

Ruth v. Oberbrunner, 40 Wis. 238; Downing v. Marshall, 23 N. Y. 366; White v. Howard, 46 N. Y. 144; Seda v. Huble, 75 Iowa 429, 39 N. W. 685; Sewall v. Cargill, 15 Me. 414; Jackson v. Cory, 8 Johns. (N. Y.) 385; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109, 133; Terrett v. Taylor, 9 Cranch. (U. S.) 43; Philadelphia &c. Asso. v. Hart, 4 Wheat. (U. S.) 1; Inglis v. Sailor's Snug Harbor &c., 3 Pet. (U. S.) 99; Kain v. Gibboney, 101 U. S. 362; Marx v. McGlynn, 88 N. Y. 357; Cobb v. Denton, 6 Baxt. (Tenn.) 235; Reeves v. Reeves, 5 Lea (Tenn.) 644; Coke Litt. 55; 2 Blackstone Comm. 296; Underhill Wills, §§ 81, 829.

¹⁸² Green v. Dennis, 6 Conn. 293; Brewster v. McCall, 15 Conn. 274; American Bible Soc. v. Wetmore, 17 Conn. 281.

¹⁸³ McCord v. Ochiltree, 8 Blackf. (Ind.) 15; Cruse v. Axtell, 50 Ind. 49.

¹⁸⁴ Beall v. Fox, 4 Ga. 404; Cruse v. Axtell, 50 Ind. 49; Bartlett v. Nye, 4 Metc. (Mass.) 378; Bartlett v. King, 12 Mass. 555; King v. Parker, 9 Cush. (Mass.) 71; Wil-

liams v. Williams, 4 Seld. (N. Y.) 525; Wright v. Trustees Methodist Ch., 1 Hoff. (N. Y.) 202; King v. Woodhull, 3 Edw. Ch. (N. Y.) 79; McIntire Poor School v. Zanesville Canal Co., 9 Ohio 203.

¹⁸⁵ Milne v. Milne, 17 La. 46; Shapleigh v. Pillsbury, 1 Me. 271; Sewall v. Cargill, 15 Me. 414; Kimball v. Universalist Soc., 34 Me. 424; Preachers' Aid Soc. v. Rich, 45 Me. 552; Swasey v. American Bible Soc., 57 Me. 523, 526; Dascomb v. Marstin, 80 Me. 232, 13 Atl. 888; Bull v. Bull, 8 Conn. 47; Storr's School v. Whitney, 54 Conn. 345, 8 Atl. 141; Conkling v. Davis, 63 Conn. 377, 28 Atl. 537; Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516; Hoeffler v. Clogon, 171 Ill. 462, 49 N. E. 527; Seda v. Huble, 75 Iowa 429, 39 N. W. 685; Bliss v. American Bible Soc., 2 Allen (Mass.) 334; Winslow v. Cumming, 3 Cush. (Mass.) 358; Schouler's Petition, 134 Mass. 426; Minot v. Baker, 147 Mass. 348, 17 N. E. 839; Darcy v. Kelly, 153 Mass. 435, 26 N. E. 1110; Sears v. Chapman, 158 Mass. 400, 33 N. E. 604; Mason v. Methodist &c. Church, 27 N. J. Eq. 47; McGirr v. Aaron, 1 Pen. & W. (Pa.) 49; Mc-

and American authorities now, is that unincorporated societies may receive bequests to charitable or religious uses, and it is in line with the decided cases generally that gifts to charitable communities, religious bodies, clubs, and unincorporated societies are not necessarily invalid. The courts have gone so far in upholding such gifts that when necessary a trustee will be appointed to execute trust and carry out the intention of the testator.¹⁸⁶

- Lain v. Directors &c.*, 51 Pa. St. 196; *Johnson v. Johnson*, 92 Tenn. 559; *Stone v. Griffin*, 3 Vt. 400; *Gould v. Asylum*, 46 Wis. 106, 50 N. W. 422; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92; *Mercantile Library Company's Appeal*, 154 Pa. St. 331; *Peper's Estate*, In re, 154 Pa. St. 331, 25 Atl. 1058; *Lewis' Estate*, In re, 11 Pa. C. C. 561; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Longheed v. Dykeman's &c. Church*, 58 Hun (N. Y.) 364, 12 N. Y. S. 207; *New York &c. Society v. American &c. Society*, 50 Hun (N. Y.) 194; *Teed*, In re, 59 Hun (N. Y.) 64, 12 N. Y. S. 642; *Pennoyer v. Wadhams*, 20 Ore. 274; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503; *Field v. Drew &c. Seminary*, 41 Fed. 371; *Inglis v. Sailor's Snug Harbor*, 3 Pet. (U. S.) 99; *Ould v. Washington Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336; *Coit v. Comstock*, 51 Conn. 352; *Tappan's Appeal*, 52 Conn. 412.
- ¹⁸⁶ *Williams v. Pearson*, 38 Ala. 299; *Chatham v. Brainard*, 11 Conn. 60; *American Bible Soc. v. Wetmore*, 17 Conn. 181; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Lindley*, Ex parte, 32 Ind. 367; *Craig v. Secrist*, 54 Ind. 419; *De Bruler v. Ferguson*, 54 Ind. 549; *Board &c. v. Rogers*, 55 Ind. 297; *Haines v. Allen*, 78 Ind. 100; *Erskine v. Whitehead*, 84 Ind. 357; *Hadley v. Hadley*, 147 Ind. 423, 46 N. E. 823; *Byers v. McCartney*, 62 Iowa 339, 17 N. E. 571; *Seda v. Huble*, 75 Iowa 428, 39 N. W. 685; *Vance's Succession*, 39 La. Ann. 371; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Everett v. Carr*, 59 Me. 325; *Dexter v. Gardner*, 7 Allen (Mass.) 243; *Bartlett v. Nye*, 4 Metc. (Mass.) 378; *Washburne v. Sewall*, 9 Metc. (Mass.) 280; *Sohier v. St. Paul's Church*, 12 Metc. (Mass.) 250; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604; *Eutaw &c. Church v. Shively*, 67 Md. 490, 10 Atl. 244; *Ticknor's Estate*, 13 Mich. 44; *Had-den v. Dandy*, 51 N. J. Eq. 154, 26 Atl. 464; *Bullock*, In re, 6 Dem. Surr. (N. Y.) 335; *Vanderolgen v. Yates*, 3 Barb. Ch. (N. Y.) 242; *Hornbeck v. American Bible Soc.*, 2 Sandf. Ch. (N. Y.) 133; *Potter v. Chapin*, 6 Paige (N. Y.) 649; *McCartee v. Orphan Asylum*, 9 Cow. (N. Y.) 484; *Banks v. Phelan*, 4 Barb. (N. Y.) 80; *Owens*, In re, 33 N. Y. S. 422; *McIntire v. Zanesville &c. Co.*, 9 Ohio 203; *American Tract Soc. v. Atwater*, 30 Ohio St. 77; *Zimmerman v. Anders*, 6 Watts & S. (Pa.) 218; *Pickering v. Shotwell*, 10 Pa. St. 23; *Evangelical Asso.'s Appeal*, 35 Pa. St. 316; *Bethlehem v. Perseverance Co.*, 81 Pa. St. 445; *Bates v. Taylor*, 28 S. Car. 476; *Gibson v. McCall*, 1 Rich. L. (S. Car.) 174; *Burr v. Smith*, 7 Vt.

§ 2237. **Unincorporated societies—Definite bodies.**—The rule is said to be that if a devise is made to an association, either corporate or voluntary, having a regular board of trustees, which was organized for a known and legal purpose, the law will presume that the testator intended that the trustees or the managing board of such association would administer the gift in accordance with the purposes of the society or association, and when necessary, select the beneficiaries.¹⁸⁷ The proof must show a capable beneficiary with the same degree of certainty as a grantee in a deed.¹⁸⁸ And on the question of the capacity of such societies to hold real estate the rule was stated as follows: "A voluntary association meeting and acting under a common name, for a common object, especially a charitable one, duly organized by choosing officers keeping written minutes of their funds and acts in the nature of a record, and thus being capable of being designated and identified by proof, is a body capable of paying the beneficiaries of such a trust (referring to real estate) though not incorporated."¹⁸⁹ Courts will not permit a devise for charitable use to such an association to fail because the society or association named as the devisee or legatee is unincorporated. If the objects of the testator's bounty can be ascertained the devise will be in force for its benefit, and courts will not suffer the devise to fail for want of a trustee or other person in whom the title may vest.¹⁹⁰

§ 2238. **Misnomer of society—Identification.**—The misnomer or misdescription of the legatee or devisee, in the case of a corporation as in that of a natural person, will not invalidate the bequest if the object of the testator's bounty can be ascertained either from the will itself or evidence dehors the will; and parol evidence is admissible to aid in ascertaining the testator's intention and to identify a corpora-

241; *Smith v. Nelson*, 18 Vt. 511; *v. Pleasants*, 4 Ired. Eq. (N. Car.) 26.
Mong v. Roush, 29 W. Va. 119, 11 S. E. 906; *Fadness v. Braunborg*, 73

Wis. 257, 41 N. W. 84; *Beatty v. Kurtz*, 2 Pet. (U. S.) 583; *Inglis v. Trustees, Sailor's &c. Harbor*, 3 Pet. (U. S.) 99; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401; *Trustees &c. v. Adams*, 4 Ore. 76; *Boyce v. Christian*, 69 Mo. 492.

¹⁸⁷ *Grimes v. Harmon*, 35 Ind. 198; *Cruse v. Axtell*, 50 Ind. 49; *Bridges v. Pleasants*, 4 Ired. Eq. (N. Car.) 26.

¹⁸⁸ *Le Page v. McNamara*, 5 Iowa 124; *Kelley v. Kelley*, 25 Pa. St. 460; *Gallego v. Attorney-General*, 3 Leigh (Va.) 450.

¹⁸⁹ *King v. Parker*, 9 Cush. (Mass.) 71.
¹⁹⁰ *Penick v. Thom*, 90 Ky. 665, 14 S. W. 830; *Chambers v. Higgins*, (Ky.) 49 S. W. 436; *Cromie v. Louisville &c. Soc.*, 66 Ky. 365.

tion or society as the one intended where the name used is not the correct corporate name.¹⁹¹ It is held that if a corporation can be found which is certainly designated by the description of the legatee in the will, the bequest is valid and such legatee is entitled to it.¹⁹²

§ 2239. Gifts to charities by wrong names.—The most frequent cases of misnomer of legatees and devisees are found in bequests for charitable purposes, to corporations, churches and societies. It is not essential, however, in such cases that the bequest be made to any such society by its real corporate name, if the language of the will sufficiently describes the society intended by its character, office or duty. The requirements of the law are fulfilled if such a specification or description of the object of the bequest or legacy is made as will show the intention of the testator. "Wills, in many, and perhaps in most cases, are drawn in haste, and when there is not time or opportunity to learn the true name of the legatee, courts are bound to give effect to the intention of the testator, if it can be ascertained, and see that his will is not defeated by narrow technicalities."¹⁹³ It has been held that a gift may be made to a charitable association by its reputed name, or by any one of the names by which it was known to the testator.¹⁹⁴

§ 2240. Parol evidence to aid in identification.—The parol evidence admissible for the purpose of identifying the legatee is not evidence to prove that the testator intended something different from

¹⁹¹ *Leonard v. Davenport*, 58 How. 392; *Missionary Society v. Cadwell*, 69 Ill. App. 280; *Van Nostrand v. Board &c.*, 59 N. J. Eq. 19, 44 Atl. 472; *Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894; *Cromie v. Louisville &c. Society*, 66 Ky. 364; *Newell's Appeal*, 24 Pa. St. 197; *Brewster v. McCall*, 15 Conn. 274.

¹⁹² *Lefevre v. Lefevre*, 2 T. & C. (N. Y.) 330.

¹⁹³ *Holmes v. Mead*, 52 N. Y. 332; *Riker v. Leo*, 115 N. Y. 93, 21 N. E. 719.

¹⁹⁴ *Baptist Convention v. Ladd's Estate*, 59 Vt. 5, 9 Atl. 1.

Pr. (N. Y. 384; Trustees &c. v. Peaslee, 15 N. H. 317; *Woman's &c. Soc. v. Mead*, 131 Ill. 338, 23 N. E. 603; *Bodman v. American Tr. Soc.*, 9 Allen (Mass.) 447; *Faulkner v. National Sailor's Home*, 155 Mass. 458, 29 N. E. 645; *Chambers v. Watson*, 60 Iowa 339, 14 N. W. 336; *St. Luke's Home &c. Association &c.*, 52 N. Y. 191; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige (N. Y.) 11; *Smith v. Kimball*, 62 N. H. 607; *Smith v. First Presbyterian Church*, 26 N. J. Eq. 132; *Goodell v. Union Asso. &c.* 29 N. J. Eq. 32; *Lanning v. Sisters of Francis*, 35 N. J. Eq.

the provisions of the will, but to show the meaning of the words used or what the testator intended by them.¹⁰⁶ In arriving at this intention it is proper to ascertain, if possible, the motives by which he was probably influenced; and in doing this it is proper to consider the fact that his religious sentiments accorded with those of the corporation or society intended by him; and that those sentiments would naturally induce him to prefer the society named, as the distributor of his bounty, rather than to those of which he had no knowledge or whose object it was to disseminate different views.¹⁰⁶

§ 2241. **Two corporations—Name and description.**—Where two or more corporations or societies claim a bequest, when none is found which answers to the name given, and the name is followed by some description, or the character and object of the society is stated, there are two methods of determining the identity of the one intended: first, the one which most nearly answers to the name given; second, the one which most nearly answers to the description or delineation by the testator. The rule has been stated thus: "If there are two corporations, neither of which can claim under the precise name used by the testator, the question, if the name rather than the description is to control, is, which of the two is the best or most nearly described by the name? and if the description is to prevail, then the question is, which of the two will best and most clearly answer to the delineation of the corporation by the testator? If, from the will and the charters of the two corporations, the court can determine which of the two was intended by the testator, there can be no resort to other evidence in aid of the interpretation. In other words, if, with a knowledge of the name of the two corporations and of their general character and purposes as declared by the laws of their creation, there is no latent ambiguity, there is no necessity for a resort to parol evidence, and it would not be allowable."¹⁰⁷

¹⁰⁶ *Lefevre v. Lefevre*, 2 T. & C. 60 Conn. 472, 22 Atl. 848; *Cosgrove v. Cosgrove*, 69 Conn. 416, 38 Atl. 219; *Preston v. Foster*, 75 Conn. 709; *Button v. American Tr. Soc.*, 23 Vt. 336.
¹⁰⁷ *St. Luke's Home v. Association &c.*, 52 N. Y. 191; *Bodman v. American &c. Soc.*, 9 Allen (Mass.) 447;

¹⁰⁸ *Brewster v. McCall*, 15 Conn. 274; *Dunham v. Averill*, 45 Conn. 61; *Bristol v. Ontario &c. Asylum*, *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689.

§ 2242. **Corporations misnamed—Illustrations.**—It is sufficient for the purpose of this chapter to give a few of the many cases where corporations and societies, misnamed as legatees and devisees, made it appear by extrinsic evidence that they were the societies intended. Thus the Preachers' Aid Society of the Illinois Annual Conference of the Methodist Episcopal Church was held to be sufficiently designated by the "Preachers' Aid Society of the Illinois Conference of the Methodist Episcopal Church."¹⁹⁸ A gift to the Missionary Society of Foreign Missions was held to be intended for the corporation by the name of "The American Board of Commissioners of Foreign Missions."¹⁹⁹ It was held that the American Home Missionary Society was entitled to a bequest to the "Home Mission Society," on proof that there was no such society as the one named, and that the claimant was the one intended by the testator.²⁰⁰ A gift to the Second Congregational Church was held to vest a title to the property in the Second Congregational Society of Norwick, the town in which the testator lived.²⁰¹ A bequest to the "Baptist Church and Society in East Killingly" was claimed by The East Killingly Baptist Church, and The East Killingly Free Will Baptist Church and Society. On proof of the testator's connection and associations and the condition surrounding him, it was held that he intended the bequest for The East Killingly Free Will Baptist Church.²⁰² A gift to the "Home Missionary Society of the M. E. Church" was claimed by The Missionary Society of the M. E. Church and by The Woman's Home Missionary Society of the M. E. Church. It was held to be intended for the Missionary Society of the M. E. Church.²⁰³ A bequest to "Harrison Township" was held to be intended for Harrison School Township.²⁰⁴ A devise to the "Roman Catholic Bishop of the City of Louisville sufficiently designated the corporation named, "The Rt. Rev. Wm. George McCloskey, Roman Catholic Bishop of Louisville."²⁰⁵ A bequest for a house of worship in the city of Bangor to be under the control of, and used by, the First Christian Church or (First Church of the Christian Denomination), was held to be

¹⁹⁸ *Preacher's Aid Society v. Eng-*
land, 106 Ill. 125.

¹⁹⁹ *Preston v. Foster*, 75 Conn. 709.

²⁰⁰ *Brewster v. McCall*, 15 Conn.
274.

²⁰¹ *Missionary Society &c. v. Cas-*
well, 69 Ill. App. 280.

²⁰² *Beardsley v. American Home*
&c. Society, 45 Conn. 327.

²⁰³ *Skinner v. Harrison Tp.*, 116

Ind. 139, 18 N. E. 529.

²⁰⁴ *Cosgrove v. Cosgrove*, 69 Conn.
416, 38 Atl. 219.

²⁰⁵ *Tichenor v. Brewer*, 98 Ky. 349,

33 S. W. 86.

intended for the First Bangor Christian Church, in part for the "First Christian Church of Bangor."²⁰⁶ A gift to the Episcopal Missionary Society of Maine" was intended for the use of the East Maine Conference of the Methodist Episcopal Church."²⁰⁷ A bequest to the Presbyterian Infirmary on Division street in Baltimore city was properly shown to be intended for a hospital called the Union Protestant Infirmary, the only Protestant infirmary on Division street in Baltimore. And in the case of a legacy to the "Home Mission of the Presbyterian Church of Baltimore" was intended for a corporation known as the Board of the Presbytery of Baltimore.²⁰⁸ A bequest to "The Boston and Farm School" was held to be intended for "The Boston and Farm School for Indigent Boys."²⁰⁹ So in a bequest authorized agents of the Home and Foreign Missionary Society to aid in propagating the holy religion of Jesus Christ, it was held to be a parol proof of the circumstances and situation that the Board of Commissioners for Foreign Missions and the New Hampshire Home Missionary Society were the organizations intended. A legacy "to the Sailors' Home in Boston" was held to be intended for the Sailors' Home Fund of the Boston Ladies' Bethel Society. And where bequests were made to the "Bible Society, the Home Missionary Society," "Home Missionary Society" and "Foreign Missionary Society" they were held to mean the New Hampshire Bible Society, the Home Board of Commissioners for Foreign Missions, the New Hampshire Home Missionary Society, and the American Bible Society.²¹² A gift to the Blair Academy of Blairstown was held to be intended for an institution under the corporate name of the Blair Presbyterian Academy.²¹³ A testator made bequests "To the Board of Foreign Missions; to the Board of Home Missions; to the Board of Education; to the Board of Church and Society; to the Board of Ministerial Relief; to the Board of Publication," and these were held to be intended for the respective corporations respectively: "The Board of Foreign Missions

²⁰⁶ *Nason v. First Church*, 66 Me. 100.

²⁰⁷ *Straw v. Societies*, 67 Me. 493.

²⁰⁸ *Reilly v. Union Prot. Infirmary*, 87 Md. 664, 40 Atl. 894.

²⁰⁹ *Minot v. Boston Asylum &c.*, 48 Mass. 416.

²¹⁰ *Hinckley v. Thatch*, 477, 1 N. E. 840.

²¹¹ *Faulkner v. National Home*, 155 Mass. 458, 29 N. E. 277.

²¹² *Tilton v. American Bible Society*, 60 N. H. 377.

²¹³ *Smith v. First Church*, 26 N. J. Eq. 13.

Presbyterian Church in the United States of America; the Board of Home Missions of the Presbyterian Church, etc., as above; the Trustees of the Board of Education of the Presbyterian Church, etc.; the Trustees of the Church Erection Fund of the General Assembly of the Presbyterian Church, etc.; the Trustees of the General Assembly of the Presbyterian Church, etc., for the use of the fund for disabled ministers and their families; the Trustees of the Presbyterian Board of Publication."²¹⁴ A devise to the Domestic Missionary Society on the proper parol proof was held to be intended for the Board of Domestic Missions of the Reformed Church in America.²¹⁵ Where a testator authorized his executors to pay to the officers of the Protestant Episcopal Church to support the episcopacy of said church, this was held to mean the Trustees for Management and Care of the Fund for the Support of the Episcopate of the Diocese of Central New York.²¹⁶ A devise "To the Trustees or those who hold the fund of the Theological Seminary at Princeton, New Jersey," was held to be intended for the "Trustees of the Theological Seminary of the Presbyterian Church," at Princeton, New Jersey.²¹⁷ A bequest to "The New Church of Pittsburgh" was intended for "The First New Jerusalem Society of the city of Pittsburgh and its vicinity."²¹⁸ Where a devise to the American Home Mission Tract Society for our western mission was claimed by the American Tract Society and the American Home Missionary Society, it was held on testimony showing the testator's relations, and the operation of the American Tract Society, that the latter was entitled to the devise.²¹⁹ A bequest to the Methodist Episcopal Mission at Bombay was held to be intended for the incorporated society known as "The Missionary Society of the Methodist Episcopal Church."²²⁰ A testator directed that the residue of his estate be equally divided between the Board of Foreign and the Board of Home Missions, and on proof of the testator's religious sentiments and affiliations it was held that the bequest was intended for the "Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United States of America."²²¹

²¹⁴ *Smith v. Presbyterian Church*, 26 N. J. Eq. 132, 139.

²¹⁵ *Van Nostrand v. Board &c.*, 59 N. J. Eq. 19, 44 Atl. 472.

²¹⁶ *Trustees &c. v. Colgrove*, 4 Hun (N. Y.) 362.

²¹⁷ *Newell's Appeal*, 24 Pa. St. 197.

²¹⁸ *Altken's Estate*, 158 Pa. 541, 27 Atl. 1102.

²¹⁹ *Button v. American Tract Society*, 23 Vt. 336.

²²⁰ *McAllister v. McAllister*, 46 Vt. 272.

²²¹ *Gilmer v. Stone*, 120 U. S. 586,

§ 2243. **Beneficiary must be definite and certain.**—The policy of the law has always been to uphold gifts for charitable and religious purposes, and ascertain, if possible, the intended beneficiary where any doubt exists. The fundamental rule is that the object intended must be so denominated and described that it is ascertainable, and the testamentary provision capable of execution. The bequest is said to be sufficiently definite “if provision is made for its precise ascertainment.”²²² Two requirements seem to be essential: first, the certainty in the person or persons to be benefited; second, an ascertained mode of selecting them if they are to be taken from a definite class.²²³ The rule as stated in one case is that “a gift to charity which is void at law for the want of a certain beneficiary will be upheld by the courts of this state if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite.”²²⁴ Some courts hold that a charitable bequest will not fail for indefiniteness except in the amount given, or “unless it be so absolutely dark that they cannot find the testator’s intention.”²²⁵ The rule seems to be that

7 Sup. Ct. 689; see generally, for additional illustrations: *Gibson*, In re, 75 Cal. 329, 17 Pac. 438; *Dunham v. Avery*, 45 Conn. 61; *Doughten v. Vandever*, 5 Del. Ch. 51; *Grimes v. Harmon*, 35 Ind. 198; *Chambers v. Watson*, 60 Iowa 339, 14 N. W. 336; *Cromie v. Louisville Orphans Home*, 3 Bush (Ky.) 365; *Sewall v. Cargill*, 15 Me. 414; *Tappan v. Deblois*, 45 Me. 122; *Preacher’s Aid Soc. v. Rich*, 45 Me. 552; *Howard v. American &c. Soc.*, 49 Me. 288; *Hazeltine v. Vose*, 80 Me. 374, 14 Atl. 733; *American Tract Soc. v. De Witt*, 9 Allen (Mass.) 447; *Goodhue v. Clark*, 37 N. H. 525; *Attorney-General v. Dublin*, 38 N. H. 459; *Smith v. Kimball*, 62 N. H. 606; *McBride v. Elmer*, 6 N. J. Eq. 107; *Van Wagonen v. Baldwin*, 7 N. J. Eq. 211; *New York &c. Soc. v. Clarkson*, 8 N. J. Eq. 541; *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Moore v.*

Moore, 50 N. J. Eq. 554, 25 Atl. 403; *St. Luke’s Home v. Association &c.*, 52 N. Y. 191; *North Carolina Inst. v. Norwood*, Busb. Eq. (N. Car.) 65; *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324; *Cady v. Rhode Island Hospital*, 17 R. I. 207, 21 Atl. 365; *Elwell v. Universalist &c. Conv.*, 76 Tex. 514, 13 S. W. 552; *Missionary &c. Soc. v. Calvert*, 32 Gratt. (Va.) 357; *Shore v. Willson*, 9 Cl. & F. 355; *General &c. Hospital v. Knight*, 11 E. L. & Eq. 191; *Queen’s College v. Sutton*, 12 Sim. 441; *Willson v. Squire*, 1 Y. & C. Ch. 654; *Kilvert*, In re, L. R. 7 Ch. 170; *Fearn Will*, In re, 27 W. R. 392; 1 *Jarman Wills* 330.

²²² *Bull v. Bull*, 8 Conn. 47.

²²³ *Treat’s Appeal*, 30 Conn. 113.

²²⁴ *Beekman v. Bonsor*, 23 N. Y. 298.

²²⁵ *Burr v. Smith*, 7 Vt. 241; *Button v. American Tract Society*, 23 Vt. 336.

it is immaterial how uncertain the beneficiaries may be if the court has power to appoint trustees who may exercise the discretion of making the beneficiaries certain. As said by one court, "a charitable donation, precise and definite in its purpose, void at law because the beneficiaries are uncertain, may be sustained if there be a competent trustee to take the fund and effectuate the charity."²²⁶

²²⁶ *Downing v. Marshall*, 23 N. Y. 366; *Sherwood v. American Bible Society*, 1 Keyes (N. Y.) 561; and see, on this subject generally, 4 Abb. App. 227; *Goddard v. Pomeroy*, 36 Barb. (N. Y.) 546; *Williams v. Pearson*, 38 Ala. 299; *Lockwood v. Weed*, 2 Conn. 287; *Brewster v. McCall*, 15 Conn. 274; *White v. Task*, 22 Conn. 31; *Treat's Appeal*, 30 Conn. 113; *Birchard v. Scott*, 39 Conn. 63; *State v. Griffith*, 3 Del. Ch. 392; *Newson v. Starke*, 46 Ga. 88; *Heuser v. Harris*, 42 Ill. 425; *Miller v. Chittenden*, 2 Iowa 315; *Chambers v. St. Louis*, 29 Mo. 543; *Beekman v. Bon-sor*, 23 N. Y. 298; *Levy v. Levy*, 33 N. Y. 97; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Lindley, Ex parte*, 32 Ind. 367; *Craig v. Secrist*, 54 Ind. 420; *De Bruler v. Ferguson*, 54 Ind. 549; *Board &c. v. Rogers*, 55 Ind. 297; *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631; *Moore v. Moore*, 4 Dana (Ky.) 354; *Chambers v. Baptist Soc.*, 1 B. Mon. (Ky.) 219; *Shapleigh v. Pittsburgh*, 1 Me. 271; *Kimball v. Universalist Soc.*, 34 Me. 424; *Tappan v. Dublois*, 45 Me. 122; *Drew v. Wakefield*, 54 Me. 297; *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *North Adams v. Fitch*, 8 Gray (Mass.) 421; *Brown v. Kelsey*, 2 Cush. (Mass.) 243; *Webb v. Neal*, 5 Allen (Mass.) 575; *Odell v. Odell*, 10 Allen (Mass.) 1; *Salton-stall v. Sanders*, 11 Allen (Mass.) 446; *Attorney-General v. Old South Church*, 13 Allen (Mass.) 474; *At-torney-General v. Garrison*, 101 Mass. 223, 227; *Rotch v. Emerson*, 105 Mass. 433; *Gooch v. Association*, 109 Mass. 558; *Fellows v. Miner*, 119 Mass. 541; *Wade v. American Col-onization Soc.*, 7 Sm. & M. (Miss.) 663, 695; *Chambers v. St. Louis*, 29 Mo. 453; *Union Baptist Society v. Candia*, 2 N. H. 20; *Second Con. So-ciety v. First Society*, 14 N. H. 315; *Methodist Trustees v. Peaslee*, 15 N. H. 317; *Brown v. Concord*, 33 N. H. 285, 296; *Dublin Case*, 38 N. H. 459; *Baldwin v. Baldwin*, 8 N. J. Eq. (3 Halst.) 211; *Mason v. Methodist &c. Church*, 27 N. J. Eq. (12 C. E. Green) 47; *Williams v. Williams*, 8 N. Y. 525; *New York Schools, In re*, 31 N. Y. 574; *Christie v. Gage*, 2 Thomp. & C. (N. Y.) 344; *State v. Gerard*, 2 Ired. Eq. (N. Car.) 210; *Urmey v. Wooden*, 1 Ohio St. 160; *Miller v. Teachout*, 24 Ohio St. 525; *Sowers v. Cyrenius*, 39 Ohio St. 29; *Grandoms' Estate*, 6 Watts & S. (Pa.) 547; *Whitman v. Lex*, 17 S. & R. (Pa.) 88; *Philadelphia v. Gir-ard*, 45 Pa. St. 9; *Cresson's Appeal*, 30 Pa. St. 437; *Mayer v. Society for Visitation*, 2 Brewst. (Pa.) 385; *Blenon's Estate, In re*, Bright (Pa.) 338; *Heddlestone's Estate, In re*, 8 Phil. Super. Ct. (Pa.) 602; *Derby v. Derby*, 4 R. I. 414; *Hornberger v. Hornberger*, 12 Helsk. (Tenn.) 635; *McAllister v. McAllister*, 46 Vt. 272; *Clement v. Hyde*, 50 Vt. 716.

§ 2244. **Beneficiaries sufficiently definite—Illustrations.**—A gift to three trustees by name, and to their successors as a board, with power to perpetuate their number, in trust for promotion of education and science among the Indians and African children and youth of the United States, in the judgment of such trustees, was held sufficiently definite.²²⁷ And a gift to trustees, to be applied to the maintenance and education of the poor white citizens of ——— was held sufficiently definite.²²⁸ A bequest in trust for the education of poor children of the county was held valid.²²⁹ A gift to a county “for educating some poor orphans for this county, to be selected by the county court,” was held sufficiently certain.²³⁰ So a gift for “the use of a public seminary” was held sufficiently definite.²³¹ And a gift to “an asylum for Protestant widows and orphans” is not void for uncertainty.²³² A bequest “for the purposes of the American Board of Commissioners of Foreign Missions and to promote the pious objects thereof” was held to be sufficiently definite.²³³ A gift in trust “for the furtherance and promotion of the cause of piety and good morals or in aid of objects and purposes of benevolence and charity, public or private, or temporary, or for the education of deserving youths,” to be applied as the trustee named might think proper, was held sufficiently definite.²³⁴ And a gift “for the support of evangelical preaching and for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Missionary Union Society” was held sufficiently definite.²³⁵ So a gift “to such charities as shall be deemed most useful by my executors.”²³⁶ And a gift to the Universalist religious denomination in a certain county “to be applied to the support of the denomination was held sufficient.”²³⁷ A gift “for the advancement and benefit of the Christian religion to be applied as my executors’ judgment will best promote the object named” was held sufficiently definite.²³⁸ A gift to certain societies named “for

²²⁷ Treat’s Appeal, 30 Conn. 113.

²²⁸ State v. Griffith, 2 Del. Ch. 392.

²²⁹ Newsom v. Starke, 46 Ga. 88;

Fox Will Case, 4 Ga. 404; Heuser v. Harris, 42 Ill. 425.

²³⁰ Moore v. Moore, 4 Dana (Ky.) 354.

²³¹ Curling v. Curling, 8 Dana (Ky.) 38.

²³² Fink v. Fink, 12 La. 301.

²³³ Bartlett v. King, 12 Mass. 537.

²³⁴ Saltonstall v. Sanders, 10 Allen (Mass.) 446.

²³⁵ Brown v. Kelsey, 2 Cush. (Mass.) 243.

²³⁶ Wells v. Doane, 3 Gray (Mass.) 201.

²³⁷ North Adams v. Fitch, 8 Gray (Mass.) 421.

²³⁸ Miller v. Teachout, 24 Ohio St.

the interests of religion and for the advancement of the Kingdom of Christ in the world" was held certain and definite.²³⁹ A gift to aid in the education of "young students in the ministry of the German Lutheran Congregation, under the direction of the vestryman of St. Mary's Church," was held to be definite and certain.²⁴⁰ A gift for the support of primary schools was held valid.²⁴¹ And one for the education of the poor of a certain county was held valid.²⁴² A gift to a church in trust to pay out of the income a certain sum for the use of the church and certain public charities, and to repair the testator's tomb, was held sufficiently definite.²⁴³

§ 2245. **Beneficiaries indefinite—Illustrations.**—A gift to the orthodox Protestant clergymen of Delphi, to be expended in the education of colored children, was held void for uncertainty.²⁴⁴ So a gift to trustees for the support of "indigent, pious, young men preparing for the ministry in New Haven," was held void for uncertainty.²⁴⁵ So a power given to a bishop to apply the proceeds of the sale of real estate, to the church or to the education and maintenance of poor children, as he, in his wisdom, may think proper and legal, was held void for uncertainty.²⁴⁶ A gift to a city "for the relief and support of the indigent and necessitous poor persons who may from time to time reside within the limits of the twelfth ward" was held void for uncertainty.²⁴⁷ So, a gift in trust "for the education of free colored persons in the city of Baltimore" was held void for uncertainty.²⁴⁸ And a devise to "the real, distressed, private poor of a certain county" was held indefinite and uncertain.²⁴⁹ And a gift "to be applied toward feeding and clothing and educating the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church in the city of Baltimore."²⁵⁰ A gift for

525; *Sowers v. Cyrenius*, 39 Ohio St.

29; *Mannix v. Purcell*, 46 Ohio St.

102, 19 N. E. 572.

²³⁹ *American Tract Soc. v. Atwater*, 146.

30 Ohio St. 77.

²⁴⁰ *Whitman v. Lex*, 17 S. & R. 551.

(Pa.) 88.

²⁴¹ *Bell Co. v. Alexandria*, 22 Tex.

350.

²⁴² *Paschal v. Acklin*, 27 Tex. 196.

²⁴³ *Attorney-General v. Trinity*

Church, 9 Allen (Mass.) 422.

²⁴⁴ *Grimes v. Harmin*, 35 Ind. 246.

²⁴⁵ *White v. Task*, 22 Conn. 31.

²⁴⁶ *LePage v. McNamara*, 5 Iowa

146.

²⁴⁷ *Wilderman v. Baltimore*, 8 Md.

551.

²⁴⁸ *Needles v. Martin*, 33 Md. 609.

²⁴⁹ *Trippe v. Frazier*, 4 H. & J.

(Md.) 446.

²⁵⁰ *Dashiell v. Attorney-General*, 5

H. & J. (Md.) 392.

the use of such charitable institutions in Pennsylvania and South Carolina as the trustees might deem most beneficial to mankind, and so that part of the colored population in each of said states should partake of the benefits of the gifts, was held to be too uncertain for judicial administration.²⁵¹ And a gift of funds for a public dispensary for indigent persons, both sick and lame, to be attended by a physician elected for the establishment, at their own house, and also daily at the dispensary, was held void for uncertainty.²⁵² And a bequest to certain trustees, naming them, "for such purposes as they consider might prove to be most beneficial to the town and trade of Alexandria," was held to be too uncertain and indefinite.²⁵³ So a gift "for the use of the schools among the inhabitants of the Northwest Parish of Boxford" was held void for uncertainty.²⁵⁴ A gift to the poor of a certain parish was held void for uncertainty.²⁵⁵ A bequest for the establishment of a school at a certain place, "for the education of children," was held uncertain and indefinite.²⁵⁶ A bequest to an executor to be used by him for charity "in his discretion," or "for a purpose explained to him," was held void for uncertainty.²⁵⁷ And a gift to a missionary society "appointed to preach the gospel to the poor" was held void for uncertainty.²⁵⁸ A gift to the United States or to such persons as Congress might appoint, "for an agricultural school for orphan children of warrant officers of the United States Navy," was held too uncertain and indefinite.²⁵⁹ And a gift "to be employed in preaching the gospel in the destitute regions of the west" was held void for uncertainty.²⁶⁰ A gift "for some promising young man of good talents and of the Baptist order" was held too indefinite.²⁶¹ And a gift to foreign missions, "to be applied as my executors may think the proper objects according to the Scripture, the greater part of missionary purposes," was held

²⁵¹ *Fontain v. Ravenel*, 17 How. (U. S.) 568.

²⁵² *Beekman v. Bonsor*, 23 N. Y. 298.

²⁵³ *Wheeler v. Smith*, 9 How. (U. S.) 55.

²⁵⁴ *Barker v. Wood*, 9 Mass. 419.

²⁵⁵ *Morse v. Carpenter*, 19 Vt. 613.

²⁵⁶ *Attorney-General v. Soule*, 28 Mich. 152.

²⁵⁷ *Schumucker v. Reel*, 61 Mo. 592.

²⁵⁸ *Owens v. Missionary Society*, 14 N. Y. 380.

²⁵⁹ *Levy v. Levy*, 33 N. Y. 97.

²⁶⁰ *Goddard v. Pomeroy*, 36 Barb. (N. Y.) 546.

²⁶¹ *Hester v. Hester*, 2 Ired. Eq. (N. Car.) 330.

void for uncertainty.²⁶³ And a gift "for the poor orphans of the state, and the said Bishop and his successors to have the right to select such orphans," was held too uncertain and indefinite.²⁶³ A gift to an infidel society, "for discussion of religion, politics, etc.," was held void.²⁶⁴ A gift "for distribution among needy, poor and respectable widows" was held void as being too indefinite.²⁶⁵ So a gift for "the propagation of the gospel in foreign lands" was held void.²⁶⁶ And a gift "for the benefit of Roman Catholic orphans" was held void for uncertainty.²⁶⁷

²⁶³ *Brodges v. Pleasants*, 4 Ired. Eq. (N. Car.) 26.

²⁶⁴ *Miller v. Atkinson*, 63 N. Car. 537.

²⁶⁵ *Zeisweiss v. James*, 63 Pa. St. 465.

²⁶⁶ *Gallego v. Attorney-General*, 3 Leigh. (Va.) 450.

²⁶⁷ *Carpenter v. Miller*, 3 W. Va. 174.

²⁶⁸ *Heiss v. Murphy*, 40 Wis. 276.

CHAPTER CVII.

HUSBAND AND WIFE.

Sec. 2246. Generally. 2247. Burden of proof—Agency—Necessaries. 2248. Burden of proof—Miscellaneous. 2249. Presumptions — At common law. 2250. Presumptions — Intention of wife to bind separate estate. 2251. Presumptions—As to wife's agency. 2252. Presumptions — As to husband's agency. 2253. Presumptions—As to coercion.	Sec. 2254. Presumptions—As to gifts to wife. 2255. Presumptions—As to gifts to husband. 2256. Presumptions — As to some joint matters. 2257. Presumptions— Miscellaneous. 2258. Questions of law or fact. 2259. Contracts of suretyship. 2260. Evidence as to necessities. 2261. Evidence as to gifts. 2262. Evidence as to miscellaneous matters. 2263. Declarations and admissions.
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§ 2246. **Generally.**—The relation of husband and wife is one of the great domestic relationships, being that of a man and woman lawfully joined in marriage, by which, at common law, the legal existence of a wife is incorporated with that of her husband.¹ The common law proceeded on the theory that husband and wife were one person in contemplation of law, and this theory is still influential, in some jurisdictions, especially as to questions relating to alleged contracts between husband and wife, notwithstanding enabling statutes have, in a great measure, changed the old rules.² Many matters relating more or less directly to the general subject of this

¹ Black Law Dict.

² Thus, it was held that husband and wife cannot contract with each other as persons not so bound together, and that the general statute of limitations does not apply to such transactions between themselves: *Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718, and authori-

ties cited. The general subject is also considered and numerous decisions from other states are cited in, *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462; and, *Leach v. Rains*, 149 Ind. 153, 48 N. E. 858; see also, *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798.

chapter have been treated in other volumes, and questions relating to marriage and to divorce will be found in chapters in this volume on those subjects. This chapter will be devoted largely to questions as to the burden of proof and presumptions, in cases in which they are affected by the relation of husband and wife, and to questions of evidence generally in cases in which husband and wife are interested, and especially in regard to the agency of the one for the other and the liability for necessities.

§ 2247. **Burden of proof—Agency—Necessaries.**—One who endeavors to recover from the husband for goods purchased by a wife has the burden of proving that she had authority to purchase them.³ But such authority may be proved by circumstantial evidence, and, as to necessities, it is generally implied or presumed where it is shown that the relation of husband and wife exists and that they are living together as husband and wife.⁴ The one setting up a contract made by the wife as the alleged agent of the husband has the burden of proving the relation of agency. A wife, as such, has no original inherent power to make any contract which is obligatory on her husband, unless under certain circumstances, for necessities. Hence, it is incumbent on one whose claims against the husband is derived from such contract, to show that she had authority from him to make it, or that he subsequently ratified or assented to it.⁵ A person seeking to charge a husband for debts contracted by the wife while living separate from him must show that the husband is liable, the presumption being that he is not.⁶ In a recent case the rule is laid down as follows: "The wife has, by virtue of the marriage relation alone, no authority to bind her husband by con-

³ *Compton v. Bates*, 10 Ill. App. 78.

⁴ *Benjamin v. Benjamin*, 15 Conn.

⁵ *Vusler v. Cox*, 53 N. J. L. 518, 22 Atl. 347; *Baker v. Carter*, 83 Me. 132, 23 Am. St. 764, and note, 21 Atl. 834; *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 553; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. 362; *Flynn v. Messenger*, 28 Minn. 208, 41 Am. R. 279; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713; *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Emmett v. Norton*, 8 Car. & P. 506, 34 E. C. L. 503.

⁶ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; see also, *Barrett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154.

⁷ *Rea v. Durkee*, 25 Ill. 414; *Litson v. Brown*, 26 Ind. 489; *Vusler v. Cox*, 53 N. J. L. 518, 22 Atl. 347; *Mainwaring v. Leslie*, 1 Moody & M. 18; note to, *Manby v. Scott*, 3 Smith Lead. Cas. (9th ed.) 1757; see also, *Sturbridge v. Franklin*, 160 Mass. 149, 39 N. E. 669; *Reese v. Chilton*, 26 Mo. 598.

tracts of a general nature. This agency is frequently spoken of as being of two kinds: (1) that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish; (2) that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an 'agency in law' or an 'agency of necessity,' is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable, although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife and supply her with necessities suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden is upon them to show: (1) that the husband refused or neglected to provide a suitable support for his wife; and (2) that the articles furnished were necessities. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.⁷

§ 2248. **Burden of proof—Miscellaneous.**—Where, after divorce, the husband sues the wife for money, had and received from others, but belonging to him during the existence of the marital relation, it has been held that she must prove a gift from him to herself in order to defeat a recovery; and mere possession on her part is not a substitute for such proof.⁸ In a transaction by which the husband acquires title to his wife's separate property, the burden is generally on him to show it to be fair, and without any exercise of

⁷ *Bergh v. Werner*, 47 Minn. 250, 28 Am. St. 362. ⁸ *Lane v. Lane*, 76 Me. 521.

undue influence, and such as in good conscience ought to bind her.⁹ So, as between himself and his wife the husband has the burden of proving a resulting trust in his favor.¹⁰ And if the husband seeks to recover from his wife or her estate an advancement made by him to her, he has the burden of showing that the money was advanced or the property conveyed to be repaid or under such circumstances that in equity and good conscience he is entitled to it, and that it was not merely paid as a gift or virtue of the marital rights without any obligation to repay.¹¹ The burden, however, is generally on a wife claiming property as her separate estate to prove that it is such.¹² Thus, when a wife is suing her husband's creditor for seizing her property on attachment she has the burden of showing that it was her separate property.¹³ So, a married woman suing for the cancelation of a written agreement alleged to have been procured from her by duress and coercion has the burden of proving that fact.¹⁴ And where an insolvent husband conveys personal property to the wife's brother, who thereafter conveys said property directly to the wife the burden of proving that the transfer by the husband to the brother was bona fide has been held to rest on the wife.¹⁵ The burden has also been held to be on the wife to prove that she paid for property with means not derived from her husband.¹⁶ And it is held in many jurisdictions that since the passage of the married woman's law, the burden is on a married woman to establish that her agreement or contract is void.¹⁷ The burden of proof is on

⁹ *Pennington v. Acker*, 30 Miss. 161.

¹⁰ *Read v. Huff*, 40 N. J. Eq. 229; see also, *Shaw v. Jones*, 156 Ind. 60, 59 N. E. 166.

¹¹ *Gosnell v. Jones*, 152 Ind. 638, 53 N. E. 381; *Harrell v. Harrell*, 117 Ind. 94, 19 N. E. 621; *McCaw v. Burk*, 31 Ind. 56.

¹² *Briggs v. Mitchell*, 60 Barb. (N. Y.) 288.

¹³ *Kahn v. Wood*, 82 Ill. 219.

¹⁴ *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908. It was also held in the case cited that where such agreement related to the payment of a debt which she claimed, she was under obligation to pay, evi-

dence that she had previously admitted that the debt was her own and had always intended to pay it, was held admissible as tending to rebut evidence tending to show that she was induced by improper means to execute the agreement.

¹⁵ *Herzog v. Weller*, 24 W. Va. 199.

¹⁶ *McMasters v. Edgar*, 22 W. Va. 673.

¹⁷ *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl. 1040; *Allen v. Johnson*, 13 Pa. Co. Ct. R. 218; *Miller v. Shields*, 124 Ind. 166, 24 N. E. 670; *Field v. Noblett*, 154 Ind. 357, 56 N. E. 841. But not where the contract appears on its face to be one of suretyship or guaranty prohib-

the husband, in certain cases, to show that he has made suitable provision for his wife.¹⁸ A wife indorsing certificates of stock in blank and allowing her husband to use them as collateral has been held to have the burden of proof to show a limitation on his authority to use the certificates and to show notice to the creditor of the limitation.¹⁹ But, in a proceeding on a note signed by a husband and wife the plaintiff has been held to have the burden of proof to show the liability of the wife's separate estate.²⁰ Property acquired during the marriage relation is, in some states, presumed to belong to the community, and the burden of proof, in case of divorce and demand for a division of property, is upon the defendant to overthrow the presumption.²¹ So, if the wife claims as her separate property that which appears to be community property, the burden of proof is on her.²² The burden of proof is on the heirs of a husband who attack a deed by him to his wife as having been obtained by undue influence and duress.²³

§ 2249. **Presumptions—At common law.**—At common law a presumption arises that the wife's earnings and the avails of her labor during coverture belong to her husband.²⁴ And there was a presumption of law that the wife's personal property in possession at the time of marriage in her own right, such as money, chattels and movables, vested immediately and absolutely in her husband on marriage.²⁵ So, at common law a promissory note to the wife prima

ited by statute. *Nixon v. Whitely & Co.*, 120 Ind. 360, 22 N. E. 411; *Crisman v. Leonard*, 126 Ind. 202, 25 N. E. 1101; *Stewart v. Babbs*, 120 Ind. 568, 22 N. E. 770; *Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. 311. And the question whether one loaning money to her made such an investigation as would warrant him in treating her as a principal has been held to be one of law. *Fleld v. Campbell*, (Ind.) 72 N. E. 260.

²⁵ *Tebbetts v. Hapgood*, 34 N. H. 420.

²⁶ *McMullen v. Ritchie*, 64 Fed. 253.

²⁷ *Barker v. Gillett*, 4 N. Y. St. 370; see also, *Rowell v. Klein*, 44 Ind. 290.

¹⁸ *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711.

¹⁹ *Epperson v. Jones*, 65 Tex. 425.

²⁰ *Brown v. Brown*, 44 S. Car. 378, 22 S. E. 412.

²¹ *Clark v. Curtis*, 7 Alb. Law J. 171; see also, *Citizen St. R. Co. v. Twiname*, 121 Ind. 375, 23 N. E. 159; *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798; *Yopst v. Yopst*, 51 Ind. 61; *McKavlin v. Bresslin*, 8 Gray (Mass.) 177; *Todd v. Todd*, 15 Ala. 743; *Rogers v. Bolton*, 8 L. R. Ir. 69; *Glover v. Drury Lane*, 2 Chit. 117, 18 E. C. L. 269.

²² *Carleton v. Lovejoy*, 54 Me. 445; *Cram v. Dudley*, 28 N. H. 537; *Bell v. Bell*, 1 Ga. 637; *Briggs v. Mitchell*, 60 Barb. (N. Y.) 288; see also, *Re-*

facie belongs to the husband, and can only be indorsed by him.²⁶ It is held that the courts of one state will presume that the common law is in force in another state, and therefore that personal property received in payment for land sold by a married woman in that other state became the property of her husband; and the subsequent removal of husband and wife to the one state, bringing with them such personal property, does not divest the ownership of the husband.²⁷ By the common law there is a presumption that when real estate of the wife is sold, and by husband and wife conveyed, the money arising from such sale is the property of the husband.²⁸ But although the presumption is that money of the wife, reduced to possession by the husband during the marriage, becomes his, such presumption is not conclusive, and the husband may so treat it as to charge himself and his heirs, as trustees of the wife, with the duty of applying it to her separate use.²⁹ And modern statutes and decisions have greatly changed the law and the presumptions in many instances.³⁰

§ 2250. Presumptions—Intention of wife to bind separate estate.

A presumption arises, in many jurisdictions, that a married woman in making a contract intends to make her separate estate liable for its fulfillment.³¹ This is necessarily true where she declares expressly in writing such an intention and her contract is for the benefit of herself or her separate estate.³² And it has been held that the execution of a bond by a married woman having a separate estate is sufficient evidence of her intention to charge her estate, without specifically referring to such fact.³³ So also where a wife with a separate estate gives her note for goods furnished, it has been

sor v. Resor, 9 Ind. 349; Beam v. Ind. 46, 42 N. E. 447; Hilleman v. Bridgers, 108 N. Car. 276, 23 Am. St. 59; Fleet v. Perrins, L. R. 3 Q. B. 541.

²⁶ Tryon v. Sutton, 13 Cal. 490.

²⁷ Lichtenberger v. Graham, 50 Ind. 238.

²⁸ Hamlin v. Jones, 20 Wis. 536.

²⁹ Resor v. Resor, 9 Ind. 347.

³⁰ See, Hetrick v. Hetrick, 13 Ind. 44; Arnold v. Rifner, 16 Ind. App. 442, 45 N. E. 618; Shore v. Taylor, 46 Ind. 345; Kiefer v. Klinsick, 144

609.

³¹ Cardwell v. Perry, 82 Ky. 129; Seifert v. Jones, 84 Mo. 591; Price v. Planter's Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214.

³² ElHott v. Gower, 12 R. I. 79, 34 Am. R. 600.

³³ Miller v. Miller's Adm., 92 Va. 510, 23 S. E. 891.

held prima facie evidence that they were furnished, or the credit given, on faith of her property.³⁴ But there are decisions to the contrary. Thus, it is held that an intention by a married woman to charge her separate property will not be implied merely from giving a note or other obligation.³⁵ And, under some of the statutes, no presumption of intent to bind her separate estate will arise from the mere execution of a contract by her, not showing any such intention, or the mere fact that she has a separate estate.³⁶

§ 2251. **Presumptions—As to wife's agency.**—The presumption is frequently said to be that, in purchasing necessities, the wife, living with her husband, acts as her husband's agent.³⁷ That is, the law in such cases presumes the wife to be the agent of her husband in all contracts made for necessities or goods that are for their use.³⁸ So, also, as it is sometimes said, the husband will be presumed to assent to his wife's making, on his credit, such purchases as in the conduct of the domestic concerns are proper for her management and supervision.³⁹ And it is held if a husband and wife live together, and she transact business, the presumption is that she is his agent.⁴⁰ That is, cohabitation of a husband and wife is presumptive evidence of the authority of the wife, as the agent of the husband, to purchase necessities for herself.⁴¹ Yet while cohabitation may be presumptive evidence of the wife's authority to contract, the husband may rebut the presumption by showing that the goods were supplied under such circumstances that he is not bound to pay for them.⁴² If credit be in fact given to the wife alone, the presumption of a contract obligatory on the husband is thereby repelled.⁴³ Upon

³⁴ *Vance v. Wells*, 8 Ala. 399.

³⁵ *Rice v. Railroad Co.*, 32 Ohio St. 380, 30 Am. R. 610.

³⁶ *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 583, 74 N. W. 82; *Union Stk. Yds. Nat. Bank v. Coffman*, 101 Iowa 595, 70 N. W. 693.

³⁷ *Kooker v. Williams*, 3 Pa. Dist. Ct. 446; *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533; see also, Vol. I, § 123.

³⁸ *Williams v. Coward*, 1 Grant. Cas. (Pa.) 21.

³⁹ *Keller v. Phillips*, 40 Barb. (N.

Y.) 390; *Liston v. Brown*, 26 Ind. 489; *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533.

⁴⁰ *McKinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522. But this is too broadly stated.

⁴¹ *Wiler v. Fiegel*, 10 Wkly. Notes Cas. 240.

⁴² *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

⁴³ *Shelton v. Pendleton*, 18 Conn. 417; see also, *Nelson v. Spaulding*, 11 Ind. App. 452, 39 N. E. 168; *Ellott v. Gregory*, 115 Ind. 98, 17 N.

E. 196.

this general subject it is said in a recent case: "Where husband and wife are living together, the wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live. Under such circumstances the presumption is in favor of the wife's authority to contract on behalf of her husband."⁴⁴ But, where the husband and wife are living in a state of separation, the presumption is against the authority of the wife to bind the husband by her contract. Under such circumstances, the general rule is that the husband is not liable. To this rule there are two exceptions pertinent to this inquiry, the first of which is, where husband and wife separate and live in a state of separation by mutual consent, without any provision for her maintenance or means of her own for her support; the other, where the wife leaves her husband under the stress of his misconduct of such character as in law is regarded as a justifiable cause for the wife's quitting her husband's society. In such cases the presumption being against the liability of the husband for the wife's contract, the burden of proof is upon the party seeking to enforce against him a liability for her contract. He must show affirmatively the special circumstances which shall fix responsibility on the husband in order to establish his cause of action."⁴⁵ The wife, whether the husband is abroad or at home, is not presumed to be his agent generally, or to be intrusted with any other authority as to his affairs than that which it is usual and customary to confer upon the wife.⁴⁶ Thus, a presumption does not arise that the wife was authorized to enter into a contract of hire as his agent during his absence when his absence was but for a day or two,⁴⁷ nor to transfer his personal property to a stranger.⁴⁸ Nor is the wife presumed to be the agent of her husband for the purpose of drawing his money from a savings

⁴⁴ 1 Evans Principal and Agent, *Blowers v. Sturtevant*, 4 Denio (N. Y.) 46; *Breinig v. Meitzief*, 23 Pa. Law 454; *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Manby v. Scott*, 3 Smith 94; 2 Kent Comm. 147.

⁴⁵ *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Sawyer v. Cutting*, 23 Vt. 486.

⁴⁶ *Vusler v. Cox*, 53 N. J. L. 518, 22 Atl. 347; citing, *Mainwaring v. Leslie*, 1 Moddy & M. 18; *Johnston v. Sumner*, 3 Hurl. & N. 261-268;

⁴⁷ *Savage v. Davis*, 18 Wis. 608.

⁴⁸ *Baker v. Flint*, 63 Ind. 137.

bank.⁴⁹ And it is held that while the presumption is that a wife, living with her husband, has authority, as manager of the household, to pledge his credit for ordinary household articles, such presumption does not arise on the purchase by the wife of expensive jewelry. In such a case to render the husband liable on the ground of agency, there must be affirmative proof that he clothed her with real or ostensible authority to make the purchase on his credit.⁵⁰ Nor is the wife, *prima facie*, the agent of the husband for the purpose of lending his property; and it has been held that permission from her alone to take it will be no defense to an action of trover brought by the husband for it, where there are no circumstances tending to show the husband's assent.⁵¹

§ 2252. **Presumptions—As to husband's agency.**—At common law it seems that a wife had no power to appoint her husband or any one else as her agent;⁵² but she may now do so, at least as to certain matters, in most jurisdictions; and agency is frequently implied or inferred from circumstances. As a general rule, in most jurisdictions, the principles which govern in matters of agency are the same, in most respects at least, where the agent happens to be the husband or wife of the principal as where the principal and agent are in other respects strangers.⁵³ Agency of the husband is not, ordinarily, presumed or implied from the marital relation alone.⁵⁴ Agency in such a case may be conferred in advance, either expressly or impliedly, or the acts of the husband or wife may be ratified after they are performed so as to bind the person ratifying them.⁵⁵ Where an act was done or a contract made by a husband as the agent of his wife, by her authority, a subsequent divorce does not affect its bind-

⁴⁹ *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

⁵⁰ *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, 28 Am. St. 362.

⁵¹ *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; see also, *Baker v. Flint*, 63 Ind. 137.

⁵² *Oulds v. Sansom*, 3 Taunt. 261; *Phillips v. Burr*, 4 Duer (N. Y.) 113.

⁵³ *Runyon v. Snell*, 116 Ind. 164, 18 N. E. 522; *Heustis v. Kennedy*, 23 Ill. App. 42; *Hunt v. Poole*, 139 Mass. 224, 30 N. E. 90.

⁵⁴ *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. 191; *Jones v.*

Walker, 63 N. Y. 612; *Bates v. Rockfort &c. Bank*, 89 N. Y. 286; *Ladd*

v. Hildebrant, 27 Wis. 135, 9 Am. R. 445; *Dodge v. Knowles*, 114 U. S. 435, 5 Sup. Ct. 1197.

⁵⁵ *Lichtenberger v. Graham*, 50 Ind. 238; *Sims v. Smith*, 99 Ind.

469, 476; *Barnett v. Gluting*, 3 Ind. App. 415, 421, 29 N. E. 154; *Axson v. Belt*, 103 Ga. 578, 30 S. E. 262.

ing force as the act of the wife;⁵⁶ and a contract by a husband in his wife's name as her authorized agent binds the wife only, and will not support an action against the husband.⁵⁷ When it is sought to charge the wife's separate property on account of an act of her husband, it has been held that the proof of his agency should be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation of wife.⁵⁸ Although the declarations of the supposed agent are not admissible to prove the agency,⁵⁹ it may be proved by the testimony of the principal or agent,⁶⁰ or of any other person having knowledge of the facts, or in general by any evidence that is competent to prove agency in other cases; and it has been held that if a wife who is sought to be charged as principal with the acts of her husband as her alleged agent fails to take the stand as a witness and deny the agency after *prima facie* evidence of the husband's authority has been given, such failure may be considered as a circumstance tending to show that he had such authority.⁶¹ The fact that a married woman mortgaged a city lot belonging to her for money with which to erect a house upon it, and that the husband took the money, with her knowledge and consent, and used it in erecting the building, has been held to raise an inference that he had authority to bind her by the employment of a plasterer to work on the house.⁶² And the purchase of material and erection of a barn by the husband on premises owned by him and his wife as *entireties*, with her knowledge and consent, to replace one that was burned, was held to imply such an agency as would support a mechanic's lien on the land for the value of the materials.⁶³ So, the fact that the husband traded a mule, belonging to his wife, for a mare, and, after working the mare for some time, sold her without objection from the wife, was held sufficient to establish his authority as the wife's agent to dispose of the mule.⁶⁴ Evidence that a husband who lived with his wife on

⁵⁶ *Cunningham v. Mitshell*, 30 Ind. 362.

⁵⁷ *Richardson v. League*, 32 Ind. 429.

⁵⁸ *Rowell v. Klein*, 44 Ind. 290.

⁵⁹ *Rowell v. Klein*, 44 Ind. 290, 293.

⁶⁰ *Griffin v. Ransdell*, 71 Ind. 440, 444.

⁶¹ *Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154.

⁶² *Thompson v. Shepard*, 85 Ind. 352; *Dalton v. Tindolph*, 87 Ind. 490.

⁶³ *Wilson v. Logue*, 131 Ind. 191, 30 N. E. 1079; but see, *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. 101.

⁶⁴ *Lichtenberger v. Graham*, 50 Ind. 288.

her farm used and cultivated it, and, with his wife's knowledge and consent, used, sold and marketed the annual product as his own and used the proceeds in supporting the family, has been held sufficient to prove his right as her agent to sell the growing corn in a field in payment of a bill of medical services rendered the family.⁶⁵ The fact that negotiations for leasing the wife's farm were conducted with the husband has been held admissible in evidence to prove his authority as her agent to accept a surrender of the lease, though not alone sufficient for that purpose.⁶⁶ The facts that a husband transacted his wife's business generally, and negotiated a sale of real estate for her which she ratified, are competent evidence to prove the husband's authority to contract for the payment of a real estate commission by her to the agent who found a purchaser for such land.⁶⁷ And where the fact that the husband acted as his wife's agent in the transaction of her business is fully established, there is no presumption that payments which he made on her account were made out of his own money; but in a proceeding by him to recover the amount of such payments from the wife's estate the husband has the burden of proof as to all the facts necessary to entitle him to recover.⁶⁸

§ 2253. **Presumptions—As to coercion.**—It is held in some jurisdictions that any unlawful act committed by the wife in the presence of the husband is presumed to be done under his coercion.⁶⁹ Thus, it has been held that a married woman committing an assault in the immediate presence of her husband is presumed to act under his coercion.⁷⁰ And the fact that the wife, the defendant, committed a criminal act in her husband's presence has been said to raise a presumption that she acted under coercion.⁷¹ But it is held that this doctrine does not obtain in cases of murder.⁷² This presumption of coercion has been applied both in favor of the wife and against

⁶⁵ *Cunningham v. Mitchell*, 30 Ind. Am. R. 422; *Cassin v. Delany*, 38 N. Y. 178; see, Vol. I, § 123.

⁶⁶ *Woodward v. Lindley*, 43 Ind. 233. ⁷⁰ *Commonwealth v. Eagan*, 103 Mass. 71; *State v. Williams*, 65 N. Car. 398.

⁶⁷ *Barnett v. Gluting*, 3 Ind. App. 415, 421, 29 N. E. 154. ⁷¹ *State v. Fitzgerald*, 49 Iowa 260, 41 Am. R. 148.

⁶⁸ *Gosnell v. Jones*, 152 Ind. 633, 53 N. E. 381. ⁷² *State v. Barnes*, 48 La. Ann. 460, 19 So. 251; *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559.

⁶⁹ *State v. Cleaves*, 59 Me. 298, 8

the husband.⁷³ But a husband, it should be noted, is never presumed, as a matter of law, to act under the influence of his wife.⁷⁴ The presumption of coercion may be overcome by circumstances showing that the husband, though in the same room, exercised no control over his wife.⁷⁵ It has been held that if a husband is so near his wife when she is committing a crime such as unlawfully selling liquor, his coercion will be presumed, though he is not actually present.⁷⁶ In other cases it is held that such coercion must appear clearly from all the facts and circumstances of the case, and cannot be presumed from his presence.⁷⁷

§ 2254. **Presumptions—As to gifts to wife.**—A presumption of a gift or advancement by virtue of marital rights to the wife, rather than a binding obligation to repay, arises when a husband transfers real or personal property to her.⁷⁸ Thus, where a husband pays the purchase money of land, and has the land conveyed to his wife, the presumption is that the husband intended to make a gift to his wife, and not to create a resulting trust; and this presumption must prevail unless it is rebutted by convincing evidence.⁷⁹ That is, where a husband purchases land and has title made to his wife there is no presumption of a resulting trust;⁸⁰ the presumption is that it was a gift, and after her death a trust therein in his favor cannot be established without the most convincing proof.⁸¹ So, also, where on the purchase of land by husband, he puts the title in his wife, and makes improvements, a gift to the wife of both the land and improvements is presumed,⁸² and this presumption is not overcome by the testimony of a witness that he understood from the wife that the property belonged to her husband.⁸³ So, it has been

⁷³ *State v. Boyle*, 13 R. I. 537.

E. 381; *Harrell v. Harrell*, 117 Ind.

⁷⁴ *Charleston v. Van Roven*, 2 McCord (S. Car.) 465.

94, 19 N. E. 621.

⁷⁵ *United States v. Terry*, 42 Fed. 317; *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706; see also, *Marshall v. Oakes*, 51 Me. 308; *Wharton Ev.*, § 1267.

⁷⁶ *Whitley v. Ogle*, 47 N. J. Eq. 67, 20 Atl. 284.

⁷⁷ *Commonwealth v. Munsey*, 112 Mass. 287.

⁷⁸ *Kelly v. Karsner*, 72 Ala. 106; *Seibold v. Christman*, 75 Mo. 308; *Bennett v. Camp*, 54 Vt. 36.

⁷⁹ *Edwards v. State*, 27 Ark. 493.

⁸⁰ *Cohen v. Cohen*, 1 App. Dec. (D. C.) 240.

⁸¹ *Wilson v. Silkman*, 97 Pa. 509; *Gosnell v. Jones*, 152 Ind. 633, 53 N.

⁸² *Arrington v. Arrington*, 114 N. Car. 116, 19 S. E. 278.

⁸³ *Johnson v. Johnson*, 138 Ill. 385, 27 N. E. 930.

held that where a husband conveys real estate to his wife by ordinary deed, the presumption is that such conveyance is for the purpose of making a settlement on her, or providing for her maintenance, even though it include all his property.⁸⁴ And where there is conflicting evidence as to a husband's object in making a conveyance of lands to his wife, the ordinary presumption that it is intended as a provision for her benefit is not rebutted.⁸⁵ But it has been held that the presumption that a conveyance of real estate by a husband to his wife was intended as an advancement and provision for her, may be rebutted by parol proof.⁸⁶ It is held that land conveyed to a wife by the husband is presumed, in the absence of other evidence, to have been purchased with funds of the husband.⁸⁷ The same presumption of a gift has been held to arise in case of personal property; thus, where a note was taken by a husband on the sale of his property, made payable to his wife, it is *prima facie* evidence of a gift to her.⁸⁸

§ 2255. **Presumptions—As to gifts to husband.**—There is a diversity of opinion as to whether or not a gift is presumed in favor of the husband when the wife allows him to take possession of her property. In some jurisdictions it is held that where a wife allows her husband to receive money of hers, belonging to her separate estate, the presumption is that it is a gift, not a loan, and she must establish by clear proof as against his creditors that it was a loan, with promise of repayment at the time of the transaction.⁸⁹ In such jurisdictions it is held that in the absence of an express claim or agreement for compensation, a contribution by a wife to the purchase of land the title whereof is taken in the name of the husband, will be adjudged a gift to him.⁹⁰ So also it is held that the receipt by the husband of the money of his wife, or use of it with her consent, and without objection, is sufficient to raise the presumption of a gift to him.⁹¹ And where husband and wife live together and enjoy a common support from their joint property, and the husband

⁸⁴ *Wilder v. Brooks*, 10 Minn. 50, 88 Am. Dec. 49.

⁸⁵ *Linker v. Linker*, 32 N. J. Eq. 174.

⁸⁶ *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 537.

⁸⁷ *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025.

⁸⁸ *Richardson v. Lowry*, 67 Mo. 411.

⁸⁹ *Bennett v. Bennett*, 37 W. Va. 296, 16 S. E. 638.

⁹⁰ *Campbell v. Campbell*, 21 Mich. 438.

⁹¹ *Hinney v. Phillips*, 50 Pa. St. 382.

receives the income and profits of the wife's separate estate, with her knowledge and without objection from her, it is presumed to be intended as a gift to her husband, and neither he nor his estate is liable for such income and profits.⁹² A deed of gift from wife to husband, duly recorded, has been held admissible in evidence in favor of a third person who was loaned money on the faith of it, without affirmative proof that it was freely and voluntarily executed and not obtained by undue influence, persuasion or fraud, the presumption being in favor of its validity.⁹³ A presumption has been said to arise that a husband may apply money to the use of either himself or wife or both of them when the only evidence is that the wife gave money of her separate property to him and there is no evidence that he received it in trust for her.⁹⁴ In other jurisdictions it is held that if there is no evidence of a gift the presumption of law is that the wife's money remains her own after her husband has taken it into his possession and that he holds it for her use and benefit.⁹⁵ Thus, in such jurisdictions it is held that under the married woman's act, which, as to property rights, places a feme covert on substantially the same footing as a feme sole, there is no presumption that when a wife places her money in the hands of her husband she intends to make a gift to him.⁹⁶ It has also been held that the law presumes a loan from the mere fact of the receipt of a wife's money by her husband, and this presumption can only be rebutted by proof of a gift, where a gift is alleged.⁹⁷ So, in these jurisdictions where a husband receives money belonging to his wife, there is a presumption that he receives it for her use as her trustee.⁹⁸ And it is generally agreed that when a wife authorizes her husband to act as her agent in the care of her money, there is no presumption of a gift to him.⁹⁹

§ 2256. **Presumptions—As to some joint matters.**—A presumption has been held to arise that a husband and wife are joint owners

⁹² *Andrews v. Huckabee Adm.*, 30 Ala. 143.

⁹³ *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806.

⁹⁴ *Jacobs v. Hesler*, 113 Mass. 157.

⁹⁵ *Hilleman v. Hilleman*, 85 Ind. 1; *Armstrong v. Lindley*, 116 Ind. 295, 19 N. E. 138; *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713.

⁹⁶ *Chadbourne v. Williams*, 45 Minn. 294, 47 N. W. 812.

⁹⁷ *Wormley Estate, In re*, 137 Pa. St. 101, 20 Atl. 621.

⁹⁸ *Black v. Black*, 30 N. J. Eq. 215; *Appeal v. Hamill*, 88 Pa. 363.

⁹⁹ *Heath v. Slocum*, 115 Pa. St. 549, 9 Atl. 259.

in equal shares of an amount deposited in the joint names of husband and wife.¹⁰⁰ In some jurisdictions it has been held that choses in action due to husband and wife jointly, if not reduced to possession during coverture go to the survivor, and in some it has been held that the doctrine of tenancy by entireties does not apply to personality, and that if reduced to possession it becomes the husband's. In most jurisdictions a presumption of law arises that a conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole.¹⁰¹ In a joint proceeding by a husband and wife attacking proceedings for laying out a ditch, it was held that it would be presumed that their interest in the premises was the common-law tenure of husband and wife, and the wife cannot stand in any better position than her husband.¹⁰² Where the right of redeeming from a levy was in the husband, the wife, in the absence of anything to the contrary, was presumed to occupy the estate levied on in subordination to the legal title and not adversely thereto.¹⁰³ Property is presumed to belong to the husband and is liable to seizure for his debts when bought under the following circumstances, that is, with money borrowed by the wife and placed in his hands for such investment, in his name and for his benefit.¹⁰⁴ Land acquired by a husband is presumed, in the absence of rebutting evidence, to have been purchased with the property of the husband, so that when he conveys it to his wife, while he has creditors, the burden is on her to show a consideration.¹⁰⁵ Where a husband and wife held themselves out to the world as partners in trade, it was presumed that she contributed her portion of the capital, and that her time, skill and earnings went into the business.¹⁰⁶ In an action against a husband and wife for joint purchase of necessities, book entries charging the goods to them jointly, were held to be presumptive evidence of a sale on

¹⁰⁰ *State v. Brady*, 53 Mo. App. 202.

¹⁰¹ *Strawn v. Strawn*, 50 Ill. 33; *Simpson v. Pearson*, 31 Ind. 1; *Dodge v. Kinzy*, 101 Ind. 105; *Jacobs v. Miller*, 50 Mich. 119, 15 N. W. 42; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *Reynolds v. Strong*, 82 Hun (N. Y.) 202, 31 N. Y. S. 329; *Fleek v. Zillhaver*, 117 Pa. St. 213, 12 Atl. 420; *Myers v. Reed*, 17 Fed. 401.

¹⁰² *People v. Drain Com. of Wayne County*, 40 Mich. 745.

¹⁰³ *Allen v. Hooper*, 50 Me. 371.

¹⁰⁴ *Nelson v. Smith*, 64 Ill. 394.

¹⁰⁵ *Hoffman v. Nolte*, 127 Mo. 120, 29 S. W. 1006.

¹⁰⁶ *Kinkead, In re*, 3 Biss. (U. S.) 405.

his credit.¹⁰⁷ And where a husband and wife both lived on her land, held as a general estate, the possession of the products was held to be presumptively in him, and corn standing thereon was held to be subject to levy and sale under an execution against him.¹⁰⁸

§ 2257. **Presumptions—Miscellaneous.**—A presumption arises that the residence of the husband is, legally, the domicile of the wife while the marriage relation continues, though they may be living separately and in different states.¹⁰⁹ And it has been held that respective rights of husband and wife in their personal property are determined by the law of the place of the matrimonial domicile, which is presumed to be the domicile of the husband at the time of the marriage.¹¹⁰ It has been held that a presumption of fraud on the second wife does not arise where a man about to marry conveys a reasonable portion of his property to his children by a former wife.¹¹¹ And a voluntary gift of part of her property made by a wife on the eve of marriage is presumed to be without fraud on the marital rights of the intended husband, if he knew of such gift before marriage.¹¹² But it is held that a presumption of fraud on marital rights arises when a woman makes a conveyance during a treaty for marriage, without her intended husband's knowledge.¹¹³ In some jurisdictions there is a presumption that all property held by husband and wife is common property.¹¹⁴ But this presumption is overcome by evidence that the property was purchased wholly with the wife's separate estate.¹¹⁵ In some jurisdictions a presumption arises that all property purchased during the marriage is community

¹⁰⁷ *Hoff v. Koerper*, 103 Pa. 396.

¹⁰⁸ *Moreland v. Myall*, 14 Bush (Ky.) 474.

¹⁰⁹ *Hick v. Hick*, 68 Ky. (5 Bush) 670; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Loker v. Gerald*, 157 Mass. 42, 34 Am. St. 252; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. 328; *Warrender v. Warrender*, 2 Cl. & F. 488; *McClellan v. Carroll*, (Tenn.) 42 S. W. 185; but see, *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. 623.

¹¹⁰ *Parrett v. Palmer*, 8 Ind. App.

356, 35 N. E. 713; see also, *Riddick v. Walsh*, 15 Mo. 519.

¹¹¹ *Kinne v. Webb*, 54 Fed. 34, 4 C. C. A. 170, 12 U. S. App. 137.

¹¹² *Jones v. Cole*, 2 Bailey (S. Car.) 330.

¹¹³ *Kelly v. McGrath*, 70 Ala. 75, 45 Am. R. 75; *Baker v. Jordan*, 73 N. Car. 145; *Waller v. Armistead*, 2 Leigh (Va.) 10, 21 Am. Dec. 594.

¹¹⁴ *Pratt, Succession of*, 12 La. Ann. 457; *Lott v. Keach*, 5 Tex. 394.

¹¹⁵ *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109.

property.¹¹⁶ It has been said that the presumption of law is that the husband is responsible for all articles needed in the support of his family.¹¹⁷ There is a presumption that ordinary wearing apparel and services in making it up are necessities.¹¹⁸ Provisions and articles of household use are presumed to belong to the husband, when he and his wife are living together, and where there is no evidence to the contrary.¹¹⁹ It has also been said that it is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes on her husband because of the marital relation.¹²⁰ In another case it was held that where a husband cultivates his wife's farm, the produce is presumably hers.¹²¹ A marriage settlement remaining in the possession of the vendor does not change its legal effect or raise a presumption that it was abandoned.¹²²

§ 2258. **Questions of law or fact.**—In an action against the husband for goods bought by the wife on credit it is generally a question for the jury whether the goods were necessities.¹²³ Thus, whether a cooking stove is a necessary within the meaning of a statute has been held to be a question of fact for the jury.¹²⁴ So the question whether a sewing machine is a necessary for a wife, in such a sense that the husband can be sued for it, has also been held for the jury.¹²⁵ And whether articles not wholly ornamental, bought for the wife's personal use, are necessities, so as to render the husband liable therefor, is for the jury; and it cannot be ruled as a matter of law that two gold chains, a gold locket and a gold watch are not necessities.¹²⁶ The question whether goods purchased

¹¹⁶ *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *Duruty v. Musachia*, 42 La. Ann. 357, 7 So. 555; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

¹¹⁷ *Strong v. Moul*, 22 N. Y. St. 762, 4 N. Y. S. 299.

¹¹⁸ *Hardenbrook v. Harrison*, 11 Colo. 9, 17 Pac. 72.

¹¹⁹ *Allen v. Eldrige*, 1 Colo. 287.

¹²⁰ *Randall v. Randall*, 37 Mich. 563.

¹²¹ *Scott v. Hudson*, 86 Ind. 286.

¹²² *Templeton v. Twitty*, 83 Tenn. 595, 14 S. W. 435.

¹²³ *Walling v. Hannig*, 73 Tex. 580, 11 S. W. 547; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. 362, 364. But it may be for the court in a clear case, *Phillipson v. Hayter*, L. R. 6 C. P. 41; *Sauter v. Scrutchfield*, 28 Mo. App. 150, 157.

¹²⁴ *Berry v. Henderson*, 102 N. Car. 525, 9 S. E. 455.

¹²⁵ *Willey v. Beach*, 115 Mass. 559.

¹²⁶ *Raynes v. Bennett*, 114 Mass. 424, but diamond earrings have been held not to be necessities; *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. 362.

by a wife while living separate from her husband are necessities, and whether she is justified in separating herself from her husband, have likewise been held questions of fact for the jury.¹²⁷ It is generally a question of fact for the jury whether the credit was given to the wife or the husband.¹²⁸ And whether a wife is the agent of her husband by express or implied authority is generally a question for the jury.¹²⁹ So, whether a certain agreement by a married woman was within the scope of her authority as her husband's agent was held to be one of mixed law and fact.¹³⁰ And whether a married man was his wife's agent in managing a farm, where the proof tended to show that she paid for the labor employed, was held to be a question for the jury.¹³¹ The question whether a wife made a contract for her own benefit or as agent of her husband is also one of fact for the jury.¹³² So, also, the question whether a husband living on his wife's farm and managing the same to some extent is her tenant or servant, has been held to be a question of fact.¹³³ The question whether a wife uniting with her husband in the commission of a crime acted under his coercion, is for the jury.¹³⁴ So, it has been held that any inference of coercion from proximity of a husband to a wife committing a minor offense, is a question of fact.¹³⁵

§ 2259. *Contracts of suretyship.*—Although modern statutes generally remove the disabilities of married women to a great extent, it is nevertheless frequently provided that she shall not enter into any contract of suretyship, and that, if she does such contract as to her shall be void. Whether she is surety or principal is to be determined in most jurisdictions not merely from the form of the contract, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends.¹³⁶ If she did, and the contract is not one of suretyship,

¹²⁷ *Rea v. Durkee*, 25 Ill. 503; see also, *McGrath v. Donnelly*, 181 Pa. St. 549, 551, 20 Atl. 282.

¹²⁸ *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421.

¹²⁹ *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763.

¹³⁰ *Phillips v. Sanchez*, 85 Fla. 187, 17 So. 363.

¹³¹ *Bongard v. Core*, 82 Ill. 19.

¹³² *Hart v. Young*, 1 Lans. (N. Y.) 417.

¹³³ *State v. Hayes*, 59 N. H. 450.

¹³⁴ *State v. Hendricks*, 32 Kans. 559, 4 Pac. 1050.

¹³⁵ *State v. Shee*, 13 R. I. 535.

¹³⁶ *Field v. Campbell*, (Ind.) 72 N. E. 260, 262; *Field v. Noblett*, 154 Ind. 360, 56 N. E. 841; *Harbaugh v. Tanner*, (Ind.) 71 N. E. 145.

it makes no difference what she afterwards did with the money.¹³⁷ And she may estop herself from afterwards claiming that she was merely a surety.¹³⁸ But if the lender of money to her knows, or is chargeable with knowledge that she is borrowing the money and executing the contract not for her own benefit, but as surety, he cannot recover against her on such contract, and no device which is a mere cloak or indirect means of violating the statute will avail to save the transaction and make her liable as a principal.¹³⁹ Under some statutes a married woman may make contracts of suretyship the same as if unmarried, and it has been held that intention to charge her separate property will be presumed;¹⁴⁰ but where she may be held as a surety only when the contract is made on the faith and credit of her separate estate, it has been held that the mere fact that she possesses a separate estate does not show that the contract was made with reference to it;¹⁴¹ and that the burden is upon the plaintiff to show that the contract was made on the faith and credit thereof.¹⁴²

¹³⁷ *Bouvey v. McNeal*, 126 Ind. 541, 544, 26 N. E. 396; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173; *Crisman v. Leonard*, 126 Ind. 202, 203, 204, 25 N. E. 1101; *Johnson v. Pessou*, (La.) 21 So. 177, 178; *Langesford v. Harrison*, (Ala.) 31 So. 24; *Iona Sav. Bank v. Boynton*, 69 N. H. 77, 39 Atl. 522; *Hamil v. American &c. Co.*, (Ala.) 28 So. 558; *American &c. Co. v. Thornton*, 108 Ala. 258, 54 Am. St. 148.

¹³⁸ *Taylor v. Hearn*, 131 Ind. 257, 30 N. E. 201; *Galvin v. Button*, 151 Ind. 1, 49 N. E. 1064; *Tombler v. Reitz*, 134 Ind. 9, 33 N. E. 789; *Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. 396; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173; *Rogers v. Union &c. Co.*, 111 Ind. 343, 12 N. E. 495; *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564; *Till v. Collier*, 27 Ind. App. 333, 340, 61 N. E. 203; *Johnson v. Pessou*, (La.) 21 So. 177; *Temple v. Equitable &c. Co.*, (Ga.) 28 S. E. 232; *City &c. Asso. v. Jones*, (Ga.) 10 S. E. 1079; *Law v. Lips-*

comb, (Ga.) 10 S. E. 226; see also, *Vliet v. Eastburn*, 64 N. J. L. 627, 46 Atl. 735.

¹³⁹ *Ffield v. Campbell*, (Ind.) 72 N. E. 260, 262; *Webb v. John Hancock &c. Co.*, 162 Ind. 616, 69 N. E. 1006; *Long v. Cresson*, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565; *Andrysiak v. Satkoski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286.

¹⁴⁰ *Coats v. Robinson*, 10 Mo. 757; *Kinm v. Weippert*, 46 Mo. 532, 545, 2 Am. 541; see also, *Deering v. Boyle*, 8 Kana. 525, 12 Am. R. 480; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. R. 611; *Bell v. Kellar*, 13 B. Mon. (Ky.) 381; *Hulme v. Tenant*, 1 Bro. C. C. 16, 1 White & T. Lead. Cas. 536; but see, *Post v. Koch*, 30 Fed. 208; *Farrand v. Be-shoar*, 9 Colo. 291; *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503.

¹⁴¹ *Union Stk. Yds. Nat. Bank v. Coffman*, 101 Iowa 594, 70 N. W. 693.

¹⁴² *Grand Island Banking Co. v.*

§ 2260. **Evidence as to necessities.**—No action will lie against a married woman for family necessities, unless it be averred and proved that she has a separate estate.¹⁴³ On the trial of a suit against a husband to recover for necessities furnished to his wife living apart from him without his consent, but because, as she claims, of his cruel and abusive treatment, evidence of the manner in which he treated her before the separation was held admissible.¹⁴⁴ Evidence that a wife living with her husband employed a servant for ordinary domestic service in their family has also been held competent against the husband in an action for such services without showing any express authority from him.¹⁴⁵ In order to charge a husband for necessities sold to his wife it has been held that it must affirmatively appear that the goods were sold on the husband's credit.¹⁴⁶ And in an action for necessities furnished to a wife, the question to whom the credit was given is said to be one of intent, and the controlling issue.¹⁴⁷ In an action against a husband for goods sold to his wife, evidence of a separation between them is usually competent.^{147*} And, in a proper case, evidence to the effect that he abandoned his wife and family, or by his bad treatment forced his wife to leave him, that he left her without sufficient support, and that the article furnished was reasonably necessary and suitable is competent.¹⁴⁸ The husband is bound, under such circumstances at least, for the contracts of his wife for necessities suitable to his degree and station in life, furnished on his credit without proof of assent on his part that she should make such purchase.¹⁴⁹ Where a wife is guilty of adultery and elopes from her husband, he is not, ordinarily, liable thereafter for necessities, but it has been held that the proceedings in a divorce court establishing adultery are not admissible in the absence of a decree.¹⁵⁰ The subject of the burden of proof and presumptions in such cases has already been sufficiently considered in prior sections in this chapter.

Wright, 53 Neb. 574, 583, 74 N. W. 82.

¹⁴³ Childress v. Mann, 33 Ala. 206.

¹⁴⁴ Wilson v. Bishop, 10 Ill. App. 583.

¹⁴⁵ Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308.

¹⁴⁶ Ehrich v. Buckl, 7 Misc. (N. Y.) 118, 27 N. Y. S. 247.

¹⁴⁷ Arnold v. Allen, 9 Daly (N. Y.) 198.

^{147*} Le Boutillier v. Fiske, 47 Hun (N. Y.) 323.

¹⁴⁸ See, Eller v. Crull, 99 Ind. 375; Watkins v. De Armond, 89 Ind. 553.

¹⁴⁹ Hughes v. Chadwick, 6 Ala. 651.

¹⁵⁰ Needham v. Bremner, L. R. 1 C. P. 583, 12 Jur. N. S. 434, 14 L. T. N. S. 437.

§ 2261. **Evidence as to gifts.**—A gift by a wife to her husband may be shown by circumstances.¹⁵¹ Indeed, it is sometimes presumed under rules already stated. But testimony by a husband that his wife gave to him a note, "to use just as any other property," does not necessarily show a gift of the note by her to him.¹⁵² And, in some instances, the courts require very clear and satisfactory proof to establish a gift made by a husband to his wife after marriage.¹⁵³ So, because of the danger of improper influence, it has been held that a gift by a wife to her husband will be closely inspected.¹⁵⁴

§ 2262. **Evidence as to miscellaneous matters.**—It has been held that the presumption arising at common law from the fact that a judgment has been obtained in the name of the husband for an injury to the separate property of the wife, and that he has reduced it to possession, may be overcome by proof that the action was prosecuted at the instance of the wife and for her sole benefit, without any intent on the part of the husband to appropriate the chose in action to his own use.¹⁵⁵ Conversion of the wife's property by the husband is not reduction into possession, but only evidence thereof, liable to be negatived by proof of his declarations and acts when receiving the same.¹⁵⁶ A deed to two persons who are in fact husband and wife creates in them a joint tenancy, though the deed does not describe them as husband and wife, and one claiming by deed from the survivor of the two grantees may properly show by parol that such grantees were husband and wife.¹⁵⁷ But, it has been held that the consent of a married woman to the delivery of a deed executed by her is evinced by her acknowledgment, and that this is the only way known to our law by which the consent of a feme covert can be exhibited.¹⁵⁸

¹⁵¹ *Black v. Black*, 30 N. J. Eq. 215; *McLure v. Lancaster*, 24 S. Car. 273, 58 Am. R. 259.

¹⁵² *Conger v. Nesbitt*, 30 Minn. 436, 15 N. W. 875.

¹⁵³ *George v. Spencer*, 2 Md. Ch. 353; *Jennings v. Davis*, 31 Conn. 134; *Shuttleworth v. Winter*, 55 N. Y. 624; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Keniston v. Keniston*, 56 Vt. 680; *Marshal v. Crutwell*, L. R. 20 Eq. 328; *Mews v. Mews*, 15 Beav. 528.

¹⁵⁴ *Boyd v. De La Montaguie*, 73 N. Y. 498, 29 Am. R. 197; see also, *Golding v. Golding*, 82 Ky. 51; *Rich v. Cockwell*, 9 Ves. Jr. 369; see also, *Patten v. Patten*, 75 Ill. 446.

¹⁵⁵ *Pierson v. Smith*, 9 Ohio St. 554, 75 Am. Dec. 486.

¹⁵⁶ *Moyer*, Appeal of, 77 Pa. St. 482.

¹⁵⁷ *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. 225.

¹⁵⁸ *Devorse v. Snider*, 60 Mo. 235.

§ 2263. **Declarations and admissions.**—A husband's admissions alone are not admissible to prove him agent for his wife.¹⁵⁹ The agency of the one spouse for the other cannot be thus proved by the declarations of the supposed agent.¹⁶⁰ But it may be proved by the direct testimony of either the principal or the agent.¹⁶¹ If a husband has either expressly or impliedly made his wife his agent, her declarations in regard to matters within her authority are admissible evidence against him.¹⁶² And, under many of the statutes a married woman as well as her husband may be estopped, in many instances, by her admissions and conduct upon which she has knowingly induced others to act in good faith on their part.¹⁶³ But the right of one spouse to make admissions binding upon the other is not implied from the mere existence of the marriage relation, and there must be authority either express or implied.¹⁶⁴

¹⁵⁹ *Whitescarver v. Bonney*, 9 Iowa 480. also, *Gault v. Sickles*, 85 Iowa 266, 52 N. W. 206; Vol. I, § 257, n. 108.

¹⁶⁰ *Rowell v. Klien*, 44 Ind. 290; Vol. I, § 257, and numerous authorities cited in note 106. ¹⁶¹ See, *Tombler v. Reitz*, 134 Ind. 9, 33 N. E. 789; *Duckwall v. Kistner*, 136 Ind. 99, 35 N. E. 697; *Lecoll v.*

¹⁶² *Griffin v. Ransdel*, 71 Ind. 440, but the agency cannot always be constituted by parol; *Percifield v. Black*, 132 Ind. 384, 31 N. E. 955. *Armstrong & Co.*, 140 Ind. 256, 39 N. E. 922; *Pierce v. Hower*, 142 Ind. 626, 42 N. E. 223; *Abbott Tr. Ev.* (2d ed.) 210.

¹⁶³ *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; see ¹⁶⁴ Vol. I, § 257, and numerous authorities cited.

CHAPTER CVIII.

INFANTS.

Sec. 2264. Burden of proof—In general. 2265. Burden of proof—As to criminal capacity. 2266. Presumptions—In general. 2267. Presumptions—As to competency. 2268. Presumptions—As to criminal capacity. 2269. Presumptions in cases of tort.	Sec. 2270. Question of law or fact—In general. 2271. Question of law or fact—Competency. 2272. Question of law or fact—Credibility. 2273. Evidence as to age. 2274. Admissions and testimony of infant. 2275. Evidence in general.
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§ 2264. **Burden of proof—In general.**—Infancy is a personal privilege, and the burden of proof rests on the person who sets it up.¹ Thus, the burden is on the defendant to establish affirmatively the defense of infancy.² So, in an action for the price of goods, where defendant pleads infancy, the burden of proof is on him to show that fact.³ And one who alleges the continuance of infancy to defeat a new promise proved against him at a given time must generally prove that his nonage was still continuing at that time.⁴ It has also been held that the burden of proof rests upon the purchaser of an infant's realty, at a sale under order of court, to show that the claims on which the decree was made were claims for which the infant was liable.⁵ When an infant promised, after reaching matur-

¹ *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67; *Shirley v. Hagar*, 3 Blackf. (Ind.) 225; *Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766; *Borthwick v. Carruthers*, 1 Term R. 648; *Jeune v. Ward*, 2 Stark. 289; *Adam-Roth Grocery Co. v. Hopkins* (Ky.) 29 S. W. 293; *Rogers v. De Bardeleben Coal &c. Co.*, 97 Ala. 154, 12 So. 81; *Craig v. Van Bebber*, 100 Mo. 584; see elaborate note in 18 Am. St. 573, 695-699.

² *Klason v. Rieger*, 22 Minn. 59.

³ *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908.

⁴ *Stewart v. Ashley*, 34 Mich. 183; see also, *Hartley v. Wharton*, 11 Ad. & El. 934, 3 P. & D. 539.

⁵ *Edmunds v. Mister*, 58 Miss. 765.

ity, to pay a debt contracted during his infancy when he became able, the burden of proof of showing such ability, by some evidence relating to the infant's property or income, is on the plaintiff in an action to recover the debt.⁶ So, in an action against an infant for necessities, the burden of proof is on the plaintiff to establish the fact that the articles furnished were necessities.⁷ And in an action on a contract made with one when a minor, the burden of proof is on the plaintiff, who replies a ratification after the defendant became of age, to prove the ratification,⁸ where the defendant takes issue thereon; but it is held that the defendant, in such case, must show his infancy at the time for the reason that the presumption is that he was of proper age, and that it is a matter peculiarly within his own knowledge.⁹ So, in actions against minors for torts, the burden of establishing that a tort was committed by the minor is on the plaintiff.

§ 2265. **Burden of proof—As to criminal capacity.**—Under the common law an infant between the ages of seven and fourteen is *prima facie* presumed to be incapable of committing crime, and the burden of proof is upon the prosecution to establish his criminal capacity.¹⁰ In some jurisdictions, however, this age limit is changed by statute,¹¹ and in many instances the matter depends very much upon evidence of capacity in the particular case. But, where the ordinary presumption of criminal capacity exists, if an infant is over fourteen years of age, and he sets up his incapacity as a defense to a criminal prosecution, he has the burden of producing evidence to establish such fact.¹²

⁶ *Kendrick v. Neiss*, 17 Colo. 506, 30 Pac. 245.

⁷ *Thrall v. Wright*, 38 Vt. 495; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Ive v. Chester*, Cro. Jac. 560.

⁸ See, *Fetrow v. Wiseman*, 40 Ind. 148, 157, to the effect that it is affirmative matter which the plaintiff must reply in order to introduce evidence of ratification.

⁹ *Borthwick v. Carruthers*, 1 Term R. 648; *Hartley v. Wharton*, 11 Ad. & E. 934; *Bay v. Gunn*, 1 Denio (N.

Y.) 108; *Bigelow v. Grannis*, 4 Hill (N. Y.) 206.

¹⁰ *Allen v. United States*, 150 U. S. 551, 14 Sup. Ct. 196; *Hellman v. Commonwealth*, 84 Ky. 457, 4 Am. St. 207; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Law v. Commonwealth*, 75 Va. 385, 40 Am. R. 750; *Harrison v. State*, (Ark.) 78 S. W. 763.

¹¹ Penal Code (Minn.), § 17; Penal Code (N. Y.), § 19; see also, Vol. I, § 125.

¹² *Irby v. State*, 32 Ga. 496; *State v. Kluseman*, 53 Minn. 541; *State v. Handy*, 4 Harr. (Del.) 566.

§ 2266. **Presumptions—In general.**—The presumption of infancy is never indulged in ordinary cases; on the contrary, the law generally presumes that all parties to suits are adults, unless the contrary is made to appear.¹³ And it has been held that where nothing appears to the contrary, persons entering into an agreement will be presumed to be adults and competent to contract.¹⁴ So, it has been held that though it be shown that when an action was commenced the plaintiff was an infant, there is no presumption, without more that he continues such.¹⁵ It has been held that a presumption of the acceptance of a gratuitous deed arises in the case of an infant.¹⁶ So, also, if a donation be to a minor, and it is to his advantage to accept, the law accepts it for him, that is, an acceptance is presumed,¹⁷ and no formal acceptance of a donation is necessary in the case of an infant.¹⁸ A presumption may arise as to the ratification of a conveyance made to or by an infant in case the infant after reaching his majority does acts in accord with the transactions. Thus, a ratification is presumed where one continues to live on land, which he purchased as a minor, after becoming of age, and pays part of the purchase money thereon.¹⁹ So, an irregularity in a transfer of a minor's property may be presumed to be ratified after his majority, if he has long continued silent and inactive.²⁰ But as long as an infant is under disability, lapse of time furnishes no presumption against him, and does not operate prejudicially to his rights.²¹ Domicile of the parents is presumed to be the domicile of their minor children.²² And it has also been held that they will not be presumed to have been emancipated while under age.²³

§ 2267. **Presumptions—As to competency.**—The rule at common law is that there is a *prima facie* presumption that one who is over

¹³ Foltz v. Wert, 103 Ind. 404, 2 N. E. 950.

¹⁴ Foltz v. Wert, 103 Ind. 404, 2 N. E. 950.

¹⁵ Germain v. Sheehan, 25 Minn. 338.

¹⁶ Gaylord v. Respass, 92 N. Car. 553.

¹⁷ De Levillain v. Evans, 39 Cal. 120.

¹⁸ Hoboard v. Copley, 10 La. Ann. 504.

¹⁹ Dewey v. Burbank, 77 N. Car. 259.

²⁰ Jamison v. Smith, 35 La. Ann. 609.

²¹ Calhoon v. Baird, 10 Ky. 168; Gaugh v. Henderson, 39 Tenn. 628.

²² Warren v. Hofer, 13 Ind. 167; Wheeler v. Burrow, 18 Ind. 14; Henning, Estate of, 128 Cal. 214, 60 Pac. 762, 79 Am. St. 43, and note.

²³ Oxford v. Rumney, 3 N. H. 331; Fitzwilliam v. Troy, 6 N. H. 166.

fourteen years of age has common discretion and understanding.²⁴ And it has been held that a witness over fourteen years of age will not be examined as to his capacity in this respect, unless some reason to the contrary appears.²⁵ But under the age of fourteen at common law no presumption as to competency arises.²⁶ In some jurisdictions the age limit as fixed by the common law is changed by statute.²⁷ Thus in some jurisdictions under statutes it is held that children over ten years of age are presumed competent,²⁸ and under ten are presumed incompetent, but may testify when they understand the obligation of an oath.²⁹

§ 2268. Presumptions—As to criminal capacity.—An infant under seven years of age is conclusively presumed, at common law, to be incapable of committing a criminal act. Between the ages of seven and fourteen, with a few exceptions, there is a *prima facie* presumption that the infant lacks discretion or criminal capacity. After the age of fourteen the presumption is that the infant has criminal capacity and this presumption is generally sufficient, if not met by counter proof, for the jury to find the fact. It should be noted, however, that it is the general rule at common law that a female under the age of ten years is conclusively presumed to be incapable of consenting to sexual intercourse, and a male under fourteen is conclusively presumed to be incapable of committing rape, but these matters are now regulated by statute in some jurisdictions.³⁰

§ 2269. Presumptions in cases of tort.—As elsewhere shown, the more or less artificial and arbitrary presumptions that generally prevail as to criminal capacity are not, ordinarily, extended to civil cases of mere tort, although there is some conflict upon the subject.³¹

²⁴ *Blackwell v. State*, 11 Ind. 196; *Oliver v. Commonwealth*, 77 Va. 590; *People v. Bernal*, 10 Cal. 67; *Brown v. State*, 2 Tex. App. 115.

²⁵ *Den v. Vancleve*, 5 N. J. L. 680; see, however, Vol. II, §§ 766, 767.

²⁶ *State v. Richie*, 48 La. Ann. 327, 26 Am. R. 100; *Brown v. State*, 2 Tex. App. 115; *Oliver v. Commonwealth*, 77 Va. 590; *Brashears v. Western U. Tel. Co.*, 45 Mo. App. 433.

²⁷ *Burns' R. S. (Ind.)* 1881, § 497; *Missouri R. S.* 1889, § 8925; see also, ante, Vol. II, § 767.

²⁸ *Holmes v. State*, 88 Ind. 145; *Duncan v. Welty*, 20 Ind. 44.

²⁹ *Blackwell v. State*, 11 Ind. 196; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. 889.

³⁰ Vol. I, § 125.

³¹ Vol. I, § 125.

It is not, ordinarily, to be presumed that an infant, or at least one of tender years, will have the discretion and exercise all the care of an adult, and the law does not, ordinarily at least, hold an infant to the exercise of such discretion and care, but considers his years and capacity. So, those who discover a child in danger are not entitled to assume that it will give heed and exercise the care of an adult even though such a presumption might be indulged in the case of an adult. Thus, it has frequently been held that there is, ordinarily, no presumption that a young child upon a railroad track will heed signals of danger and get out of the way or avoid it in time, and that those who see the child in danger have no right to act on any such presumption or assumption.³²

§ 2270. **Question of law or fact—In general.**—What is a reasonable time for an infant, after coming of age, to disaffirm a deed, is a question for the jury.³³ Thus, it has been held that what is a reasonable time for disaffirmance of his voidable conveyance by an infant is a question for the jury, and depends upon the circumstances of each particular case.³⁴ And whether an infant feme covert has delayed unreasonably, after reaching her majority, to disaffirm a deed, is a question of fact.³⁵ And whether the contract of a minor was ratified by his silence for two years after majority has been held to be a question for the jury.³⁶ So, generally, especially where the question of ratification depends upon a variety of circumstances to be passed on as matters of fact it is for the jury to determine under the instructions of the court.³⁷ What are necessities in law, or, in other words, what are the general classes for which an infant may

³² *Kansas &c. R. Co. v. Whipple*, 39 Kans. 531, 18 Pac. 730; *Isabel v. Hannibal &c. R. Co.*, 60 Mo. 475; *Philadelphia &c. R. Co. v. Spearen*, 47 Pa. St. 300; *Meeks v. Southern &c. R. Co.*, 56 Cal. 513; see also, 2 *Elcott Railroads*, §§ 1253, 1257, 1259-1262.

³³ *Wiley v. Wilson*, 77 Ind. 596; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; but see, *Weaver v. Carpenter*, 42 Iowa 343; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 472, 18 N. W. 284.

³⁴ *Scott v. Buchanan*, 30 Tenn. 468.

³⁵ *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100.

³⁶ *Tyler v. Gallop's Estate*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. 336. In some jurisdictions, however, mere silence cannot, ordinarily, amount to a ratification. See for review of conflicting authorities, *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. 675-677.

³⁷ *State v. Plainsted*, 43 N. H. 413; *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

be held liable as necessities is generally a question of law for the court,³⁸ but whether a particular article is suitable to the condition and estate of the particular infant and similar matters depending upon the facts and circumstances of the particular case are questions of fact for the jury, under proper instructions.³⁹

§ 2271. **Question of law or fact—Competency.**—When no presumption arises that an infant is competent to testify it is a question for the court to determine whether or not such witness is competent.⁴⁰ And it has been held that the court should carry the investigation to such an extent as to make the competency of the infant apparent.⁴¹ This subject, however, is sufficiently treated elsewhere.⁴²

§ 2272. **Question of law or fact.—Credibility.**—The question as to how much credit shall be given to an infant is a question of fact to be decided by the jury. In deciding this they should, or at least may, take into consideration the age, the understanding and “the sense of accountability for moral conduct.”⁴³

§ 2273. **Evidence as to age.**—As elsewhere shown, opinion evidence of an ordinary witness as to the age of a person is admissible in a proper case,⁴⁴ and this doctrine is applied to cases in which the question is as to whether one was an infant or not as well as in other cases.⁴⁵ In some jurisdictions it is also held that the jury

* *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. 652, note.

* *Stanton v. Willson's Exr.*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 42 Am. St. 665, mixed question of law and fact; *Crafts v. Carr*, 24 R. I. 397, 96 Am. St. 721, and note on page 732; see also, *Bent v. Manning*, 10 Vt. 225; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

* *State v. Richie*, 28 La. Ann. 327, 26 Am. R. 100; *Carter v. State*, 63 Ala. 52, 35 Am. R. 4.

* *Murphy v. State*, 36 Tex. Cr. App. 24.

* Vol. II, §§ 766-771.

* *McGuire v. People*, 44 Mich. 286, 38 Am. R. 265; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

* Vol. I, § 677, n. 44.

* *Benson v. McFadden*, 50 Ind. 431; *State v. Grubb*, 55 Kans. 578, 41 Pac. 951; *Garner v. State*, 28 Tex. App. 561, 13 S. W. 1004; *Jones v. State*, 32 Tex. Cr. App. 108, 22 S. W. 149, his appearance is usually required to be described first, however, as far as it can be intelligently

may judge of the age from the child's appearance before them,⁴⁶ and in a recent case in New York it was held that where the defense of infancy depended on the defendant's uncorroborated testimony the jurors were authorized to consider his personal appearance, and, if it was such as to render his nonage at the time of the transaction in question improbable, they could disregard his testimony as to his age.⁴⁷ So, as elsewhere shown, age may be proved by entries in the family Bible, registers of birth and family tradition in proper cases.⁴⁸

§ 2274. **Admissions and testimony of infant.**—The admissions of a party made during nonage are evidence against him, in a proper case, and a promise after majority "to pay what I owe," when connected with such admission, is sufficient.⁴⁹ Thus, in an action to recover money lent to an infant his admissions of the amount received by him, though made during his infancy, are admissible as evidence of the sum loaned.⁵⁰ And it has frequently been held that the acts and admissions of a minor relative to the subject matter of his suit are admissible in evidence against him, although his infancy may be shown to lessen their effect, and the weight to be attached to them must depend upon the circumstances.⁵¹ But, in an action by an infant by guardian ad litem, a letter written by such guardian to defendant is not admissible.⁵² An infant may testify, in a proper case, as to his age at the time of a certain transaction. Thus, in an action for goods sold and delivered, to which the defense is infancy, the defendant may testify that he was of a certain age at the time of the sale.⁵³

done; *Ehlert v. State*, 93 Ind. 76; *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167; but compare, *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. 844.

⁴⁶ Vol. II, §§ 1221, 1234; *State v. Arnold*, 13 Ired. L. (N. Car.) 184; see also, Vol. I, § 166; *Stephenson v. State*, 28 Ind. 272; *Bird v. State*, 104 Ind. 384.

⁴⁷ *Waterman v. Waterman*, 85 N. Y. S. 377, so his own admissions as to his age have been held competent against him; *State v. Joest*, 51 Ind. 287.

⁴⁸ Vol. I §§ 317, 373, 375, 377.

⁴⁹ *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169, 3 Abb. Prac. 111, so his admissions and declarations as to his age are admissible against him; *State v. Joest*, 51 Ind. 287, and he may testify as to his own age; *State v. Best*, 108 N. Car. 747, 12 S. E. 907.

⁵⁰ *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169, 3 Abb. Pr. (N. Y.) 111.

⁵¹ *Hamblett v. Hamblett*, 6 N. H. 333.

⁵² *Chipman v. Union Pac. R. Co.*, 12 Utah 68, 41 Pac. 562.

⁵³ *Hill v. Eldridge*, 126 Mass. 234.

§ 2275. **Evidence in general.**—In the federal court it has been decided that infancy may be given in evidence, in an action of trover, on the plea of not guilty, not as a bar, but to show the nature of the act which is supposed to be a conversion.⁵⁴ In a suit by a minor for wages for labor defendant offered to prove that he had furnished a home, schooling, clothing and washing to the minor as a return for the labor, and in accordance with an agreement between defendant and an older brother of the minor. It was held that this evidence was admissible, for if the minor knew of the agreement and acted under it he thereby gave his assent to, and was bound by, it.⁵⁵ Evidence of a new consideration moving to a minor who has reached his majority has been held unnecessary in order to hold him to his original agreement when he has made a promise after reaching his majority. Thus, where a minor purchased lands and two of his friends of full age gave their joint note for the purchase money which the minor promised he would sign and pay on arrival at full age, and afterwards having come to full age, by a memorandum on the bottom of the note he acknowledged himself a co-surety. In an action by a payee against him as an original promisor it was held that the promise was for the defendant's debt, and proof of new consideration was unnecessary.⁵⁶ It has been held where the only evidence in support of a defense of infancy is that of the defendant alone, although it is uncontradicted on that point, but contradicted on other material facts, the jury may properly deem defendant's testimony insufficient to support his plea of infancy.⁵⁷ When a question arises as to the capacity of an infant to entertain a criminal intent it would seem that no witness, and certainly no ordinary witness, should be heard to testify in so many words that he did or did not have such capacity, but it has been held that witnesses who are acquainted with him may testify that he was or was not bright or of quick mind.⁵⁸ It has also been held that the testimony of experts may be received⁵⁹ to prove capacity

⁵⁴ *Vasse v. Smith*, 6 Cranch (U. S.) 226.

⁵⁵ *Squier v. Hydliff*, 9 Mich. 274.

⁵⁶ *Thompson v. Linscott*, 2 Me. 186, 11 Am. Dec. 57.

⁵⁷ *Klason v. Rieger*, 22 Minn. 59.

⁵⁸ *Martin v. State*, 90 Ala. 602, 24 Am. St. 844.

⁵⁹ *State v. Nickleson*, 45 La. Ann. 1172, 14 So. 134, but the question in this case was as to the intelligence of the accused, and it does not appear that the witness was asked to express an opinion upon the exact point of mental capacity to entertain a criminal intent, al-

for committing crimes. And circumstantial evidence is admissible on such question.⁶⁰

though the court referred to opinions as to insanity as being analogous. (Mass.) 380; *State v. Handy*, 4 Harr. (Del.) 566; see also, *Carr v. State*, 24 Tex. App. 562, 5 Am. St.

⁶⁰ *Commonwealth v. Green*, 2 Pick. 905, and note.

CHAPTER CIX.

INSANITY.

Sec.	Sec.
2276. Presumptions.	2284. Letters and diaries.
2277. Burden of proof.	2285. Nature of act in question as evidence of insanity.
2278. Question of law or fact.	2286. Absence of motive as evidence of insanity.
2279. Inquisition and records as evidence on question of insanity.	2287. Suicide as evidence of insanity.
2280. Conduct and appearance as evidence of insanity.	2288. Evidence of insanity of ancestors.
2281. Insanity at time in question—Evidence as to insanity at other times.	2289. Reputation as evidence of insanity.
2282. Evidence of conduct in other matters and at other times.	2290. Opinion evidence—Experts.
2283. Instruments executed by party claimed to be insane.	2291. Declarations.

§ 2276. **Presumptions.**—The general rule, as elsewhere shown, in both civil and criminal cases, is that all persons who have reached the age of discretion are presumed to be sane until the contrary is shown.¹ But when permanent or habitual insanity is once established it is presumed to continue; and it is said in many cases that the party who would take advantage of the fact of restoration to a sane condition or of a lucid interval of reason, must prove it.² It is not

¹ Vol. I, § 126, and numerous authorities there cited.

² *Attorney-General v. Parnter*, 3 Bro. (U. S.) 441; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Stevens v. Van-cleve*, 4 Wash. (U. S.) 262; *Hoge v. Fisher, Pet.* (U. S.) 163; *Pike v. Pike*, 104 Ala. 642, 16 So. 689; *Saxon v. Whitaker*, 30 Ala. 237; *McDaniel v. Crosby*, 19 Ark. 533, 545; *People v. Francis*, 38 Cal. 183; *Duffield v.*

Robeson, 2 Harr. (Del.) 375; *Armstrong v. State*, 30 Fla. 170, 11 So. 618; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Emery v. Hoyt*, 46 Ill. 258; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Rush v. Megee*, 36 Ind. 69; *Wade v. State*, 37 Ind. 180; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431; *State v. Reddick*, 7 Kans. 143; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec.

necessary, however, to show that the person has been restored to the full possession of his former mental vigor. The test of his mental capacity is the same as if he had never been insane, and a comparison of his present with his former mental strength is generally irrelevant or at least of no use.³ And the rule that where insanity is once shown it is presumed to continue, does not apply when it is merely temporary in its nature.⁴

§ 2277. **Burden of proof.**—As sanity, rather than insanity, is presumed, the burden of proving insanity is often said to be upon the party asserting such insanity.⁵ Thus, the burden of proving

701; *Weston v. Higgins*, 40 Me. 102; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Taylor v. Creswell*, 45 Md. 422; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Mullins v. Cottrell*, 41 Miss. 291; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *Pettes v. Bingham*, 10 N. H. 514; *Goble v. Grant*, 3 N. J. Eq. 629; *State v. Spencer*, 21 N. J. L. 196; *Stewart v. Lispenard*, 26 Wend. (N. Y.) 255, 313; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Ballew v. Clark*, 2 Ired. L. (N. Car.) 23; *Dornick v. Reichenback*, 10 S. & R. (Pa.) 84; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Jenckes v. Probate Ct.*, 2 R. I. 255; *Kinloch v. Palmer*, 1 Mill (S. Car.) 216; *Leache v. State*, 22 Tex. App. 279, 58 Am. R. 638, 3 S. W. 539; *Smith v. State*, 22 Tex. App. 316, 3 S. W. 684; *Anderson v. Cranmer*, 11 W. Va. 562; *Ripley v. Babcock*, 13 Wis. 425; see also, Vol. I, § 126.

³ *Hall v. Warren*, 9 Ves. Jr. 605; *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y.) 207; *McMasters v. Blair*, 29 Pa. St. 298; *Boyd v. Eby*, 8 Watts (Pa.) 66.

⁴ *Brogden v. Brown*, 2 Add. Ecc. 441; *Legeyt v. O'Brien*, Milw. (Ir.) 325; *Hall v. Unger*, 4 Sawy. (U. S.) 672; *United States v. McGlue*, 1

Curt. (U. S.) 1; *Ford v. State*, 71 Ala. 385; *People v. Francis*, 38 Cal. 183; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Armstrong v. State*, 30 Fla. 170, 11 So. 618; *Brown v. Rigglin*, 94 Ill. 560; *Castor v. Davis*, 120 Ind. 231, 22 N. E. 110; *Raymond v. Wathen*, 142 Ind. 367, 371, 41 N. E. 815; *State v. Reddick*, 7 Kans. 143; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Halley v. Webster*, 21 Me. 461; *Turner v. Rusk*, 53 Md. 65; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *Ford v. State*, 73 Miss. 734, 19 So. 665; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *State v. Sewell*, 3 Jones L. (N. Car.) 243; *McMasters v. Blair*, 29 Pa. St. 298; *Puryear v. Reese*, 6 Coldw. (Tenn.) 21; *Leache v. State*, 22 Tex. App. 279, 38 Am. R. 638, 3 S. W. 539; *Manley v. Staples*, 65 Vt. 370, 26 Atl. 630; *Burton v. Scott*, 3 Rand. (Va.) 399; *State v. Wilner*, 40 Wis. 304. Though, it does not, ordinarily, apply where the condition is temporarily caused by drunkenness, a violent disease, or the like. Vol. I, § 126, n. 291; see, *Ford v. State*, 73 Miss. 734, 19 So. 665, and an exhaustive note in 35 L. R. A. 117 et seq.

⁵ *Paulus v. Reed*, 121 Iowa 224, 96 N. W. 757; *Perkins v. Perkins*, 39

insanity at the time of a conveyance has been held to be upon the guardian in an action to set aside a conveyance by his ward on the ground that the latter was insane at the time he made the conveyance.⁶ But the burden of showing that a conveyance by an insane person was made during a lucid interval, has been held to be upon the party claiming under the conveyance.⁷ It is doubtless true that in one sense the burden is ordinarily upon the party asserting insanity. As the presumption of sanity exists, in the absence of anything to the contrary, the burden of producing or going forward with evidence to show insanity is upon the party asserting it; but, under what seems to us to be the better rule, it does not necessarily follow that the presumption of sanity is to be given weight as evidence, in addition to permitting it to perform the ordinary office of a presumption, so as to require the party asserting insanity to establish it by preponderance of the evidence and relieve the other party of the burden of ultimately establishing his case if that burden otherwise rests upon him. Attention has elsewhere been called to the conflicting views upon this subject in criminal cases, and what is regarded as the better rule is there stated.⁸ But the numerical weight of authority is, perhaps, in favor of the rule which places the burden upon the accused to establish insanity by a preponderance of the

N. H. 163; *Egbert v. Egbert*, 78 Pa. St. 326; *Yardley v. Cuthertson*, 108 Pa. St. 395, 1 Atl. 765; *State v. Brown*, 12 Minn. 538; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 158; *Weed v. Mutual Life Ins. Co.*, 70 N. Y. 561; *Myatt v. Walker*, 44 Ill. 485; *Cotton v. Ulmer*, 45 Ala. 378; *Lilly v. Waggoner*, 27 Ill. 395; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500; *Howe v. Howe*, 99 Mass. 88; *Achey v. Stephens*, 8 Ind. 411; *Reg. v. Layton*, 4 Cox Cr. Cas. 149; *Sutton v. Sadler*, 3 C. B. N. S. 87, and authorities cited in Vol. I, § 126, n. 293. The rule, however, varies in different jurisdictions, at least as to formal proof, in probating wills.

⁶ *Paulus v. Reed*, 121 Iowa 224, 96 N. W. 757; see also, *Saxon v. Whit-*

aker, 30 Ala. 237; *First Nat. Bank v. Wirebach*, 106 Pa. St. 37; *Farrell v. Brennan*, 32 Mo. 328.

⁷ *Gingrich v. Rogers*, (Neb.) 96 N. W. 156; *Rogers v. Walker*, 6 Pa. St. 371; *Gangwere's Estate*, 14 Pa. St. 417; *Achey v. Stephens*, 8 Ind. 411, and cases cited in the second note to the last preceding section. Statements of a lunatic made after the appointment of guardian or committee were held inadmissible in *Hottle v. Weaver*, 206 Pa. St. 87, 55 Atl. 838, there being no offer to prove that they were made during a lucid interval.

⁸ Vol. I, §§ 91-93, 126, and numerous authorities cited in note 294, p. 181; see also, *Knights v. State*, 58 Neb. 225, 78 N. W. 508, and note in 76 Am. St. 83-97.

§ 2279. Inquisition and records as evidence on question of sanity.

In collateral proceedings a finding of lunacy upon an inquisition which has not been superseded is presumptive though not, ordinarily, conclusive evidence of insanity.¹⁶ When the record of such an inquisition is offered in evidence in another proceeding it is generally held that its validity is not open to collateral attack.¹⁷ So, where a transaction is overreached by the finding of the jury in lunacy proceedings, that is, where the finding is after the time in question, but retrospectively includes it, it is presumptive but not conclusive evidence of insanity at the time of such transaction.¹⁸ And where there has been an inquisition, and appointment of a guardian or committee, or, in other words, after office found, contracts of the lunatic thereafter are generally held to be void, and it may be said in such cases that the lunacy record, so long as it remains in force, is conclusive evidence of incapacity.¹⁹ But an order made on ex

177, 29 N. E. 380; *Kelly v. Miller*, 39 Miss. 17; *Van Zandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169.

¹⁶ *Cooke v. Turner*, 15 Sim. 611; *Thomas v. Hatch*, 3 Sumn. (U. S.) 170; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *White v. Palmer*, 4 Mass. 147; *Hunt v. Hunt*, 13 N. J. Eq. 161; *Hill v. Day*, 34 N. J. Eq. 150; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. 386, 22 N. E. 446; *Christmas v. Mitchell*, 3 Ired. Eq. (N. Car.) 535; *Noel v. Karper*, 53 Pa. St. 97; *Hamilton v. Hamilton*, 10 R. I. 538; *M'Cright v. Aiken*, Rice L. (S. Car.) 56; *Herndon v. Vick*, 18 Tex. Civ. App. 582, 583, 45 S. W. 852; *Shumway v. Shumway*, 2 Vt. 339; *Blaisdell v. Holmes*, 48 Vt. 492; *Gangwere's Estate*, In re, 14 Pa. St. 417, 53 Am. Dec. 554, and note; see also, *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, and note in 47 Am. Dec. 474.

¹⁷ *Gates v. Carpenter*, 43 Iowa 152; *Gillespie v. Hauenstein*, 72 Miss. 838, 17 So. 602; *Dutcher v. Hill*, 29 Mo. 271, 274; *Crow v. Meyersleck*, 88 Mo. 411; *Cook v. Cook*, 53 Barb. (N.

Y.) 180; *Dodge v. Cole*, 97 Ill. 333, 37 Am. R. 111.

¹⁸ *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. 386; *Banker v. Banker*, 63 N. Y. 409, 413; *Portsmouth v. Portsmouth*, 1 Hag. Ecc. 355; *Titcomb v. Vantyle*, 84 Ill. 371; *Wall v. Hill*, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; *Breed v. Pratt*, 13 Pick. (Mass.) 115; *L'Amoureux v. Crosby*, 2 Paige Ch. (N. Y.) 422, 22 Am. Dec. 655; *Johnson v. Kincade*, 2 Ired. Eq. (N. Car.) 470; *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. R. 24; *Noel v. Karper*, 53 Pa. St. 97; *Knox v. Knox*, 30 S. Car. 377, 9 S. E. 353; *Hughes v. Hughes*, 2 Munf. (Va.) 209.

¹⁹ *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. 386, 388, also giving history of lunacy inquisitions; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Pearl v. M'Dowell*, 3 J. J. Marsh. (Ky.) 658; *Elston v. Jasper*, 45 Tex. 409; *American Trust Co. v. Boone*, 102 Ga. 202, 29 S. E. 182; *McCormick v. Littler*, 85 Ill. 62, 28 Am. R. 610; *Wait v. Maxwell*, 5 Pick. (Mass.)

parte proceedings by a statutory commission, or the like, committing a person to a lunatic asylum is not admissible to prove such person's insanity, at least where his contractual capacity is in issue.²⁰ Yet, where one was sent to an asylum after a regular trial of the question of his sanity, the record of that trial was held to be competent evidence on the subject in a subsequent prosecution for crime,²¹ but the order of a statutory commission declaring a person insane and entitled to admission in the asylum for the insane is not conclusive; and the state, in a criminal prosecution may show by proper evidence that he was sane both before and after his admission to the asylum.²² Such a statutory proceeding is said to be very different from an inquisition of lunacy involving a matter of public interest and fixing by a judicial proceeding the status of the party as to all the world; and in a recent case the ex parte proceedings of such a commission finding that the accused was not insane, but at times feigned insanity, were held inadmissible against such accused in a criminal prosecution.²³ It has been held, however, that the official records of the asylum or hospital are competent evidence on the question of the mental condition of a patient who has been confined in such institution.²⁴

§ 2280. **Conduct and appearance as evidence of insanity.**—The language and conduct and even the appearance and general health of a person whose insanity is in question may be considered, when they throw light upon the subject, in connection with other circumstances in the case.²⁵ It has been said that in determining the mental

217, 16 Am. Dec. 391; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Redden v. Baker*, 86 Ind. 191; *Dan v. Brown*, 4 Cow. (N. Y.) 483, note in, 15 Am. Dec. 398; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, and note in 71 Am. St. 426.

²⁰ *Leggate v. Clark*, 111 Mass. 308; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. 529; *Topeka Water Supply Co. v. Root*, 56 Kans. 187, 42 Pac. 715; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276; *Pfleuger v. State*, 46 Neb. 492, 64 N. W. 1094.

²¹ *Wheeler v. State*, 34 Ohio St. 394, 32 Am. R. 372.

²² *Goodwin v. State*, 96 Ind. 550, and in this case and the case cited in the last preceding note, it was said that such evidence, even if competent, did not necessarily make a prima facie case.

²³ *Naanes v. State*, 143 Ind. 299, 303, 304, 305, 42 N. E. 299; see also, *Leggate v. Clark*, 111 Mass. 308; *Goodwin v. State*, 96 Ind. 550, 564; *Pfleuger v. State*, 46 Neb. 493, 64 N. W. 1094.

²⁴ *Townsend v. Pepperell*, 99 Mass. 40; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596.

capacity of a person, his substantial business transactions are of greater weight than his foolish sayings and doings unconnected with business;²⁶ but his irrational acts and beliefs may generally be shown as circumstances to be considered in connection with other evidence in the case.²⁷ The defendant may generally prove not only irrational acts, conduct and delusions, but facts which show them to be such or which account for them and reveal an adequate cause for mental aberration.²⁸ But evidence that a cause existed which might tend to produce insanity has been held not to be sufficient of itself to prove insanity.²⁹ "If a mild, quiet, amiable and modest man should suddenly become irritable, harsh, suspicious, obscene, and profane, evidence of such a revolution of temperament and character would be admissible as tending to show mental derangement."³⁰ But mere irritability of temper and excitability of disposition, without more, do not constitute insanity, nor are such peculiarities of themselves evidence of insanity."³¹ Nor are depravity and abandoned habits of themselves evidence of insanity.³² A person may make improvident bargains or be unthrifty or unsuccessful or even reckless in business, without being of unsound mind, and such facts do not of themselves prove insanity. But evidence thereof may be admissible in many cases in connection with other facts and circumstances tend-

²⁶ *Clinton v. Estes*, 20 Ark. 216; *Halley v. Webster*, 21 Me. 461; *Doud v. Hall*, 8 Allen (Mass.) 410; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Commonwealth v. Buccleri*, 153 Pa. St. 535, 26 Atl. 228; *Irish v. Smith*, 8 S. & R. (Pa.) 573, 11 Am. Dec. 648; *McLeod v. State*, 31 Tex. Cr. App. 331, 20 S. W. 749; *Adams v. State*, 34 Tex. Cr. App. 470, 31 S. W. 372; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Daniel v. Daniel*, 39 Pa. St. 191; see also, *Yorke, In re*, 185 Pa. St. 61, 63, 39 Atl. 1119; *Wilson v. Mitchell*, 101 Pa. St. 495; Vol. I, § 166.

²⁷ *Turner v. Hand*, 3 Wall. Jr. (U. S.) 88; *Hamilton v. Hamilton*, 10 R. I. 538; *McGinnis v. Kempsey*, 27 Mich. 363.

²⁸ *Smith's Case*, 22 Pa. Co. Ct. 487, 489; *Florey v. Florey*, 24 Ala. 241; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Rush v. Megee*, 36 Ind. 69.

²⁹ *People v. Wood*, 126 N. Y. 249, 27 N. E. 362; *French v. State*, 93 Wis. 325, 67 N. W. 706; *People v. Osmond*, 138 N. Y. 80, 33 N. E. 739; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118.

³⁰ *Sawyer v. State*, 35 Ind. 80.

³¹ *Conely v. McDonald*, 40 Mich. 150; *Bitner v. Bitner*, 65 Pa. St. 347.

³² 16 Am. & Eng. Ency. of Law 611; *Willis v. People*, 32 N. Y. 715; see, however, *Boswell v. State*, 63 Ala. 307, 35 Am. R. 20; *Brown v. Ward*, 53 Md. 376, 36 Am. R. 422.

³³ *Hill v. Hill*, 27 N. J. Eq. 214.

ing to show insanity,³³ and shrewdness in trade and general success in business would often tend to show or to rebut inconclusive testimony of mental unsoundness, unless the act in question was influenced by some delusion. Evidence of one's religious beliefs or opinions regarding the existence of rewards and punishments in a future state has been held inadmissible to prove his insanity.³⁴ And a general belief in spiritualism or witchcraft has been held not to be evidence of a want of mental capacity;³⁵ but it might be competent, in some instances, in connection with other evidence, and an insane delusion that one's acts are directed by the spirit of some departed friend and may be sufficient to avoid acts done under its influence.³⁶

§ 2281. **Insanity at time in question—Evidence as to insanity at other times.**—The question to be decided is usually as to the mental condition of the person whose sanity is in issue at the very time of doing the act under investigation.³⁷ But in order to ascertain this it is generally proper to receive evidence of the condition of his mind for a reasonable period both before and after that time, especially where it is claimed that his disorder is of a continuing or permanent nature in connection with other facts and circumstances of the case.³⁸ "And where a party has put in issue his sanity at a

³³ 1 Beck Med. Jur. 745; Carmichael, In re, 36 Ala. 514; Henry v. Fine, 23 Ark. 417; Kenworthy v. Williams, 5 Ind. 375; Hall v. Hall, 17 Pick. (Mass.) 373; Noel v. Karper, 53 Pa. St. 97.

³⁴ Gass v. Gass, 3 Humph. (Tenn.) 277, 284; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; see also, Williams v. Williams, 90 Ky. 28, 13 S. W. 250; Schouler Wills (2d ed.), § 166.

³⁵ Turner v. Hand, 3 Wall. Jr. (U. S.) 88; Brown v. Ward, 53 Md. 376, 36 Am. R. 422; Beach, Matter of, 23 App. Div. (N. Y.) 411; Addington v. Wilson, 5 Ind. 137.

³⁶ Robinson v. Adams, 62 Me. 369, 16 Am. R. 473; Matter of Beach, 23 App. Div. (N. Y.) 411.

³⁷ Hadfield Case, 27 How. St. Tr.

1281; Reg. v. Renshaw, 11 Jur. 615; Jones v. State, 13 Ala. 153; People v. Schmitt, 106 Cal. 48, 39 Pac. 204; Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; State v. Huting, 21 Mo. 464; State v. Lewis, 20 Nev. 333, 22 Pac. 241; State v. Spencer, 21 N. J. L. 196; People v. Pine, 2 Barb. (N. Y.) 566; State v. Vann, 82 N. Car. 631; Nonnemacher v. Nonnemacher, 159 Pa. St. 634, 28 Atl. 439; State v. Stark, 1 Strobb. L. (S. Car.) 479; Shultz v. State, 13 Tex. 401; Clark v. State, 8 Tex. App. 350; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Webb v. State, 5 Tex. App. 596; Williams v. State, 7 Tex. App. 163; People v. Schmitt, 106 Cal. 48, 49, 39 Pac. 204.

³⁸ Beavan v. McDonnell, 10 Exch. 184; Stevens v. Vancleve, 4 Wash.

particular time, the other party may, in rebuttal, inquire into his condition before and after that time.³⁹ But it has been held that this should not be carried beyond reasonable limits.⁴⁰

§ 2282. Evidence of conduct in other matters and at other times.

Evidence of the acts, conduct or condition of the person whose sanity is in question at other times, or in other matters may tend to prove his insanity at the time in question, especially where it is of a permanent nature, and in such cases it is generally relevant and admissible if otherwise competent.⁴¹ Thus, it has been held that evidence of his acts, conduct and delusions, including the act of self-destruction, is admissible to establish the fact of insanity.⁴² So, it has been held that declarations and conduct of a testator, whether long before or long after the execution of his will, and of

(U. S.) 262; *United States v. Holmes*, 1 Cliff. (U. S.) 98; *Jones v. State*, 13 Ala. 153; *Clinton v. Estes*, 20 Ark. 216; *People v. March*, 6 Cal. 543; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Gray v. Obear*, 59 Ga. 675; *Kolle v. Ellis*, 16 Ind. 301; *Ross v. McQuiston*, 45 Iowa 145; *State v. Newman*, 57 Kans. 705, 47 Pac. 881; *Montgomery v. Commonwealth*, 88 Ky. 509, 11 S. W. 475; *Robinson v. Adams*, 62 Me. 369, 16 Am. R. 473; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Lane v. Moore*, 151 Mass. 87, 21 Am. St. 430, 23 N. E. 828; *Conely v. McDonald*, 40 Mich. 150; *Matter of Pinney*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Russell v. State*, 53 Miss. 367; *State v. Kring*, 64 Mo. 591; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *State v. Kelley*, 57 N. H. 549; *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *Berry v. Hall*, 105 N. Car. 154, 10 S. E. 903; *Wheeler v. State*, 34 Ohio St. 394, 32 Am. R. 372; *State v. Hansen*, 25 Ore. 391; *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634, 28 Atl. 439; *Thayer v. Thayer*, 9 R. I.

377; *Overall v. State*, 15 Lea (Tenn.) 672; *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687; *Wheelock's Will, In re*, (Vt.) 56 Atl. 1013; *Fairchild v. Bascomb*, 35 Vt. 398; *French v. State*, 93 Wis. 325, 67 N. W. 706.

* 16 Am. & Eng. Ency. of Law 615, citing: *United States v. Holmes*, 1 Cliff. (U. S.) 98; *Walker v. Clay*, 21 Ala. 797; *Gardner v. State*, 96 Ala. 12, 11 So. 402; *Robinson v. Adams*, 62 Me. 369, 16 Am. R. 473; *State v. Kring*, 64 Mo. 591; *Sayres v. Commonwealth*, 88 Pa. St. 291; *People v. Hoch*, 150 N. Y. 291, 292, 44 N. E. 976; *Green v. State*, 59 Ark. 246, 27 S. W. 5; *Merritt v. State*, 39 Tex. Crim. 70, 45 S. W. 21.

* *Green v. State*, 59 Ark. 246, 27 S. W. 5; see also, *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 58.

* Vol. I, § 166, and numerous authorities there cited. See also, *Dyer v. Dyer*, 87 Ind. 13; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Knox's Will, In re*, 123 Iowa 24, 98 N. W. 468.

* *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59.

the unnatural distribution of his property is competent upon the question of his mental capacity.⁴³ And evidence that the person in question was violently insane in a distant city two or three weeks before the time in question has likewise been held competent.⁴⁴ So, evidence that a testator had charged his wife with improper intimacy with his son-in-law and other men, and their testimony that there was no such intimacy has been held admissible, along with other facts tending to show an unsound mind.⁴⁵ But it is not error to exclude evidence of sanity sought to be introduced by the state many years before the time in question and long before the time covered by the defendant's evidence of insanity.⁴⁶ So, it has been held that upon the trial of an accomplice in a prosecution for homicide two years after it was committed, evidence that the alleged murderer was an inmate of an insane asylum at the time of the trial was properly excluded.⁴⁷

§ 2283. **Instruments executed by party claimed to be insane.**—An instrument such as a former deed or will executed by the party may be received in evidence to show the condition of his mind at or near the time of the transaction in question, when it tends to do so, but not for the purpose of proving its contents, or showing a different disposition of the property in the instrument in suit.⁴⁸ But it has been held that a person whose sanity is in question cannot himself be compelled to disclose the contents of a will he has made.⁴⁹ In a recent case a trust deed executed by the accused to his attorney four days after the homicide with which the accused was charged,

"Burns' Will, In re, 121 N. Car. 169; Marsh v. Tyrrell, 2 Hag. Ecc. 336, 28 S. E. 519; Fountain v. 84; Hughes v. Hughes, 31 Ala. 519, Brown, 38 Ala. 72, 74; see also, overruling, Roberts v. Trawick, 13 United States v. Holmes, 1 Cliff. (U. Ala. 68; Tobin v. Jenkins, 29 Ark. S.) 98; Lamb v. Lamb, 105 Ind. 456, 151; Ross v. McQuiston, 45 Iowa 5 N. E. 171. 145; Rankin v. Rankin, 61 Mo. 295;

"St. Louis &c. R. Co. v. Greenthal, Wood v. Sawyer, 1 Phil. L. (N. 77 Fed. (U. S.) 150. Car.) 251; Love v. Johnston, 12

"Burkhart v. Gladish, 123 Ind. Ired. L. (N. Car.) 355; Titlow v. 337, 24 N. E. 118. Titlow, 54 Pa. St. 216, 93 Am. Dec.

"Green v. State, 59 Ark. 246, 27 691; Irish v. Smith, 8 S. & R. (Pa.) S. W. 5. 573, 11 Am. Dec. 648.

"Caddell v. State, 136 Ala. 9, 34 "Alvord v. Alvord, 109 Iowa 113, 80 N. W. 306.

"Mynn v. Robison, 2 Hag. Ecc.

and to which he interposed the defense of insanity, was held admissible as tending to show sanity.⁵⁰

§ 2284. **Letters and diaries.**—Letters⁵¹ or diaries⁵² of one whose sanity is questioned may generally be received in evidence if they throw any light on his mental condition at or near the time of the act under an investigation. But letters of third persons addressed to such a person are clearly not of themselves any evidence of the latter's mental condition, and they are not admissible for the purpose of showing the mental condition of the person to whom they are addressed, unless, perhaps, when connected by other evidence with some act of the party done with reference to them which the contents of the letters are admissible to explain.⁵³ Nor is a letter of a third person who is insane admissible upon the issue of a testator's sanity to show that insane persons may apparently write rationally.⁵⁴

§ 2285. **Nature of the act in question as evidence of insanity.** In a criminal prosecution for an act the atrocious nature of the act or the enormity of the crime cannot stand as the proof itself of the actor's insanity.⁵⁵ But in a civil action or proceeding, the act is of a civil nature purely, such as an unnatural disposition of property, or an act indicating a delusion or the like, it is competent to consider it, in connection with the circumstances surrounding its commission and the other evidence in the case proper to be considered for such purpose, upon the question of the sanity of the actor.⁵⁶

⁵⁰ *State v. Privitt*, 175 Mo. 207, 75 S. W. 457.

⁵¹ *State v. Kring*, 64 Mo. 591; *Marx v. McGlynn*, 88 N. Y. 357, 358; *Sayres v. Commonwealth*, 88 Pa. St. 291; *Guiteau's Case*, 10 Fed. (U. S.) 161, 167; *Baker v. Baker*, 202 Ill. 595, 67 S. E. 410.

⁵² *United States v. Sharp*, 1 Pet. (U. S.) 118; *Marx v. McGlynn*, 88 N. Y. 357, 358; see also, *Irish v. Smith*, 8 S. & R. (Pa.) 573.

⁵³ *Wright v. Doe*, 7 Ad. & El. 313, 84 E. C. L. 95; *Waters v. Waters*, 35 Md. 531.

⁵⁴ *Ware v. Ware*, 8 Greenl. (Me.) 42.

⁵⁵ *Guiteau's Case*, 10 Fed. (U. S.) 168; *State v. Spencer*, 21 N. J. L. 196, 207; *Laros v. Commonwealth*, 84 Pa. St. 200; *Commonwealth v. Mosler*, 4 Pa. St. 264; *State v. Stark*, 1 Strobb. L. (S. Car.) 479, but it would seem that in some instances where no motive appears the atrocious nature of the crime might be considered along with that fact and other evidence of insanity. *Laros v. Commonwealth*, 84 Pa. St. 200; see also, *Goodwin v. State*, 96 Ind. 550, 567.

⁵⁶ *Wheeler v. Alderson*, 3 Hag. Ecc. 574; *Campbell v. Hill*, 22 U. C. C. P. 526; *Stubbs v. Houston*, 33 Ala. 555;

§ 2286. **Absence of motive as evidence of insanity.**—In prosecutions for crime the absence of any apparent motive for its commission is a circumstance to be considered in connection with other evidence of insanity, but it does not of itself prove insanity.⁵⁷ The law upon this subject is stated in a carefully considered case as follows: "The absence of motive is regarded as a fact tending to show that the criminal act was the product of a mind incapable of forming an intent. It is not, however, true that because the motive is not apparent it is to be presumed that none existed, nor is it true that an absence of motive proves a man insane, or proves him innocent. There are many recorded cases where atrocious crimes were committed in sheer recklessness, neither the hope of gain nor the gratification of any passion prompting the act. Exceptional cases there are, but the general rule unquestionably is that sane men are influenced by motives, while the insane are motiveless. The presence of motive is, in general, evidence of sanity; its absence is evidence of insanity, but in neither case is the evidence conclusive."⁵⁸

§ 2287. **Suicide as evidence of insanity.**—It has often been contended that self-destruction can result only from a deranged mind, and that suicide should therefore raise a presumption of insanity, but it is now pretty well settled that suicide does not of itself raise any presumption of insanity.⁵⁹ Evidence of suicide, however, is usually competent upon the question, and should be taken into con-

Beller v. Jones, 22 Ark. 92; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Snow v. Benton*, 28 Ill. 306; *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431; *Weir's Will*, 9 Dana (Ky.) 434, 440; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Mullins v. Cottrell*, 41 Miss. 291; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Bitner v. Bitner*, 65 Pa. St. 347; *Means v. Means*, 5 Storbh. L. (S. Car.) 167; *Denson v. Beazley*, 34 Tex. 191.

⁵⁷ *Reg. v. Layton*, 4 Cox Cr. Cas. 149; *State v. Spencer*, 21 N. J. L. 196; *Commonwealth v. Mosler*, 4 Pa. St. 264; *McLeod v. State*, 31 Tex.

Cr. App. 331, 20 S. W. 749; *People v. Barber*, 115 N. Y. 475, 22 N. E. 182.

⁵⁸ *Goodwin v. State*, 96 Ind. 550, 556, 567.

⁵⁹ *Reg. v. Barton*, 3 Cox Cr. Cas. 275; *M'Adam v. Walker*, 1 Dow 148; *Rex v. Saloway*, 3 Mod. 100; *Burrows v. Burrows*, 1 Hag. Ecc. 109; *Terry v. Life Ins. Co.*, 1 Dill. (U. S.) 403; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103; *McElwee v. Ferguson*, 43 Md. 479; *Weed v. Mutual Ben. Life Co.*, 70 N. Y. 561; *Van Zandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169; *McClure v. Mutual Life Ins. Co.*, 55 N. Y. 651.

sideration in connection with the previous conduct of the party and other proper circumstances in order to determine whether he was or was not insane.⁶⁰ Evidence of suicide, it has also been said, is admissible to show the absence of a sound and disposing mind in a testator.⁶¹ In prosecutions for murder it has been held that it is not permissible to prove that the deceased had threatened to commit suicide, unless such threat can be considered either as a dying declaration or as a part of the *res gestae*.⁶² But, in a comparatively recent case, where there was nothing in evidence inconsistent with the theory of suicide, the court on appeal held that the trial court should have admitted evidence that the deceased, on the day preceding her death, had expressed a determination to put an end to her life.⁶³

§ 2288. **Evidence of insanity of ancestors.**—It was formerly held that proof that other members of the same family had been insane was not admissible either in civil or criminal cases.⁶⁴ But it is now generally held that the insanity of either parent, or even of a more remote ancestor⁶⁵ may be shown in a proper case.⁶⁶ So, the insanity

⁶⁰ *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Borradalle v. Hunter*, 5 M. & G. 647, 44 E. C. L. R. 339; *Clift v. Schwabe*, 3 C. B. 448, 54 E. C. L. 436, 448; *Terry v. Imperial Fire Ins. Co.*, 3 Dill. (U. S.) 408; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Jones v. Gorham*, 90 Ky. 622, 29 Am. St. 423, 14 S. W. 599; *McElwee v. Ferguson*, 43 Md. 479; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Karow v. Continental Ins. Co.*, 57 Wis. 56, 46 Am. R. 17, 15 N. W. 27; *Coffey v. Home Life Ins. Co.*, 35 N. Y. Super. Ct. 314; *Germain v. Brooklyn Life Ins. Co.*, 26 Hun (N. Y.) 604.

⁶¹ *M'Adam v. Walker*, 1 Dow. 148; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Pettitt v. Pettitt*, 4 Humph. (Tenn.) 191.

⁶² *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *State v. Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *State v. Punshon*, 133 Mo. 44, 34 S. W. 25.

⁶³ *Commonwealth v. Trefethen*, 157

Mass. 180, 31 N. E. 961; see also, *Reg. v. Jessop*, 16 Cox Cr. Cas. 204; *Mut. Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909; Vol. I, § 519.

⁶⁴ *Shelford Lunacy* 59; *M'Adam v. Walker*, 1 Dow 148, 174; *People v. Garbutt*, 17 Mich. 1, 17, 97 Am. Dec. 162; see also, *Berry v. Safe & Co.*, 96 Md. 45, 53 Atl. 720.

⁶⁵ 1 *Wharton & Stille Med. Jur.*, § 362, et seq.; *Esquirol Mental Maladies* (translated by Hunt) 49; 1 *Beck Med. Jur.* (10th ed.) 725; *Taylor Med. Jur.* (Eng. ed.) 629; *Ray Med. Jur.*, § 72; *Combe Mental Derangement* (Am. ed.) 96; *State v. Hoyt*, 47 Conn. 518, 36 Am. R. 89; *State v. Windsor*, 5 Har. (Del.) 512; *Coughlin v. Poulson*, 2 *MacArthur* (D. C.) 308; *Taylor v. State*, 105 Ga. 746, 31 S. E. 764; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *People v. Garbutt*, 17 Mich. 1, 17, 97 Am. Dec. 162; *State v. Simms*, 68 Mo. 305; *People v. Montgomery*, 13 Abb. Pr.

of a brother or sister of the accused may be shown in connection with other evidence bearing on the subject of the mental condition of the person in question.⁶⁶ And the same rule has been laid down as to showing the insanity of more remote collateral relatives of the person whose insanity is directly in question,⁶⁷ but in such cases it has been held that it should be made to appear that they are descended from a common stock which bears the hereditary taint,⁶⁸ and that the insanity alleged should be a kind that may in its nature be hereditary.⁶⁹ The insanity of ancestors is, of course, no defense of itself where the only question is as to the insanity of the defendant,⁷⁰ and while evidence of hereditary insanity in the prisoner's family is admissible, after laying a foundation for its reception by the introduction of some evidence of the defendant's own insanity,⁷¹ yet it is not admissible, as a rule at least, until such foundation has been laid by an offer of some other evidence of insanity in the person whose mental condition as to sanity or insanity is in issue.⁷²

§ 2289. **Reputation as evidence of insanity.**—Insanity is a fact which cannot, ordinarily at least, be proved by reputation.⁷³ But it

N. S. (N. Y.) 207; *State v. Cunningham*, 72 N. Car. 469; *Commonwealth v. Haskell*, 2 Brews. (Pa.) 491; *Lovegrove v. State*, 31 Tex. Cr. App. 491, 21 S. W. 191.

⁶⁶ *Shaeffer v. State*, 61 Ark. 241. 32 S. W. 679; *People v. Garbutt*, 17 Mich. 1, 9, 97 Am. Dec. 162; *Fraser v. Jennison*, 42 Mich. 206, 228, 3 N. W. 206; *State v. Simms*, 68 Mo. 305; *Hagan v. State*, 5 Baxt. (Tenn.) 615. ⁶⁷ *Reg. v. Tucket*, 1 Cox Cr. Cas. 103; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *State v. Simms*, 68 Mo. 305.

⁶⁸ *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

⁶⁹ *Reg. v. Tucket*, 1 Cox Cr. Cas. 103; *State v. Hoyt*, 47 Conn. 518, 36 Am. R. 89; *Meeker v. Meeker*, 75 Ill. 260; *Reg. v. Oxford*, 9 Car. & P. 525, 38 E. C. L. 208; *State v. Christmas*, 6 Jones L. (N. Car.) 471; see, 1

Wharton Cr. L., § 65; 1 *Wharton & Stille Med. Jur.*, § 376.

⁷⁰ 1 *Wharton & Stille Med. Jur.*, § 377; *Shaeffer v. State*, 51 Ark. 241, 244, 32 S. W. 679; *State v. Van Tassel*, 103 Iowa 11, 72 N. W. 497; *Smith v. Kramer*, 1 Am. L. Reg. 353; *Snow v. Benton*, 28 Ill. 306.

⁷¹ *Green v. State*, 64 Ark. 523, 530, 43 S. W. 973; *People v. Garbutt*, 17 Mich. 1, 9, 97 Am. Dec. 162; *People v. Smith*, 31 Cal. 466; *Bradley v. State*, 31 Ind. 492.

⁷² *Mather v. Whitefoot*, 8 Car. & P. 270, 34 E. C. L. 386; *Green v. State*, 64 Ark. 523, 530, 43 S. W. 973; *Bradley v. State*, 31 Ind. 492; *State v. Van Tassel*, 103 Iowa 6, 11, 72 N. W. 497; *Laros v. Commonwealth*, 84 Pa. St. 200; *State v. Cunningham*, 72 N. Car. 469.

⁷³ *State v. Hoyt*, 47 Conn. 518, 36 Am. R. 89; *Walker v. State*, 102 Ind.

is sometimes difficult or even impossible to find living witnesses who have personal knowledge of the insanity of remote ancestors of the person whose sanity is in question, and in one case the court admitted evidence of family tradition to show the hereditary taint, on the principle that such evidence is admissible, when it is the best obtainable, to prove births, deaths, genealogies and the like.⁷⁴ This, however, seems unsound, and at all events evidence of mere reputation in the family, of insanity of the person whose mental condition is directly in issue, is incompetent.⁷⁵ So, evidence of general reputation is not competent evidence of such a person's mental condition.⁷⁶

§ 2290. Opinion evidence—Experts.—It has elsewhere been shown that an ordinary witness, having sufficient knowledge and acquaintance with the person in question, may give his opinion, in a proper case, upon the question of sanity or insanity, and the rules upon the subject have been stated.⁷⁷ So, the subject of expert evidence upon the same subject has already been treated.⁷⁸ But there are a few recent decisions upon these topics to which attention should be called. It is not required that a witness, even though not an expert, should have a very long or intimate acquaintance with the person whose sanity is in question, in order to give an opinion,⁷⁹ but

502, 507, 1 N. E. 856; see also, *Ashcraft v. De Armond*, 44 Iowa 229; *Foster v. Brooks*, 6 Ga. 287; *Choice v. State*, 31 Ga. 424.

"*State v. Windsor*, 5 Har. (Del.) 512.

"*People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Choice v. State*, 31 Ga. 424.

"*Brinkley v. State*, 58 Ga. 296, 298; *Stewart v. State*, 58 Ga. 577; *Townsend v. Pepperell*, 99 Mass. 40; *Brinkman v. Rueggelick*, 71 Mo. 553; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. R. 181; *Territory v. Padilla*, 8 N. Mex. 510, 46 Pac. 346; *Ashcraft v. De Armond*, 44 Iowa 229; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407.

"Vol. I, § 681.

"Vol. II, §§ 1091, 1124. As to form of question to expert, see also,

State v. Privitt, 175 Mo. 207, 75 S. W. 457.

"*Lowe v. State*, 118 Wis. 641, 96 N. W. 417; *State v. Shuff*, (Idaho) 72 Pac. 664; *Fields v. State*, (Fla.) 35 So. 185; see also, *Commonwealth v. Gearhardt*, 205 Pa. St. 387, 54 Atl. 1029; *Commonwealth v. Wireback*, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. 625. The intimacy of the acquaintance and extent of the knowledge by the witness of such person and his acts or conduct would doubtless affect the weight of his testimony, but if he has any substantial and material knowledge that would make his opinion of some value and be a sufficient basis therefor, his lack of more extensive knowledge would not render him incompetent.

he must have some acquaintance with such person or actual knowledge of his acts or conduct;⁸⁰ and it is held by the Supreme Court of the United States in a recent case, that a non-expert witness cannot give his opinion, formed since the commission of a crime, as to the mental condition of the accused at the time the offense was committed, where the only knowledge he has was derived from his familiarity with the accused as a patron of the latter's barber shop for several years.⁸¹ In another recent case, on a prosecution for murder, the defense was that the accused had been laboring under the delusion that his wife had been intimate with the deceased, and it was held that the accused was entitled to show, by a physician who had examined him as to his sanity, what the accused said to such physician as to the cause of the killing, for the purpose of producing the facts on which the physician had based his opinion of insanity and as tending to establish the insane delusion and good faith of the accused.⁸² In another recent case a question propounded by the court to an expert who had testified that the accused was insane was held improper, but that no advantage could be taken because no objection was made and no exception saved.⁸³

§ 2291. **Declarations.**—It is the general rule that declarations of a party indicating an intention to make a disposition of his property other than that which he did make are not admissible for the purpose of avoiding his deed or will.⁸⁴ But declarations of the party in question are generally admissible when part of the *res gestae* and whether made before or after the act in question, and although not

⁸⁰ See, *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59.

⁸¹ *Queenan v. Oklahoma*, 190 U. S. 548, 23 Sup. Ct. 762.

⁸² *Spivey v. State*, (Tex. Cr. App.) 77 S. W. 444, but this decision seems questionable.

⁸³ *Lowe v. State*, 118 Wis. 641, 96 N. W. 417.

⁸⁴ *Comstock v. Hadlyne Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Rutherford v. Morris*, 77 Ill. 397; *Hayes v. West*, 37 Ind. 21; *Gay v. Gay*, 60 Iowa 415, 46 Am. R. 78, 14 N. W. 238; *Caeman v. Van Harke*, 33 Kans. 333, 6 Pac. 620;

Quisenberry v. Quisenberry, 14 B. Mon. (Ky.) 481; *Stewart v. Redditt*, 3 Md. 67; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882; *Gibson v. Gibson*, 24 Mo. 227; *Holtt v. Holtt*, 63 N. H. 475, 56 Am. R. 530, 3 Atl. 604; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. R. 395; *Chess v. Chess*, 1 P. & W. (Pa.) 32, 31 Am. Dec. 350; *Ladd's Will*, In re, 60 Wis. 187, 50 Am. R. 355, 18 N. W. 734; *Provis v. Reed*, 5 Bing. 435, 15 E. C. L. 490. As to when declarations of a testator as to his intent are admissible, see, Vol. I, §§ 533, 620.

strictly part of the *res gestae*, it has often been held that they may be received in evidence if they tend to show and throw light on his mental condition at the time of the act, although they cannot, ordinarily, be considered as proof of any other matter.⁸⁵ Thus, conversation with a testator on the day a will was drawn has been held competent on the question of his sanity and testamentary capacity;⁸⁶ and a testator's letters have been held competent on the same question,⁸⁷ and so have declarations of purpose, intention and state of mind both before and after the making of a will.⁸⁸ It has also been held that where the declarations of an accused are susceptible of more than one interpretation it is for the jury to determine what interpretation they shall have, and the court in admitting them as competent does not determine that they shall be given an interpretation adverse to the innocence of the accused.⁸⁹

⁸⁵ *Sutton v. Sadler*, 3 C. B. N. S. 87, 91 E. C. L. 87; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. 552; *Comstock v. Hadlyne Ec. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Taylor v. State*, 83 Ga. 647, 10 S. E. 442; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. R. 15; *Bates v. Bates*, 27 Iowa 110; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; *Mooney v. Olsen*, 22 Kans. 69; *Howe v. Howe*, 99 Mass. 88; *Potter v. Baldwin*, 133 Mass. 427; *Lane v. Moore*, 151 Mass. 87, 21 Am. St. 430, 23 N. E. 828; *Harring v. Allen*, 25 Mich. 505; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, note; *Norwood v. Marrow*, 4 Dev. & B. L. (N. Car.) 442; *Chess v. Chess*, 1 P. & W. (Pa.) 32, 21 Am. Dec. 350; but see, *Stewart v.*

Redditt, 3 Md. 67; *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371; *People v. Nino*, 149 N. Y. 317, 326, 43 N. E. 853; *State v. Scott*, 1 Hawks (8 N. Car.) 24; *Bensell v. Chancellor*, 5 Whart. (Pa.) 371, 376, 34 Am. Dec. 561.

⁸⁶ *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459; *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Knor's Will*, In re, 123 Iowa 24, 98 N. W. 468, but in the first case above cited evidence of statements made long before, was held properly excluded as too remote.

⁸⁷ *Wheelock's Will*, In re, (Vt.) 56 Atl. 1013; *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

⁸⁸ *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. 552, 556, and numerous other authorities cited in the second note to this section.

⁸⁹ *Goodwin v. State*, 96 Ind. 550.

CHAPTER CX.

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§ 2292. **Burden of proof—Plaintiff's Case.**—Insurance policies contain so many conditions precedent to the right of recovery, and other conditions the breach of which constitute only a defense to the action, that the question of the burden of proof is both difficult and important. As a rule of pleading in an action on an insurance policy it is sufficient to allege generally the due performance of all the conditions on the part of the plaintiff. The burden of proof is upon the plaintiff to prove only those conditions precedent upon which the assured is *prima facie* entitled to recover in case of loss, and the necessary steps provided by the policy to establish his right to recover. The rule more accurately and fully stated is as follows: "An unexpired policy of fire insurance, which has been regularly issued, and remains uncanceled, must, in the absence of a showing to the contrary, be regarded as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs, and the steps necessary to establish it have been taken; and hence, the conditions precedent in such a policy include only those affirmative acts on the part of the assured, the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be, in some cases, other steps of a like nature. Thus, clauses usually contained in policies of insurance which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing or omission to do some act, are not in any proper sense conditions precedent."¹ The burden is upon the plaintiff to show that the policy was in force on the day of the loss.²

§ 2293. **Defense—Burden of proof.**—The burden of proof has been held to be on the defendant to show that the plaintiff is not the owner of the policy, or is not the person named therein as the beneficiary.³ And when a policy of insurance is issued with the indorsement thereon that the loss should be paid to a certain named person, it

¹ *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011; *Phillips v. Insurance Co.*, 13 Ohio C. C. 679; ² *Schroeder v. Trade Ins. Co.*, 12 Ill. App. 651. ³ *Hartford L. & C. Ins. Co. v. Way-Phenix Ins. Co. v. Stock*, 149 Ill. land, (Ky.) 20 S. W. 199. 319, 36 N. E. 408.

was held that this was an admission by the company that the person named had an interest in the contract and was to receive the benefit of it.⁴ If the defense relied upon is either fraudulent representation or breach of conditions of warranty, these are matters of affirmative defense and must be pleaded as such; and the party relying upon such defenses must prove them.⁵ The burden of proving a breach of any

⁴*Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Franklin v. National Ins. Co.*, 43 Mo. 491; *Western &c. Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Farmers' &c. Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847.

⁵*Boulden v. Phoenix Ins. Co.*, 112 Ala. 422, 20 So. 587; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040; *Osterman v. District Grand Lodge*, (Cal.) 43 Pac. 412; *Young v. Newark &c. Ins. Co.*, 59 Conn. 41, 22 Atl. 32; *O'Connell v. Supreme Conclave &c.*, 102 Ga. 143, 28 S. E. 282, 66 Am. St. 159; *Continental &c. Ins. Co. v. Rogers*, 119 Ill. 474, 485, 10 N. E. 242; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Arnhorst v. National Union*, 179 Ill. 486, 53 N. E. 988; *Penn &c. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. R. 769; *National &c. Asso. v. Grauman*, 107 Ind. 288, 7 N. E. 233; *American &c. Ins. Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. 659; *Newman v. Covenant &c. Ins. Co.*, 76 Iowa 56, 74, 40 N. W. 87, 14 Am. St. 196; *Russell v. Fidelity Ins. Co.*, 84 Iowa 93, 50 N. W. 546; *Sutherland v. Standard &c. Ins. Co.*, 87 Iowa 505, 54 N. W. 453; *Newhall v. Union &c. Ins. Co.*, 52 Me. 180; *Campbell v. New England &c. Ins. Co.*, 98 Mass. 381; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226, 13 N. E. 604; *Price v. Phoenix &c. Ins. Co.*, 17 Minn. 497, 10 Am. R. 166; *Perine v.*

Grand Lodge &c., 51 Minn. 224, 53 N. W. 367; *Caplis v. American &c. Ins. Co.*, 60 Minn. 376, 62 N. W. 440; *Mistilski v. German Ins. Co.*, 64 Minn. 366, 67 N. W. 80; *Grangers' &c. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. R. 446, note; *Mueller v. Putnam &c. Ins. Co.*, 45 Mo. 84; *Forse v. Supreme Lodge &c.*, 41 Mo. App. 106; *Jefferson v. German-American &c. Asso.*, 69 Mo. App. 126; *Hester v. Fidelity &c. Co.*, 69 Mo. App. 186; *Jones v. Brooklyn &c. Ins. Co.*, 61 N. Y. 79; *Spencer v. Citizens' &c. Asso.*, 142 N. Y. 505, 37 N. E. 617; *Germain v. Brooklyn &c. Ins. Co.*, 30 Hun (N. Y.) 535; *Folb v. Phenix Ins. Co.*, 109 N. Car. 568, 13 S. E. 798; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. 699; *Dougherty v. Pacific &c. Ins. Co.*, 154 Pa. St. 385, 25 Atl. 739; *Roach v. Kentucky &c. Co.*, 28 S. Car. 431, 6 S. E. 286; *Dial v. Valley &c. Asso.*, 29 S. Car. 560, 8 S. E. 27; *Copeland v. Western Assur. Co.*, 43 S. Car. 26, 20 S. E. 754; *Ormsby v. Phenix Ins. Co.*, 5 S. Dak. 72, 58 N. W. 301; *London &c. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140; *East Texas &c. Ins. Co. v. Dyches*, 56 Tex. 565; *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. (Va.) 613; *Redman v. Ætna Ins. Co.*, 49 Wis. 431, 4 N. W. 591; *River Falls Bank v. German &c. Ins. Co.*, 72 Wis. 535, 40 N. W. 506; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731, 17 Am. St.

representation or fraud relied upon as a defense or an avoidance of the policy is upon the defendant.⁶ Where the defense is based on an alienation of the property as a breach of the conditions of a policy, the burden of proof on this point is upon the defendant.⁷ Where the defendant pleads fraud or a false and fraudulent claim made by the plaintiff, the burden is upon him to prove: (1) that there was a false statement in the proof of loss as to the value of the goods destroyed; (2) that such false statement was made with knowledge of its falsity, and with the intent to defraud the company by deceiving them as to the value of the goods. And where the defendant alleges that the loss was caused or procured by the plaintiff the burden is upon him to prove the allegation with reasonable certainty.⁸ Where the defense is that the action was not brought within the stipulated time, this fact must be specially pleaded, and the burden is upon the defendant to prove the allegation.⁹

§ 2294. **Premium—Amount not fixed.**—The contract of insurance, like other agreements, must be definite and certain. But it is not always necessary that the exact amount of the premium shall be expressly stated or agreed upon. This, like other business transactions, may be established by usage and custom known to the parties. And where the proof showed that the rate of insurance was not agreed upon but that the insured was familiar with the rates and had carried large amounts of insurance and had made frequent payments of premiums, it was held sufficiently definite.¹⁰ In some kinds of risks the exact

184; *Butternut &c. Co. v. Manufacturers' &c. Ins. Co.*, 78 Wis. 202, 47 N. W. 366; *Northwestern &c. Ins. Co. v. Gridley*, 100 U. S. 614; *Manhattan &c. Ins. Co. v. Willis*, 60 Fed. 236; *Fidelity &c. Co. v. Alpert*, 67 Fed. 460; *Penn &c. Ins. Co. v. Mechanics' &c. Co.*, 72 Fed. 413, 38 L. R. A. 33, note.

⁶ *Kingsley v. New England Ins. Co.*, 8 Cush. (Mass.) 393; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 413; *Orrell v. Hampden Ins. Co.*, 13 Gray (Mass.) 431; *Hudson v. Guardian &c. Ins. Co.*, 97 Mass. 144, 93 Am. Dec. 73; *Gray v. Standard &c. Ins. Co.*, 170 Mass.

558, 49 N. E. 921; *Denver &c. Ins. Co. v. Crane*, (Colo. App.) 73 Pac. 875; *Ley v. Metropolitan &c. Ins. Co.*, 120 Iowa 203, 94 N. W. 568; *North American &c. Ins. Co. v. Sickles*, 23 Ohio C. C. 594; *Price v. Standard &c. Ins. Co.*, 90 Minn. 264, 95 N. W. 1118.

⁷ *Orrell v. Hampden Fire Ins. Co.*, 13 Gray (Mass.) 431.

⁸ *Mack v. Lancashire Ins. Co.*, 4 Fed. 59.

⁹ *Allibone v. Fidelity &c. Co.*, (Tex. Civ. App.) 32 S. W. 569.

¹⁰ *Michigan Pipe Co. v. North British &c. Ins. Co.*, 97 Mich. 493, 56 N. W. 849; *Train v. Holland &c.*

amount of the premium cannot be ascertained at the time the insurance is agreed upon. But where the proof shows that the parties knew such fact, and that they had frequently dealt before in the same manner, it was held sufficient proof of the contract of insurance and an agreement as to the rate.¹¹ In the absence of an agreement as to the rate or other terms the parties are presumed to intend that which was usual and customary.¹² Of this rule the Supreme Court of Alabama say: "The authorities agree, that before a contract of insurance, or to insure, is binding, all the essential elements and terms of the contract must be understood and mutually assented to. A mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure without more, would not amount to a contract of insurance or an agreement to insure. The subject matter, period, rate to be paid and amount of insurance and perhaps other elements must be agreed upon expressly or by implication before there can be an absolute binding agreement between the parties; nor would the mere fact that there had been previous dealings of insurance, between the parties, alone without some reference to such previous dealings, be sufficient to show a completed and binding contract that the parties intended to and did adopt the provisions of the former dealings. Where, however, there exists a contract of insurance, not expired, and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract included and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and upon failure to comply with the agreement, the party offending, may be compelled by bill in equity, specifically to perform the agreement, or held liable in a court of law for damages, resulting from a breach of the agreement."¹³

§ 2295. **Premium—Payment.**—The payment of the premium frequently becomes the turning point in an action on an insurance policy. Generally speaking, the contract of insurance is not complete

Ins. Co., 62 N. Y. 598; Van Loan v. Farmers' &c. Ins. Asso., 90 N. Y. 280.

¹¹ Fabbri v. Phoenix Ins. Co., 55 N. Y. 129; Bolce v. Thames &c. Ins. Co., 38 Hun (N. Y.) 246.

¹² Newark Machine Co. v. Kenton

Ins. Co., 50 Ohio St. 549, 35 N. E. 1060; Salisbury v. Hekla Ins. Co., 32 Minn. 458, 21 N. W. 552; Eames v. Home Ins. Co., 94 U. S. 621, 629.

¹³ Commercial F. Ins. Co. v. Morris, 105 Ala. 498, 19 So. 34.

without the payment of a premium. However, it is not always necessary to prove the actual payment, but proof of a promise to pay, either express or implied, is sufficient in the absence of any stipulation making the actual payment of the premium a condition precedent, or where such condition has not been waived. It has been frequently held that a valid contract of insurance may exist without a delivery of the policy or payment of the premium.¹⁴ And at the time the contract of insurance is made it is not necessary to show that payment of a premium was made if it appears that credit was given, or if the proof shows that from the circumstances and situation of the parties payment of the premium at the time was not required.¹⁵ It has been held sufficient where the premium was paid after loss, and that the failure to disclose the loss at the time was not a fraud.¹⁶ And the failure to pay the premium within a definite and fixed time will not work a forfeiture in the absence of a stipulation to that effect in the policy.¹⁷ And where credit is given it is implied that the insured has a reasonable time in which to pay.¹⁸ So, where the policy expressly recites that it "shall be conclusive evidence that the above amount has been paid," it was held that the insurer was estopped to deny payment as against the beneficiary.¹⁹ And where a receipt is held inadmissible, not having

¹⁴ *Sheldon v. Connecticut &c. Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Wash. (U. S.) 93; Xenos v. Wick-*

Kentucky &c. Ins. Co. v. Jenks, 5 Ind. 96; *New England F. &c. Ins. Co. v. Robinson*, 25 Ind. 536; *Union Cent. L. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Bragdon v. Appleton &c. Ins. Co.*, 42 Me. 259;

Hallock v. Commercial Ins. Co., 26 N. J. L. 268; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379; *Carpenter v. Mutual &c. Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408;

Fried v. Royal Ins. Co., 50 N. Y. 243; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *British Ins. Co. v. Lambert*, 26 Ore. 199, 37 Pac. 909;

Hamilton v. Lycoming &c. Ins. Co., 5 Barr (Pa.) 339; *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Taylor v. Merchants' &c. Ins. Co.*, 9 How. (U. S.) 390;

Eames v. Home Ins. Co., 94 U. S. 621; *Kohne v. Insurance Co.*, 1 Wash. (U. S.) 93; *Xenos v. Wick-*

ham, L. R. 2 H. L. 296. ¹⁵ *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Trustees &c. v. Brooklyn &c. Ins. Co.*, 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216;

Angell v. Hartford F. Ins. Co., 59 N. Y. 171, 17 Am. R. 322. ¹⁶ *Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540.

¹⁷ *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940.

¹⁸ *Carson v. German Ins. Co.*, 62 Iowa 433, 17 N. W. 650; *Lum v. United States F. Ins. Co.*, 104 Mich. 397, 62 N. W. 562; *Trundle v. Providence &c. Ins. Co.*, 54 Mo. App. 188;

Bowman v. Agricultural Ins. Co., 59 N. Y. 521. ¹⁹ *Kline v. National &c. Ass.*, 111 Ind. 462, 11 N. E. 620, 60 Am. R. 703, note.

the seal of the company, it was held that the payment of the premium could be proved by other competent evidence.²⁰

§ 2296. Payment of premium—Prima facie case.—A completed contract of insurance implies the payment of a premium, and in an action on the policy the plaintiff in the first instance is not required to prove affirmatively that a premium was paid. The possession of the policy by the insured is prima facie proof of its delivery as a valid and subsisting contract. Therefore, when the plaintiff produces and puts in evidence the policy, this makes a prima facie case, so far as it relates to the payment of the premium and entitles him to recover. The burden of overcoming the prima facie case thus made is upon the defendant, and it is a question for the jury to determine whether or not that has been done.²¹ When the policy acknowledges the receipt of payment of premiums the burden is upon the insurer to show by clear and satisfactory evidence that the premiums were not in fact paid.²² Or where the agent himself agrees to pay the premium, bringing it within the rule that "the thing to be done is agreed to be considered as done," and in this way the obligation to pay the premium is held to be sufficient proof of actual payment.²³

§ 2297. Premium—Payment required by policy.—The policies of insurance usually require the payment of premiums on their delivery. Where this is one of the conditions of the policy proof of the failure to pay the premium will defeat an action on the policy unless the evidence further shows that such condition was waived.²⁴ A condition in a policy, to the effect that the company shall not be liable for loss if a note given for the premium is due and unpaid, is valid.²⁵ And

²⁰ *American L. Ins. Co. v. Green*, 57 Ga. 469.

²¹ *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 Pac. 922.

²² *Lee v. Fraternal &c. Ins. Co.*, 1 Handy (Ohio) 217; *Robert v. New England Ins. Co.*, 2 Disn. (Ohio) 106.

²³ *Sheldon v. Connecticut &c. Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565.

²⁴ *Union Cent. &c. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Watrous v. Mississippi &c. Ins. Co.*, 35 Iowa 582; *Pino v. Merchants'*

&c. Ins. Co., 19 La. Ann. 214; *Mis- selhorn v. Mutual Reserve &c. Asso.*, 30 Mo. App. 589; *Barnes v. Pied- mont &c. Ins. Co.*, 74 N. Car. 22; *Ormond v. Fidelity Life Asso. &c.*, 96 N. Car. 158, 1 S. E. 796; *Mar- land v. Royal Ins. Co.*, 71 Pa. St. 393; *Collins v. Insurance Co.*, 7 Phila. 201; *Cronkhite v. Accident Ins. Co.*, 35 Fed. 26.

²⁵ *Schmidt v. Marine Ins. Co.*, 41 Ill. 295; *Keenan v. Missouri &c. Ins. Co.*, 12 Iowa 126, 134; *Watrous v. Mississippi &c. Ins. Co.*, 35 Iowa 582; *Shultz v. Hawkeye Ins. Co.*, 42

where a life policy provided that the premium was to be paid when the applicant was in good health, it was held binding.²⁶

§ 2298. **Premium—Payment waived.**—The courts are generally unanimous in holding that the conditions of the policy as to the payment of premiums must be strictly complied with. But they are equally unanimous in holding that the conditions as to payment may be waived. This rule that the power to waive a condition as to the payment of premiums is not limited to the company, but extends to the agent as well. The controversy in many cases has arisen over the contention on the part of the insurer of the failure to pay the premium, and the counter-contention on the part of the insured that this condition of the policy was waived. Hence, the statement of the rules of proof as to the waiver of such conditions becomes important.²⁷ It has many times been held that the unconditional delivery of a policy to the insured as a completed and executed contract, under either an express or an implied agreement that credit shall be given for the premium, is a waiver of the condition in the policy.²⁸

Iowa 239; *Nedrow v. Farmers' Ins. Co.*, 43 Iowa 24; *Garlick v. Mississippi &c. Ins. Co.*, 44 Iowa 553; *Harle &c. Co. v. Council Bluffs Ins. Co.*, 71 Iowa 401, 32 N. W. 396; *Williams v. Albany Ins. Co.*, 10 Mich. 451; see, *McLean v. Piedmont &c. Ins. Co.*, 29 Gratt. (Va.) 361.

²⁶ *St. Louis &c. Ins. Co. v. Kennedy*, 6 Bush (Ky.) 450.

²⁷ *Thompson v. St. Louis &c. Ins. Co.*, 52 Mo. 469; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. R. 671; *New York &c. Ins. Co. v. Stone*, 42 Mo. App. 383; *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Nebraska &c. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924, 26 Am. St. 407; *Western &c. Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597; *Wood v. Poughkeepsie &c. Ins. Co.*, 32 N. Y. 619; *Bodine v. Exchange &c. Ins. Co.*, 51 N. Y. 117, 10 Am. R. 566; *Bowman v. Agricultural &c. Ins. Co.*, 59 N. Y. 521; *Train v. Holland &c. Ins. Co.*, 62 N. Y. 598; *Richmond*

v. Niagara &c. Ins. Co., 79 N. Y. 230; *Hastings v. Brooklyn &c. Ins. Co.*, 138 N. Y. 473, 34 N. E. 289; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615; *Wood v. American &c. Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733; *Stewart v. Union Mut. &c. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876; *New York &c. Ins. Co. v. National &c. Ins. Co.*, 20 Barb. (N. Y.) 468; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060; *Johnson v. North British &c. Ins. Co.*, 66 Ohio St. 6, 63 N. E. 610; *Universal &c. Ins. Co. v. Block*, 109 Pa. St. 535, 1 Atl. 523; *Susquehanna &c. Ins. Co. v. Elkins*, 124 Pa. St. 484, 17 Atl. 24, 10 Am. St. 608; *Heaton v. Manhattan &c. Ins. Co.*, 7 R. I. 502; *Southern &c. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. R. 344; *Equitable Ins. Co. v. McCrea*, 76 Tenn. 541.

²⁸ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233;

§ 2299. **Waiver by general agent.**—It is well settled that a general agent of an insurance company can waive the payment of the premium and deliver the policy so that it becomes a valid and subsisting contract of insurance notwithstanding the condition in the policy that it should not take effect until the premium was paid.²⁹ But the rule is that a waiver can only be made by one having sufficient authority; it is also the rule that such authority must be shown. The burden is upon the party claiming the waiver to show by a preponderance of the evidence not only the waiver of the condition but the authority of the agent to make it; this authority is not presumed. It is not necessary, however, to show that the agent has express authority to waive a condition, but it may be inferred by proving either general authority to represent the company, or general authority in a particular territory or authority to do such acts from which the law may infer a power to waive conditions.³⁰ Thus, it has been held that an adjuster of losses did not, as a matter of law, have power to waive conditions.³¹ And in the absence of evidence the law will not presume

Young v. Hartford F. Ins. Co., 45 Iowa 378, 24 Am. R. 784; *Mississippi Val. L. Ins. Co. v. Neyland*, 9 Bush (Ky.) 430; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 233; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Sheldon v. Atlantic &c. Ins.* 26 N. Y. 460, 84 Am. Dec. 213; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117, 10 Am. R. 566; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Church v. Lafayette F. Ins. Co.*, 66 N. Y. 222; *Washoe &c. Mfg. Co. v. Hibernia Ins. Co.*, 66 N. Y. 613; *Trustees &c. v. Brooklyn Ins. Co.*, 18 Barb. (N. Y.) 69; *Goit v. National F. Ins. Co.*, 25 Barb. (N. Y.) 190; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Hodge v. Security Ins. Co.*, 33 Hun (N. Y.) 584; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 506; *Eagan v. Aetna F. Ins.*

Co., 10 W. Va. 583; *Equitable Ins. Co. v. McCrea*, 76 Tenn. 541; *Insurance Co. v. Norton*, 96 U. S. 234; *Ball &c. Wagon Co. v. Aurora Ins. Co.*, 20 Fed. 232; *O'Brien v. Union &c. Ins. Co.*, 22 Fed. 586; *Tennant v. Travelers' Ins. Co.*, 31 Fed. 322.

²⁹ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; *Griffith v. New York &c. Ins. Co.*, 101 Cal. 117, 36 Pac. 113; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 Pac. 922.

³⁰ *Barre v. Council Bluffs Ins. Co.*, 76 Iowa 609, 41 N. W. 373; *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Pino v. Merchants' &c. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Goit v. National &c. Ins. Co.*, 25 Barb. (N. Y.) 189; *American &c. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513, 41 Am. R. 637; *Morrison v. Insurance Co. &c.*, 69 Tex. 353, 6 S. W. 605; *Gans v. St. Paul &c. Ins. Co.*, 43 Wis. 108, 28 Am. R. 535.

³¹ *Hollis v. State Ins. Co.*, 65 Iowa

that an ordinary soliciting agent has power to waive conditions.²² However, it has been held that courts will find a waiver upon slight evidence, especially when the equity of the claim is in favor of the insured.²³ The waiver itself may be shown by proof of an express waiver, or by proof of such facts and circumstances from which it may be inferred.²⁴

§ 2300. **Waiver by local agent.**—It is equally well settled that a local agent of an insurance company may waive a condition in the policy as to the payment of the premiums. But it must be made to appear by proper and sufficient proof that the authority of the local agent is such as to clothe him with power to make such waiver. This authority and power may be shown in different ways: (1) Where the proof shows that such local agent has the general authority to solicit applications, make contracts for insurance and receive the first premiums, it is sufficient evidence of his power to bind his principal by any acts or contracts within the general scope of such apparent authority, even if such are in actual excess of his authority;²⁵ (2) where the proof shows that a local agent is authorized by the company, or the home office to deliver policies and receive premiums therefor with-

454, 21 N. W. 774; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa 609, 41 N. W. 373.

²² *Barre v. Council Bluffs Ins. Co.*, 76 Iowa 609, 41 N. W. 373.

²³ *Bouton v. American &c. Ins. Co.*, 25 Conn. 542; *Pulford v. Fire Dept. &c.*, 31 Mich. 458; *Westchester &c. Ins. Co. v. Earle*, 33 Mich. 143; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141, 20 N. W. 829, 54 Am. R. 354; *Bonenfant v. American &c. Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Germania &c. Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489.

²⁴ *Golt v. National &c. Ins. Co.*, 25 Barb. (N. Y.) 189; *Pino v. Merchants' &c. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; for full notes and collection of authorities of waiver and power of agents to waive, see, *Wheaton v. North British Ins. Co.*, 76 Cal. 415, 9 Am. St. 217, 229; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. 233, 247.

²⁵ *Wheaton v. North British &c. Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. 216, note; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; *German Ins. Co. v. Orr*, 56 Ill. App. 637; *National &c. Ins. Co. v. Barnes*, 41 Kans. 161, 21 Pac. 165; *Western Ins. Co. v. Hogue*, 41 Kans. 524, 21 Pac. 641; *American &c. Ins. Co. v. McLanathan*, 11 Kans. 533; *Milwaukee &c. Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. 12; *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.) 436; *Bonenfant v. American &c. Ins. Co.*, 76 Mich. 653, 43 N. W. 682; *Rivara v. Queen's Ins. Co.*, 62 Miss. 721; *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 271; *Hankins v. Rockford Ins. Co.*, 70 Wis. 4, 35 N. W. 34; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89, 42 N. W. 208; *Union &c. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 234.

in a certain territory, this is held sufficient to constitute him a general agent and empower him to waive the cash payment of premiums;²⁶ (3) where the evidence shows that the policy is not valid until counter-signed by the local agent, thus making it necessary for the insured to deal solely with such agent, this is held sufficient to bind the company to any person insured by such agent in the absence of notice of any limitation of his authority; and this is true even where the agent does exceed his authority;²⁷ (4) where it is made to appear that the local agent was held responsible for the collection of all premiums on policies issued by him, and that it was the custom of the company to permit its agents to give credit on the premiums, it was held sufficient proof of authority of the agent to waive payment, as his liability was substituted by the company for the condition of prepayment;²⁸ (5) the presumption of law is that an insurance agent has power co-extensive with the business entrusted to him, and that such power cannot be limited by instructions not communicated to the person with whom he deals.²⁹

§ 2301. **Warranties—Proof of performance.**—"The rule requiring the performance of warranties to be averred and proved was engrafted into the law of insurance before it was customary for underwriters to require from the insured the full and detailed applications which are a feature of so much prominence in the modern contract, especially in the contract of life insurance. The policy is the evidence delivered to the insured of the contract of the insurer, and ordinarily, of itself, constitutes complete evidence of the contract, while the application, although it may modify the contract, is in the nature of defensive evidence intrusted to the insurer for his protection. As a matter of pleading, if the policy is set forth, and compliance with all the conditions precedent recited in it is averred, there is no necessity for re-

²⁶ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. R. 344.

²⁷ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. 233, 23 Pac. 869; *Viele v. Germania Ins. Co.*, 26 Iowa 58; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 151; *Whited v. Germania Ins. Co.*, 76 N. Y. 415, 32 Am. R. 330; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 440.

²⁸ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869; *Elkins v. Susquehanna &c. Ins. Co.*, 113 Pa. St. 386, 6 Atl. 224; *Lebanon &c. Ins. Co. v. Hoover*, 118 Pa. St. 591, 599, 8 Atl. 163; *Susquehanna &c. Ins. Co. v. Elkins*, 124 Pa. St. 484, 17 Atl. 24, 10 Am. St. 608.

²⁹ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; *Bauble v. Aetna Ins. Co.*, 2 Dill. (U. S.) 156.

ferring to the application, and the complaint or declaration is sufficient upon its face. Nothing is required to be proved which does not go to support some necessary allegation in the complaint, and there seems to be no good reason which requires a plaintiff to assume the burden of proving affirmatively the truth of statements in an application not challenged by the defendant."⁴⁰ But the more recent decisions, and certainly the great weight of authority, adhere to the rule that the burden of proof as to all such matters is upon the company, for the reason that it would impose upon the insured an excessive burden to prove compliance with the conditions and stipulations in a modern insurance policy.⁴¹ In commenting on this rule the Supreme Court of the United States say: "The number of the questions now asked of the assured in every application for a policy, and the variety of the subjects, and length of time which they cover, are such, that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship, that if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests."⁴²

⁴⁰ *American Credit &c. Co. v. necticut &c. Asso.*, 44 La. Ann. 1017, 11 So. 628, 32 Am. St. 362; *Pino v. Wood*, 73 Fed. 81.

⁴¹ *Piedmont &c. Ins. Co. v. Ewing*, 92 U. S. 377; *Swick v. Home L. Ins. Co.*, 2 Dill. (U. S.) 160; *Holabird v. Atlantic &c. Ins. Co.*, 2 Dill. (U. S.) 166; *Supreme Lodge &c. v. Wollschlager*, 22 Colo. 213, 44 Pac. 598; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. R. 810, note; *Northwestern &c. Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. R. 192; *Baker v. German F. Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Kennedy v. New York L. Ins. Co.*, 10 La. Ann. 809; *Kathman v. General Ins. Co.*, 12 La. Ann. 35; *Flynn v. Merchants' &c. Ins. Co.*, 17 La. Ann. 135; *Theodore v. New Orleans &c. Asso.*, 28 La. Ann. 917; *Boisblanc v. Louisiana &c. Ins. Co.*, 34 La. Ann. 1167; *Benjamin v. Con-*

necticut &c. Asso., 44 La. Ann. 1017, 11 So. 628, 32 Am. St. 362; *Pino v. Merchants' &c. Ins. Co.*, 19 La. Ann. 214, 92 Am. Dec. 529; *Supreme Council &c. v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. 244; *Chambers v. Northwestern &c. Ins. Co.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. 549; *Grangers' &c. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. R. 446, note; *Dougherty v. Metropolitan L. Ins. Co.*, 3 N. Y. App. Div. 313; *Breese v. Metropolitan L. Ins. Co.*, 37 N. Y. App. Div. 152; *Spencer v. Citizens' &c. Ins. Asso.*, 142 N. Y. 505, 37 N. E. 617; *Mutual L. Ins. Co. v. Nichols*, (Tex. Civ. App.) 24 S. W. 910; *Gulltinan v. Metropolitan L. Ins. Co.*, 69 Vt. 469, 38 Atl. 315; *Morotock Ins. Co. v. Fostoria &c. Co.*, 94 Va. 361, 26 S. E. 850.

⁴² *Piedmont &c. Ins. Co. v. Ewing*,

§ 2302. **Performance of warranties—Burden of proof.**—The rule as stated by some courts is that the burden is on the insured in an action on the policy to show compliance with a warranty, for the reason that the warranty is regarded as a condition precedent to the contract of insurance.⁴⁸ The rule as stated by the Massachusetts Supreme Court is as follows: "An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the assured. The nature and form of the warranty may effect the amount of evidence to be required of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent the performance of which must be proved by the plaintiff in order to maintain an action on the policy."⁴⁴ But it was held otherwise where the warranty was not absolute;⁴⁵ and a distinction has been made between warranties contained in the application and those stated in the policy, and it was held that the burden was on the insured to show compliance with warranties contained in the policy and that the burden was on the insurer to show non-compliance with warranties in the application.⁴⁶ It has been conceded that this rule probably does not apply to what are called promissory warranties; such as where the party warrants

92 U. S. 377; Grangers' &c. Ins. Co. v. Brown, 57 Miss. 308, 34 Am. R. 446, note.

"Williamson v. New Orleans Ins. Co., (Ala.) 4 So. 36; Gilmore v. Lycoming F. Ins. Co., 55 Cal. 123; Miller v. Mutual &c. Ins. Co., 31 Iowa 216, 7 Am. R. 122; Wilkins v. Germania F. Ins. Co., 57 Iowa 529, 10 N. W. 916; Campbell v. New England &c. Ins. Co., 98 Mass. 381, 389; McLoon v. Com'l &c. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116; Whiton v. Albany &c. Ins. Co., 109 Mass. 24; Price v. Phoenix &c. Ins. Co., 17 Minn. 497, 10 Am. R. 166; Healey v. Imperial F. Ins. Co., 5 Nev. 268; Bobbitt v. Liverpool &c. Ins. Co., 66 N. Car. 70, 8 Am. R. 494; Wilson v. Hampden F. Ins. Co., 4 R. I. 159; Sweeney v. Metropolitan L. Ins. Co., 19 R. I. 171, 61 Am. St. 751; Craig v. United States Ins.

Co., Pet. (U. S.) 410; Bidwell v. Connecticut Mut. &c. Ins. Co., 3 Sawy. (U. S.) 261; O'Neil v. Buffalo F. Ins. Co., 3 N. Y. 122; Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922; 3 Joyce Insurance, § 1951. "McLoon v. Commercial &c. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116; American Credit &c. Co. v. Wood, 73 Fed. (U. S.) 81.

"O'Connell v. Supreme Conclave &c., 102 Ga. 143, 28 S. E. 282, 66 Am. St. 159; Clapp v. Massachusetts &c. Asso., 146 Mass. 519, 16 N. E. 433.

"American Credit &c. Co. v. Wood, 73 Fed. (U. S.) 81; Swick v. Home L. Ins. Co., 2 Dill. (U. S.) 160; Gelb v. International Ins. Co., 1 Dill. (U. S.) 443; Murray v. New York L. Ins. Co., 85 N. Y. 236; Dwight v. Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. R. 729.

that he will not thereafter do certain things, or that he will refrain from doing some things stipulated in the policy as to the future.⁴⁷

§ 2303. Policy as evidence.—As a general rule the policy when delivered constitutes the complete contract of insurance, and when the action is based on such written policy the policy itself must be introduced in evidence and no other evidence is required to prove or sustain the contract of insurance. In such an action its execution need not be proved unless denied under oath. And the introduction of the policy in evidence on the trial of the case raises a presumption that its terms have been complied with; but this presumption is subject to rebuttal.⁴⁸ The policy is subject to the rule that it cannot be varied by parol proof, but ambiguities or trade terms may be explained by parol. For this purpose the general usage of trade at the place where the insurance is effected may be shown for the purpose of explaining such ambiguities; but proof can only be made of such usage or custom as is presumed to have been known and referred to by the parties as the basis of the contract.⁴⁹ The principle stated in a recent case is that in the absence of a verified plea denying the execution of the policy, its introduction in evidence is sufficient proof.⁵⁰

§ 2304. Application as evidence.—In most classes of insurance the application is no part of the contract of insurance. Separate from the application the policy is usually the whole of the obligation assumed by the defendant. Hence, the general rule that in action on the policy the application need not be alleged or proved. This is the

⁴⁷ *Swick v. Home Ins. Co.*, 2 Dill. Ins. Co., 131 Mass. 239; *Mooney v. (U. S.)* 160; *O'Neil v. Buffalo &c. Howard Ins. Co.*, 138 Mass. 375, 52 Ins. Co., 3 N. Y. 122; *Berliner v. Am. R.* 277; *Burnham v. Boston &c. Travelers' Ins. Co.*, 121 Cal. 451, 53 Ins. Co., 139 Mass. 399, 1 N. E. 837; *Pac.* 922. *Eldridge v. McDermott*, 178 Mass.

⁴⁸ *Stepp v. National &c. Asso.*, 37 S. Car. 417, 16 S. E. 134. 256, 59 N. E. 806; *Colt v. Com'l Ins. Co.*, 7 Johns. (N. Y.) 385, 5 Am.

⁴⁹ *Fulton Ins. Co. v. Milner*, 23 Ala. 420; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; *Macy v. Whaling Ins. Co.*, 9 Metc. (Mass.) 354; *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 463; *Howard v. Great Western Ins. Co.*, 109 Mass. 384; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Taber v. China &c. Ins. Co.*, 131 Mass. 239; *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. R. 277; *Burnham v. Boston &c. Ins. Co.*, 139 Mass. 399, 1 N. E. 837; *Eldridge v. McDermott*, 178 Mass. 256, 59 N. E. 806; *Colt v. Com'l Ins. Co.*, 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482; *May Insurance*, §§ 173, 179, 180; 1 *Joyce Insurance*, §§ 256, 259.

⁵⁰ *Firemen's Ins. Co. v. Barnsch.* 161 Ill. 629, 4 N. E. 285.

general rule even where the application is made a part of the policy by agreement or otherwise. The application is in the nature of representations and constitutes the inducement of issuing the policy; it is usually in the possession of the defendant, and if the company claims a release by reason of a breach of any of its terms it is its duty to set out the application and aver the breach as a defense to the action. And this seems to be the rule even where the application contains warranties.⁵¹ The rule is thus stated in Illinois: "The rule seems to be well settled in this State that it is not necessary for the plaintiff, in an action on the policy, either to allege or prove such matters as appear in the application only. To be available as a defense, without regard to whether they are warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as matter of defense."⁵² The rule in Pennsylvania seems to be that where the application is made a part of the policy it was held error to admit the policy in evidence without the application.⁵³ And it was further held that the defendant would not be permitted to introduce the application in evidence when not annexed to the policy as required by statute.⁵⁴

Fire.

§ 2305. **Burden on plaintiff.**—In an action on a policy of insurance the burden of proof is on the plaintiff to establish: (1) The execution of the contract or policy of insurance sued upon; (2) the loss of the property insured, partial or total, within the terms of the

⁵¹ *New England &c. Ins. Co. v. Wetmore*, 32 Ill. 221; *Mutual &c. Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. R. 8; *Guardian &c. Ins. Co. v. Hogan*, 80 Ill. 40; *Provident &c. Soc. v. Cannon*, 103 Ill. App. 534; *Continental &c. Ins. Co. v. Rogers*, 119 Ill. 485; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Supreme Lodge &c. v. Matejowsky*, 190 Ill. 142, 60 N. E. 101; *Britt v. Mutual &c. Ins. Co.*, 105 N. Car. 175, 10 S. E. 896; *Cushman v. United States &c. Sus. Co.*, 4 Hun (N. Y.) 783; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668.

⁵² *Continental L. Ins. Co. v. Rogers*, 119 Ill. 485, 10 N. E. 242; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408.

⁵³ *Lycoming &c. Ins. Co. v. Sailer*, 67 Pa. St. 108; *American &c. Asso. v. George*, 97 Pa. St. 238; *Lycoming &c. Ins. Co. v. Storrs*, 97 Pa. St. 354.

⁵⁴ *Mahon v. Pac. &c. Ins. Co.*, 144 Pa. St. 409, 22 Atl. 876; *Pickett v. Pac. &c. Ins. Co.*, 144 Pa. St. 70, 22 Atl. 871; *Imperial &c. Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. 686.

policy; (3) that he was the owner of the property, or had an insurable interest therein at the time the policy was issued and at the time of the loss; (4) the amount of the loss, or the value of the property at the time of the loss; (5) that such notice and preliminary proof of loss had been given as required by the policy.⁵⁵ Where the plaintiff himself is the insured the burden is upon him to show ownership or insurable interest, at the time the insurance was procured and at the time the property was destroyed.⁵⁶ And the burden of proof, in the absence of proof of waiver, is on the plaintiff to prove that the loss did not occur during the existence of a riot where such a condition is stipulated in the policy; but a denial of all liability under the policy was held sufficient to dispense with the necessity of making proof that the loss occurred from independent causes.⁵⁷ But where the charter of a benevolent association does not require an insurable interest the rule does not apply.⁵⁸ Neither is the plaintiff required to set out nor prove the truth of his representations or warranties; he is not required to set out the application made by him, nor to prove the truth of the statements contained therein.⁵⁹ So where it is provided in the policy that in case additional insurance is taken, notice thereof shall be given to the insurer, it was held in an action on such policy that the burden was upon the plaintiff to prove that such notice had been given.⁶⁰

§ 2306. **Prima facie case.**—The plaintiff has generally made a sufficient prima facie case to entitle him to recover by proof of the following: (1) The contract of insurance; (2) payment of premiums; (3) the ownership or insurable interest in the property; (4) proof of loss. As shown by a preceding section, when the contract is in writing

⁵⁵ *Mack v. Lancaster Ins. Co.*, 4 Fed. (U. S.) 59.

⁵⁶ *Milwaukee &c. Ins. Co. v. Todd*, 32 Ind. App. 214; *Gustin v. Concordia &c. Ins. Co.*, 164 Mo. 172, 64 S. W. 178; *Harness v. National F. Ins. Co.*, 62 Mo. App. 245; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *White v. Merchants' Ins. Co.*, 93 Mo. App. 282; *Montgomery v. Delaware Ins. Co.*, (S. Car.) 45 S. E. 934; *Orrell v. Hampden F. Ins. Co.*, 13 Gray (Mass.) 431; *White v. Merchants' Ins. Co.*, 93 Mo. App. 282; *Planters' Ins. Co. v. Diggs*, 55 Tenn.

(8 Baxt.) 563; *Petrel Guano Co. v. Providence &c. Ins. Co.*, 52 N. Y. Super. Ct. 297; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. R. 321, note; *Ruse v. Mutual &c. Ins. Co.*, 23 N. Y. 516; *Insurance Co. v. Butler*, 38 Ohio St. 128.

⁵⁷ *Royal Ins. Co. v. Martin*, (U. S.) 24 Sup. Ct. 247; see, § 2355.

⁵⁸ *Masonic &c. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25.

⁵⁹ *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408.

⁶⁰ *Harris v. Insurance Co.*, *Wright Planters' Ins. Co.* (Ohio) 544.

the introduction of the policy is sufficient proof. As elsewhere shown, in the absence of any other evidence, the law presumes the payment of the premium from the completed and executed contract of insurance; otherwise the payment of premiums must be proved. The proof of loss must sufficiently show that it complies with the requirements of the policy. When these facts are proved, either by contract or circumstantial evidence, the plaintiff is entitled to recover.⁶¹ Where any of these facts are admitted in the answer they are not required to be proved and the prima facie case is sufficient without any proof of admitted facts.⁶² Even where ownership is denied it is held that "the plaintiff has established a prima facie ownership when he proves that he was in possession of the property, claiming it as his own, and exercising acts of ownership over it when the policy was issued. The plaintiff to make a prima facie case is not required to show the same state of facts with reference to the title as he would be required to show in an action of ejectment. It would be unreasonable and unjust to require the plaintiff to go to the expense and trouble of showing how he had acquired title to the property until the defendant had introduced some evidence which would overcome the prima facie case established by the plaintiff in the manner we have indicated."⁶³ And it is prima facie proof of ownership to show that the property was in the plaintiff's private dwelling occupied by himself and family.⁶⁴ The Supreme Court of Nebraska said: "The mere fact of the contract of insurance being effected should, we think, be enough prima facie evidence to prove the ownership of the property."⁶⁵

§ 2307. *Ownership—Prima facie case.*—While the burden of proof is upon the plaintiff to show that he was the owner of the prop-

⁶¹ *Mutual &c. Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. R. 8; *Provident &c. Soc. v. Cannon*, 103 Ill. App. 534; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 9 N. E. 274; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Supreme Lodge v. Matejowsky*, 190 Ill. 142, 60 N. E. 101; *Cushman v. United States &c. Ins. Co.*, 4 Hun (N. Y.) 786; *Britt v. Mutual &c. Ins. Co.*, 105 N. Car. 175, 10 S. E. 896; *Roach v. Kentucky &c. Ins. Co.*, 28 S. Car. 431, 6 N. E. 286; *Thompson v. St. Louis Ins. Co.*, 43 Wis. 459.

⁶² *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 9 N. E. 274.

⁶³ *Sprigg v. American &c. Ins. Co.*, 101 Ky. 185, 40 S. W. 575.

⁶⁴ *Liverpool &c. Ins. Co. v. Nations*, (Tex.) 59 S. W. 817; *American &c. Ins. Co. v. White*, (Tex.) 73 S. W. 827.

⁶⁵ *Western &c. Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Farmers' &c. Ins. Co. v. Peterson*, 47 Neb. 747, 66 N. W. 847; *American &c. Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068.

erty at the time of the loss or that he had an insurable interest in it, he is not required to make absolute and unconditional proof of ownership nor is he bound to prove a fee simple title. It is sufficient where the proof shows the insured was in possession of the property occupying and claiming it as his own. This is held to be prima facie evidence of title. And in the absence of proof of an outstanding title the prima facie presumption of a seisin in fee growing out of the occupation of the premises by the plaintiff as owner is sufficient evidence of an insurable interest.⁶⁶ And it is held that where the plaintiff was in the possession of the policy and filed it as a part of his petition, it was a sufficient prima facie case to entitle him to recover the amount stipulated, and he was not required to prove that he was the identical person named in the policy.⁶⁷ But this rule as to proof of a prima facie case by showing occupancy, is not sufficient where the title is specifically put in issue by pleading.⁶⁸ And where the policy stated that at the time it was issued the insured was the absolute owner of the property, in an action on such policy it was held that the burden was on the plaintiff to show that his interest was the same as that alleged in the policy.⁶⁹

§ 2308. **Insurable interest.**—The insured must own or have some title in the property insured; but the ownership is not required to be absolute; and conditional ownership or the contingent interest is sufficient to give an insurable interest. In the absence of specific inquiries as to the nature of the title or ownership, the applicant is not required to give the nature or extent of his interest. Thus, where insurance was obtained by an applicant upon "his stock of tobacco," it was held valid although it was shown in an action on the policy that the tobacco was owned by a partnership.⁷⁰ The courts now unanimous-

⁶⁶ *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. R. 469; *Wood v. American F. Ins. Co.*, 78 Hun (N. Y.) 109; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563; *Lindner v. St. Paul & C. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125.

⁶⁷ *Hartford L. & C. Ins. Co. v. Wayland*, (Ky.) 20 S. W. 199; *Nichols v. Fayette & C. Ins. Co.*, 1 Allen (Mass.) 63; *Wood v. American F. Ins. Co.*, 78 Hun (N. Y.) 109.

⁶⁸ *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563; 2 *Greenleaf Ev.*, § 378.

⁶⁹ *Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. (Reprint) 276, 2 Cin. Law Bul. 54.

⁷⁰ *Insurance Co. v. Harmer*, 2 Ohio St. 452; *Graham v. Insurance Co.*, 2 Disn. (Ohio) 255; *Insurance Co. v. Carson*, 9 Ohio Dec. R. 848, 17 Cin. Law Bul. 357.

ly hold that the insured must have an interest of some kind in the property covered by the policy of insurance.⁷¹ Insurance being purely a contract of indemnity, in order to entitle a person to recover on a policy he must have an insurable interest in the property both at the time of the insurance and at the time of the loss.⁷²

§ 2309. *Insurable interest—Nature and proof.*—What amounts to insurable interest is not always subject to a definite statement. But certainly the proof need not show that the interest be the largest which may be had in the subject matter, nor is it necessary that it be either absolute or vested.⁷³ An equitable interest is sufficient. Mr. May states the rule as follows: "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest."⁷⁴ It may be said to be sufficient to give a party an insurable interest where the proof shows that the insured would suffer pecuniary loss by a destruction of the property.⁷⁵ And it has been held not to be essential that the insured have any property at all in the subject matter of the insurance.⁷⁶ It

⁷¹ *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64; *Sawyer v. Mayhew*, 51 Me. 398; *Whiting v. Independent &c. Ins. Co.*, 15 Md. 297; *Balow v. Teutonia &c. Ins. Co.*, 77 Mich. 540, 43 N. W. 924; *Tallman v. Atlantic &c. Ins. Co.*, 29 How. Pr. (N. Y.) 71; *Freeman v. Fulton F. Ins. Co.*, 38 Barb. (N. Y.) 247; *Peabody v. Washington Co. &c. Ins. Co.*, 20 Barb. (N. Y.) 339; *Fowler v. New York &c. Ins. Co.*, 26 N. Y. 422; *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 133; *Chrisman v. State Ins. Co.*, 16 Ore. 283; *Sweeny v. Franklin F. Ins. Co.*, 20 Pa. St. 337.

⁷² *Bevin v. Connecticut &c. Ins. Co.*, 23 Conn. 244; *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.) 301; *German Ins. Co. v. Everett*, (Tex.) 36 S. W. 125.

⁷³ *Dunlop v. Avery*, 23 Hun (N. Y.) 509; *Berry v. American &c. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28

Am. St. 548; *California Ins. Co. v. Union &c. Co.*, 133 U. S. 387; *Merchants' &c. Co. v. Insurance Co. &c.*, 151 U. S. 368; *Rumsey v. Phoenix Ins. Co.*, 17 Blatch. (U. S.) 527.

⁷⁴ 1 May Insurance, § 80; 2 Greenleaf Ev., § 405.

⁷⁵ *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 So. 116, 11 Am. St. 51, note; *Fenn v. New Orleans &c. Ins. Co.*, 53 Ga. 578; *Lycoming &c. Ins. Co. v. Jackson*, 83 Ill. 302; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078; *Agricultural Ins. Co. v. Clancey*, 9 Ill. App. 137; *Merrett v. Farmers' Ins. Co.*, 42 Iowa 11; *Rohrbach v. Germania &c. Ins. Co.*, 62 N. Y. 47, 20 Am. R. 451; *National &c. Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. 337, 60 Am. R. 473; *United States v. American &c. Co.*, 166 U. S. 468, 17 Sup. Ct. 619.

⁷⁶ *Buck v. Chesapeake &c. Ins. Co.*, 1 Pet. (U. S.) 151.

has long been the rule that proof of expected profits is sufficient to support a policy of insurance.⁷⁷ And it is now held that valid insurance may be placed upon property which is not yet in existence as such.⁷⁸ And a policy holder may maintain an action on his policy so long as he retains an insurable interest in the property, unless he forfeits the right by reason of a prohibited change in such interest.⁷⁹

§ 2310. Insurable interest—Burden of proof.—The burden of proof of showing some insurable interest is upon the plaintiff.⁸⁰ The plaintiff's interest in the property being one of the essential facts upon which the right of recovery depends, it is necessary that such interest be pleaded and proved.⁸¹ It is held that proof of the application and that the policy issued upon such application, where both described the property insured as the property of the plaintiff, was sufficient *prima facie* evidence of insurable interest in the insured.⁸²

§ 2311. Oral contract of insurance—Proof.—In the absence of a statute and the provision requiring it by the charter of the company the contract of fire insurance may be oral and its validity is determined by the rules of the common law.⁸³ When the contract is not

⁷⁷ French v. Hope Ins. Co., 16 Pick. (Mass.) 397; Eyre v. Glover, 16 East 218.

⁷⁸ Barry v. Farmers' &c. Ins. Asso., 110 Iowa 433, 81 N. W. 690; Holmes v. Phoenix Ins. Co., 98 Fed. (U. S.) 240.

⁷⁹ Hitchcock v. North Western Ins. Co., 26 N. Y. 68; Jardee v. Cottage Grove &c. Ins. Co., 75 Wis. 345, 44 N. W. 636.

⁸⁰ Planters' Ins. Co. v. Diggs, 8 Baxt. (Tenn.) 563.

⁸¹ Murdock v. Mutual Ins. Co., 2 N. Y. 210; Tillou v. Kingston &c. Ins. Co., 5 N. Y. 405; Freeman v. Fulton &c. Ins. Co., 38 Barb. (N. Y.) 247; Chrisman v. State Ins. Co., 16 Ore. 283; German Ins. Co. v. Everett, (Tex.) 36 S. W. 125; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. R. 582.

⁸² Nichols v. Fayette Ins. Co., 1 Allen (Mass.) 63; Woodbury Sav.

Bank v. Charter Oak Ins. Co., 29 Conn. 374.

⁸³ Pierson v. State, 12 Ala. 149; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Mobile &c. Ins. Co. v. McMillan, 31 Ala. 711; Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540; Stoelke v. Hahn, 55 Ill. App. 497; Fire Asso. &c. v. Smith, 59 Ill. App. 655; New England &c. Ins. Co. v. Robinson, 25 Ind. 536; American Ins. Co. v. McWhorter, 79 Ind. 136; Commercial &c. Assur. Co. v. State, 113 Ind. 331, 15 N. E. 518; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. 423; Western Mass. Ins. Co. v. Duffey, 2 Kans. 347; Walker v. Metropolitan Ins. Co., 56 Me. 371; Gilmore v. Bradford, 82 Me. 547, 20 Atl. 92; Sanborn v. Firemen's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; Henning v. United States Ins. Co., 47 Mo. 425, 4 Am. R. 332;

required to be in writing, parol evidence is admissible to prove its terms;⁸⁴ and any writing, or written memoranda of the transaction, but which does not amount to a contract, may be given in evidence in connection with the oral proof, in order to establish the facts and circumstances necessary to constitute a contract and give effect to the transaction.⁸⁵ Thus, proof of acceptance of an application for insurance and a parol promise to issue a policy thereon make a complete oral contract of insurance.⁸⁶ It will be sufficient to constitute a contract of insurance to prove that the applicant paid the premium and the agent of the company executed a receipt for the amount of the premium, specifying the property to be insured and stipulating that a policy should be issued as soon as a blank was received, and that the risk began at the date of the contract.⁸⁷ To constitute an oral contract of insurance the proof must show that the minds of the parties met on each of the following propositions: (1) The premises, or the risk; (2) the amount of the insurance; (3) the length of the time the risk shall continue; (4) the amount of the premium.⁸⁸ Where the plaintiff establishes an oral contract to insure, the defendant will not be permitted to prove a usage to require written applications to overcome plaintiff's proof of the oral contract.⁸⁹

§ 2312. Oral contract of insurance—Presumptions as to terms.

Where the proof sufficiently shows an oral agreement to insure, the

Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252; *Sandford v. Trust &c. Ins. Co.*, 11 Paige (N. Y.) 547; *Van Ness v. Packard*, 2 Pet. (U. S.) 137; *Machine Co. v. Insurance Co.*, 50 Ohio St. 549, 35 N. E. 1060; *Stickle v. Mobile Ins. Co.*, 37 S. Car. 56.

⁸⁴ *Mobile &c. Ins. Co. v. McMillan*, 31 Ala. 711; *Home Ins. Co. v. Adler*, 77 Ala. 242; *Hartford &c. Ins. Co. v. Farrish*, 73 Ill. 166; *Taylor v. Merchants' &c. Ins. Co.*, 9 How. (U. S.) 390.

⁸⁵ *Mobile &c. Ins. Co. v. McMillan*, 31 Ala. 711.

⁸⁶ *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Palm v. Medina &c. Ins. Co.*, 20 Ohio 529; *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

⁸⁷ *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119; *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa 325, 11 Am. R. 125; *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush (Ky.) 81; *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. R. 93; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82; *Clarkson v. Western Assur. Co.*, 92 Hun (N. Y.) 527.

⁸⁸ *Trustees &c. v. Brooklyn F. Ins. Co.*, 28 N. Y. 153; *Machine Co. v. Insurance Co.*, 50 Ohio St. 549, 35 N. E. 1060; *Eames v. Insurance Co.*, 94 U. S. 629; *Bennett v. Connecticut F. Ins. Co.*, 11 Ohio Dec. R. 429, 27 Cin. Law Bul. 15.

⁸⁹ *Emery v. Boston &c. Ins. Co.*, 138 Mass. 398.

law will presume that the contract contemplated the terms and conditions of the policies usually issued by the insurance company.⁹⁰ So an oral contract for additional insurance is held to be upon the same terms as the policy in force.⁹¹ Where a loss occurred under an oral contract of insurance the rights of the parties are determined by the terms agreed upon, and that a policy subsequently issued is not conclusive as to the terms of insurance and may be rebutted by proof of the oral agreement.⁹² And where it appeared that a verbal agreement was made in October for a policy of insurance for twelve months, to be issued in the early part of November, it was held sufficient to cover a loss occurring on the 19th day of November.⁹³

§ 2313. **Oral contract of insurance—Proof in case of loss.**—In an action to enforce a parol contract of insurance the proof must be clear that such a contract was actually made. The action, it is said, cannot be maintained if there is a doubt of the matter upon the evidence as a whole.⁹⁴ But ordinarily in such an action it is not necessary to allege or prove either the payment of the premium or the delivery of the policy. There may be a valid and enforceable contract of insurance without either delivery of policy or payment of premium.⁹⁵ Some courts hold that the insured can maintain no action on the contract until he has made and delivered to the company a particular verified account of the loss with a statement of the value of the property, his interest, and when and how the loss occurred.⁹⁶ But other courts hold

⁹⁰ *Hubbard v. Hartford Ins. Co.*, 33 Iowa 325, 11 Am. R. 125; *Smith v. State Ins. Co.*, 64 Iowa 716, 21 N. W. 145; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa 609, 41 N. W. 373; *Green v. Liverpool &c. Ins. Co.*, 91 Iowa 615, 60 N. W. 189; *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458; *Machine Co. v. Insurance Co.*, 50 Ohio St. 549, 35 N. E. 1060; *Eames v. Insurance Co.*, 94 U. S. 629.

⁹¹ *Green v. Liverpool &c. Ins. Co.*, 91 Iowa 615, 60 N. W. 189; *Sater v. Henry Co. &c. Ins. Co.*, 92 Iowa 579, 61 N. W. 209.

⁹² *Salisbury v. Hekla &c. Ins. Co.*, 32 Minn. 458, 21 N. W. 552; *Ganser v. Fireman's &c. Ins. Co.*, 34 Minn. 372, 25 N. W. 943; *Nebraska &c. Ins.*

Co. v. Selvers, 27 Neb. 541, 43 N. W. 351.

⁹³ *Home Ins. Co. v. Alder*, 77 Ala. 242.

⁹⁴ *McCann v. Aetna Ins. Co.*, 3 Neb. 198; *Suydam v. Columbus Ins. Co.*, 18 Ohio 459; *Neville v. Merchants' &c. Ins. Co.*, 19 Ohio 452.

⁹⁵ *Western Assur. Co. v. McAlpin*, 23 Ind. 220, 55 N. E. 119; *Union Cent. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Bragdon v. Appleton Ins. Co.*, 42 Me. 259; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. R. 322; *Kohne v. Insurance Co.*, 1 Wash. (U. S.) 93; *May Insurance*, § 22.

⁹⁶ *McCann v. Aetna Ins. Co.*, 3 Neb. 198; *Nebraska &c. Ins. Co. v. Sel-*

that where the insurance company agreed by parol to issue a policy and fails to do so that it thereby waived the right to demand proof of loss arising under the contract of insurance.⁹⁷

§ 2314. **Agent's authority to make oral contract.**—Proof that the agent of the insurance company has authority to make contracts of insurance is sufficient to prove his authority to make oral as well as written contracts.⁹⁸ And where the proof showed that the agent of an insurance company agreed with a purchaser who had taken an assignment of a policy that the policy assigned should continue in force and have the same effect as a new policy, this was held to be binding on the insurance company.⁹⁹

§ 2315. **Loss—Damages.**—It is universally held that the contract of insurance is a contract of indemnity purely, and that in case of loss the insured is entitled to no more than will reasonably indemnify him. Hence in assessing the damages the question to be determined by the jury is the actual damages sustained by the insured by reason of the loss or destruction of his property. This damage should be estimated in either of two ways depending on the nature of the property or the extent of the injury by reason of the fire. First, by ascertaining the cost or expenses of restoring the property to its condition before

vers, 27 Neb. 541, 43 N. W. 351; Hardwick v. State Ins. Co., 20 Ore. 547.

* *Tayloe v. Merchant's &c. Co.*, 9 How. (U. S.) 390; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. 786; *Baile v. St. Joseph &c. Ins. Co.*, 73 Mo. 371; *Nebraska &c. Ins. Co. v. Selvers*, 27 Neb. 541, 43 N. W. 351; *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

* *New England &c. Ins. Co. v. Robinson*, 25 Ind. 536; *American &c. Ins. Co. v. Patterson*, 28 Ind. 17; *American &c. Ins. Co. v. McWhorter*, 78 Ind. 136; *Com'l &c. Assur. Co. v. State*, 113 Ind. 331, 15 N. E. 518; *Packard v. Fire Ins. Co.*, 77 Me. 144; *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448;

Putnam v. Home Ins. Co., 123 Mass. 324, 25 Am. R. 93; *Ellis v. Albany &c. Ins. Co.*, 50 N. Y. 402, 10 Am. R. 495; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Goldwater v. Liverpool &c. Ins. Co.*, 39 Hun (N. Y.) 176; *Palm v. Medina &c. Ins. Co.*, 20 Ohio 529; *Cohen v. Continental &c. Ins. Co.*, 67 Tex. 325, 3 S. W. 296; *Schomer v. Hekla &c. Ins. Co.*, 50 Wis. 575, 7 N. W. 544; *Humphrey v. Hartford &c. Ins. Co.*, 15 Blatch. (U. S.) 504; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. R. 322; *Ruggles v. American &c. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560; *Potter v. Phenix Ins. Co.*, 63 Fed. (U. S.) 382.

* *Insurance Co. v. Wall*, 31 Ohio St. 628, 27 Am. R. 533.

injury; second, in case this cannot be done, then its value at the time of the loss is to be determined. The damage in such cases are limited to the actual loss of the property covered by the policy. The insured is not permitted to speculate by reason of his apparent misfortune, nor can the insurer be called upon to reimburse him for the loss of any supposed profits or damages by reason of the interruption to his business. Where the loss is partial the insured is only entitled to recover the amount of that loss, provided it is less than the amount stated in the policy; where the property covered by the policy is totally destroyed then the insured is entitled to recover its actual value at the time of the loss, unless the amount stated in the policy is in the nature of liquidated damages.¹⁰⁰

§ 2316. **Loss—Proof of value.**—No definite or specific rules of evidence in proving the amount of the loss or the value of the property destroyed will govern in all cases. The proofs necessary vary according to the nature and circumstances of the case, the character and condition of the property. Any evidence may be regarded competent and material which proves or tends to prove the value of the property in controversy or the damages sustained by the plaintiff on account of the loss. Courts are somewhat liberal in the introduction of evidence as to the value of property destroyed by fire in actions on insurance policies. This arises from the necessity of the case, as not only the subject matter of the controversy is destroyed, but often the evidence as to its quantity and value is lost at the same time; hence, inferior and uncertain or indefinite evidence is frequently admitted as being the best evidence under the circumstances.¹⁰¹

§ 2317. **Proof of value—Buildings.**—Where the policy reserves for the insurance company the option of rebuilding, and the cost of such rebuilding is made the basis, or one of the criteria of liability in case of loss, it becomes proper and competent in the action on such a policy to prove the cost of rebuilding; and a witness who shows

¹⁰⁰ *Liscom v. Boston &c. Ins. Co.*, 9 Metc. (Mass.) 205; *Harris v. Eagle Ins. Co.*, 5 Johns. (N. Y.) 368; *Merchants' &c. Co.*, 82 Iowa 637, 49 Vance v. Forster, 1 Ir. Cir. Cas. 51; *N. W.* 65, 31 Am. St. 507; *Sherlock v. German Ins. Co.*, 21 App. Div. (N. Y.) 18; *Girard &c. Ins. Co. v. Braden*, 96 Pa. St. 81. 195.

himself competent and familiar with the old building may testify as to the cost of rebuilding.¹⁰² The rental of a building at the time of its loss is admissible in evidence upon the question of the value of the building destroyed. But such proof must be limited in time to the date of the loss.¹⁰³ The rule as stated by some courts is as follows: The measure of damages in an action for such a loss is the value at the time of the loss, and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one by reason of age and use, are all proper subjects of inquiry.¹⁰⁴

§ 2318. Value of buildings—Opinion evidence.—A witness may give his opinion as to what it would cost to rebuild the building destroyed; and it is no objection to his competency that he is not a carpenter, as such an objection would only go to the weight of his evidence.¹⁰⁵ And where a witness is acquainted as to the values and has heard from other witnesses a description of the building destroyed, he was held competent to state as a matter of opinion the cost of rebuilding it.¹⁰⁶ But where an expert witness has given his opinion as to the value or cost of rebuilding, it was held improper to ask him this question: "Would you be willing to rebuild this building at these figures?"¹⁰⁷ In proving the value of a building it is proper to show the price of lumber of the kind of which the building was composed at the time of the fire.¹⁰⁸

§ 2319. Proof of value—Goods and personal property.—In an action to recover the value of a stock of goods a former policy on the same stock of goods for the same amount which was shown to the agent at the time of the insurance, is competent evidence to prove the value in connection with other proofs that the stock had remained about the same in quantity and value up to the time of the fire.¹⁰⁹ It

¹⁰² *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. 143.

¹⁰³ *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Cumberland & Co. v. Schell*, 29 Pa. St. 31.

¹⁰⁴ *Holter & Co. v. Fireman's Ins. Co.*, 18 Mont. 282, 45 Pac. 207.

¹⁰⁵ *Cummins v. German & Co. Ins. Co.*, 192 Pa. 359, 43 Atl. 1016; *Whiting v. Mississippi & Co. Ins. Co.*, 76 Wis. 592, 45 N. W. 672.

¹⁰⁶ *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. 143; *Holter & Co. v. Fireman's & Co. Ins. Co.*, 18 Mont. 282, 45 Pac. 207.

¹⁰⁷ *Caraher v. Royal Ins. Co.*, 63 Hun (N. Y.) 82.

¹⁰⁸ *Cummins v. German & Co. Ins. Co.*, 192 Pa. 359, 43 Atl. 1016.

¹⁰⁹ *Gulf City Ins. Co. v. Stephen*, 51 Ala. 121.

was held proper and competent for witnesses to compare the stock of goods destroyed with another stock of goods of much less value than the amount claimed by the plaintiff under his policy; such evidence might be important and controlling where the stock was located in a small building in a country village.¹¹⁰ Where the original cost of a stock of goods that had been destroyed by fire was shown and the amount of the sales made from such stock, including profits, was also proved, the following instruction by the trial court to the jury was approved on appeal: "To determine the amount of goods on hand at the time of the fire, you should deduct from the amount of goods sold the amount of profits upon said goods as shown by the evidence and this method, that is, taking all the goods purchased by the plaintiff that the evidence shows went into said stock prior to the time of said fire, deducting from said goods the amount of the sales, less the profits as shown by the evidence, would be one method of determining the value of goods on hand at the time of the fire."¹¹¹ In an action on an insurance policy to recover the value of personal property destroyed it is competent on the behalf of the defendant to show the price at which the plaintiff offered to sell the property a short time before its destruction as tending to prove its market value.¹¹² One method of proving the value of personal property is by showing what it sold for on or about the time in controversy.¹¹³ But in an action to recover for "cold storage eggs" it was held incompetent to prove the current price of fresh eggs.¹¹⁴ It was held competent to show that the plaintiff stated the amount of insurance he carried a short time before the fire when the amount stated was much less than the sum named in the policy.¹¹⁵ So it was held competent for an insurance company to introduce in evidence an affidavit made by the insured during the year in which the fire occurred and for the purpose of securing a trader's

¹¹⁰ *Living's v. Home &c. Ins. Co.*, 50 Iowa 207. *Citizens' Nat. Bank v. Converse*, 105 Iowa 669, 75 N. W. 506; *Smith v.*

¹¹¹ *St. Paul &c. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137. *Mitchell*, 12 Mich. 180; *Davis v. Zimmerman*, 40 Mich. 24; *Dyer v.*

¹¹² *Joy v. Security F. Ins. Co.*, 83 Iowa 12, 48 N. W. 1049; *Hersey v. Merrimack &c. F. Ins. Co.*, 27 N. H. 149; *Lamoreaux v. Rolfe*, 36 N. H. 44. *Rosenthal*, 45 Mich. 588, 8 N. W. 560; *Campbell v. Woodworth*, 20 N. Y. 499; *Gill v. McNamee*, 42 N. Y. 44.

¹¹³ *Kelly v. Norwich F. Ins. Co.*, 33. 82 Iowa 137, 47 N. W. 986.

¹¹⁴ *Buford v. McGetchie*, 60 Iowa 298, 14 N. W. 790; *Clements v. Railway Co.*, 74 Iowa 442, 38 N. W. 144; ¹¹⁵ *Living's v. Home Ins. Co.*, 50 Iowa 207.

license where the amount stated in such affidavit was much less than the amount claimed.¹¹⁶ Where it appeared that the property insured cost thirty-five hundred dollars and that its value in the application was placed at that sum, it was held in the absence of any evidence to the contrary that the jury were authorized in finding its value in that sum.¹¹⁷

§ 2320. Value of stock of goods—Opinion evidence.—It is well settled that in actions on insurance policies the value of the stock of goods may be established by expert evidence. As in other cases the witness must show himself competent to give his opinion as an expert and the weight of the opinion is for the jury. Where witnesses testified that they had actual knowledge of the stock of goods destroyed and in controversy and were familiar with the price of such goods in the market, their evidence was held to be clearly competent.¹¹⁸ It was held competent to permit merchants, who were engaged in different lines of trade, who had seen the stock of goods in controversy before the fire, to express an opinion as to the value of such stock.¹¹⁹ But it was held incompetent for a witness to give his opinion as to the value of a stock where he had not seen the stock recently before the fire and was unable to state definitely the time of seeing the stock with reference to the time it was destroyed.¹²⁰ Where the property destroyed consisted of a valuable stock of liquors and where the plaintiff testified that he could not state from memory the amount of the purchase, it was held proper and competent to introduce in evidence the bills showing the amount of such purchase.¹²¹

§ 2321. Proof of value—Open policy.—The two leading divisions of policies of fire insurance determined by their construction are termed "open" and "valued." The difference is not always clearly defined and it frequently becomes a matter of some difficulty to deter-

¹¹⁶ *Mispelhorn v. Farmers' &c. Ins. Co.*, 53 Md. 473.

¹¹⁷ *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710, 29 N. W. 605.

¹¹⁸ *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121; *Newmark v. Liverpool &c. Ins. Co.*, 30 Mo. 160; *Girard &c. Ins. Co. v. Braden*, 96 Pa. St. 81.

¹¹⁹ *Graves v. Merchants' &c. Ins. Co.*, 82 Iowa 637, 49 N. W. 65.

¹²⁰ *Metzger v. Manchester &c. Assur. Co.*, 102 Mich. 334, 63 N. W. 650.

¹²¹ *Merrill v. Ithaca &c. R. Co.*, 16 Wend. (N. Y.) 586; *Bank &c. v. Culver*, 2 Hill (N. Y.) 531; *Halsey v. Sinsebaugh*, 15 N. Y. 487; *Guy v. Mead*, 22 N. Y. 462; *Nat'l &c. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408; *Sherlock v. German &c. Ins. Co.*, 21 App. Div. (N. Y.) 18.

mine to which class a given policy belongs, as this depends upon the intention of the parties to be ascertained by a local construction of the instrument.¹²² An open policy is usually defined as one in which the value of the property insured is not fixed or agreed upon, but is to be determined by proof in case of loss. A discussion as to the nature of these policies is not within the scope of this chapter, but to give rules of proof only. The chief difference in these classes of policies relates to the proof in case of loss. In an action upon an open policy for a loss within its terms the plaintiff must prove his ownership or insurable interest and the value of the property in order to entitle him to recover.¹²³ And where the action is on an open policy the burden is upon the plaintiff to prove the value of the property at the time of the loss.¹²⁴ But where the proof gives a full and accurate description of the property and the purpose for which it is used the court will take judicial notice that the property is of some value and that the plaintiff is entitled to recover substantial damages.¹²⁵

§ 2322. **Proof of value—Valued policy.**—A valued policy may be such either by agreement or by virtue of the statute. Mr. Wood defines them as follows: "Valued policies are those in which both the property insured and the loss are valued, and each bind the insurer to pay the whole sum insured in case of total loss. They may be said to be policies in which the insurer himself, at the time of making the policy, assesses the damages in a case of total loss, unless fraud, inducing an over valuation on the part of the insured, is established."¹²⁶

¹²² *Riley v. Hartford Ins. Co.*, 2 101 N. Y. 458, 5 N. E. 322; *Snell v. Conn.* 368; *Wallace v. Insurance Delaware &c. Ins. Co.*, 4 Dall. (U. Co., 4 La. (O. S.) 289; *Cushman v. S.)* 430; *Millandon v. Western Ins. Northwestern Ins. Co.*, 34 Me. 487; Co., 9 La. (O. S.) 27; *Illinois &c. Brown v. Quincy &c. Ins. Co.*, 105 Ins. Co. v. *Marseilles Mfg. Co.*, 1 Mass. 396, 7 Am. R. 538; *Ogden v. Gilm. (Ill.)* 236; *Gilbert v. North Columbian Ins. Co.*, 10 Johns. (N. American Ins. Co., 23 Wend. (N. Y.) 273; *Laurent v. Chatham Ins. Y.)* 43, 35 Am. Dec. 543; see, § 2316.

¹²³ *Schroeder v. Trade Ins. Co.*, 12 Ill. App. 651; *City of De Soto v. American &c. Ins. Co.*, (Mo. App.) 74 S. W. 1.

¹²⁴ *Schroeder v. Trade Ins. Co.*, 12 Ill. App. 651.

¹²⁵ *Wood Fire Ins., § 41; Insurance Co. v. Butler*, 38 Ohio St. 128; *Snowden v. Guion*,

Insurance Co. v. Leslie, 47 Ohio St.

As defined by Mr. Joyce: "A valued policy is one wherein the value of the subject matter is agreed upon beforehand at a specified sum. It estimates not merely the value of the property or interest insured, but values the loss, and is equivalent to an assessment of damages, or is in the nature of liquidated damages in case of loss."¹²⁷ Under a statutory valued policy it has been held that a failure of the company or its agent to follow the statutory requirements will not prevent the application of the statute to the policy, and that no conditions of the policy can change the effect of the statute as to the statutory right is not only for the benefit of the insured but fixes the absolute rule of the insurer's liability.¹²⁸ In an action on a valued policy in case of total loss no proof is required either as to ownership or as to the value of the property, as the amount agreed upon in the policy is recoverable as liquidated damages. But this rule does not apply to personal property.¹²⁹ In some valued policies there are provisions for depreciation of the property. In such cases the amount stated still stands as prima facie the amount to be recovered and the burden of proof is on the defendant company to establish any depreciation.¹³⁰ In an action on what is known in law and in insurance circles as a valued policy the plaintiff is only required to establish the fact of the insurance and the loss. The burden is not upon the plaintiff in the first instance to prove that he procured the policy fairly and without misrepresentation or fraud; nor is the burden upon him in such cases to prove that the property was accidentally destroyed by fire.¹³¹

409, 24 N. E. 1072; 1 May Insurance, §§ 30, 31; 2 May Insurance, § 425.

¹²⁷ *British American &c. Co. v. Bradford*, 60 Kans. 82, 55 Pac. 335; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367.

¹²⁸ *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072.

¹²⁹ *Joy v. Security &c. Co.*, 83 Iowa 12, 48 N. W. 1049; *Martin v. Capital Ins. Co.*, 85 Iowa 643, 52 N. W. 534; *Haven v. Germania &c. Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 45 Am. St. 570; *O'Keefe v. Liverpool &c. Ins. Co.*, 140 Mo. 558, 41 S. W. 922; *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *Home &c. Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W.

907, 47 Am. St. 711; *Insurance Co. &c. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. R. 552; *Thompson v. St. Louis &c. Ins. Co.*, 43 Wis. 459; *Thompson v. Citizens' Ins. Co.*, 45 Wis. 388; *Seyk v. Millers' &c. Ins. Co.*, 74 Wis. 67, 41 N. W. 443; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281; 2 May Insurance, § 425.

¹³⁰ *Warshawsky v. Anchor &c. Ins. Co.*, 98 Iowa 221, 67 N. W. 237; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281.

¹³¹ *Dwyer v. Insurance Co.*, 57 Tex. 181; *Sullivan v. Hartford F. Ins. Co.*, (Tex.) 34 S. W. 999.

§ 2323. **Risk—Commencement.**—Where the terms of the contract are agreed upon and in the absence of any stipulation as to the commencement of the risk, it has been held that the risk commences immediately.¹³² Where a policy is issued the general rule is that the risk begins or attaches at the date of the policy; to prevent this there must be evidence of a contrary intent in the policy itself.¹³³ And it was held that where the premium was paid and the policy was not delivered until after the property was destroyed, it took effect by relation as of its date.¹³⁴ The burden is upon the plaintiff to prove a contract to the effect that the risk was to begin on the day the application was signed and the premium paid, where these questions are material.¹³⁵

§ 2324. **Notice of loss.**—The usual provision of a policy as to notice of loss is that immediate notice shall be given to the company of the loss of the property. Under such a policy it is sufficient to prove that the notice was given to a duly authorized agent. And it has been held that notice given to the agents is notice to the company.¹³⁶ Some policies provide that the notice shall be given to a particular officer or agent of the company, and where this is required proof of notice to any other officer or agent than the one designated would not be sufficient to meet the provisions of the policy and would, therefore, be insufficient.¹³⁷

§ 2325. **Notice—Immediate or forthwith.**—Some policies specify that notice shall be given "forthwith" or "immediately;" this usually refers to the notice and preliminary proof, and under this condition the notice must be furnished forthwith, and any material delay is fatal. However, this requirement to furnish notice forthwith must be a reasonable requirement; it does not mean immediately or instantly.

¹³² *Potter v. Phenix Ins. Co.*, 63 Fed. 382.

¹³³ *Hallock v. Com. Ins. Co.*, 26 N. J. L. 268; *Hallock v. Com. Ins. Co.*, 27 N. J. L. 645, 72 Am. Dec. 379; *Ruse v. Mutual &c. Ins. Co.*, 23 N. Y. 516; *Whitaker v. Farmers' &c. Ins. Co.*, 29 Barb. (N. Y.) 312; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Philadelphia &c. Ins. Co. v. American &c. Ins. Co.*, 23 Pa. St. 65.

¹³⁴ *Davenport v. Peoria &c. Ins. Co.*, 17 Iowa 276; *Lightbody v. North American &c. Ins. Co.*, 23 Wend. (N. Y.) 18.

¹³⁵ *Brink v. Merchants' &c. Ins. Co.*, (S. Dak.) 95 N. W. 929.

¹³⁶ *Hartford &c. Ins. Co. v. Smith*, 3 Colo. 422; *Killips v. Putnam &c. Ins. Co.*, 28 Wis. 480.

¹³⁷ *Hartford &c. Ins. Co. v. Smith*, 3 Colo. 422.

neously after the fire. It has been held to mean, within a reasonable time or with reasonable diligence under all the circumstances after the fire.¹³⁸

§ 2326. **Notice—Meaning of “immediate,” “forthwith.”**—Most policies contain a condition that a written notice of the loss shall be furnished immediately, forthwith, or as soon as possible. The terms are held not to be absolute, but have always received a liberal or reasonable construction and usually the requirement will be fulfilled if the notice is given with due diligence under the circumstances of each particular case and without unnecessary or unreasonable delay. A liberal interpretation of the requirement and enforcing strict compliance therewith would in most cases amount to an absolute bar to any recovery for the loss.¹³⁹ The rule gathered from an early New York

¹³⁸ *Railway &c. Assur. Co. v. Burwell*, 44 Ind. 460; *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142; *Bennett v. Lycoming &c. Ins. Co.*, 67 N. Y. 274; *New York &c. Ins. Co. v. National &c. Ins. Co.*, 20 Barb. (N. Y.) 468; *Brown v. London &c. Corp.*, 40 Hun (N. Y.) 101; *McMasters v. Westchester &c. Ins. Co.*, 25 Wend. (N. Y.) 379; *Whitehurst v. North Carolina &c. Ins. Co.*, 7 Jones L. (N. Car.) 433, 78 Am. Dec. 246; *Edwards v. Lycoming &c. Ins. Co.*, 75 Pa. St. 378; *Inman v. Western &c. Ins. Co.*, 12 Wend. (N. Y.) 452; *Insurance Co. &c. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Peoria &c. Ins. Co. v. Lewis*, 18 Ill. 553; *Fidelity &c. Co. v. Weise*, 80 Ill. App. 499; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Kentzler v. American &c. Asso.*, 88 Wis. 596, 60 N. W. 1002; *Foster v. Fidelity &c. Co.*, 99 Wis. 447, 75 N. W. 69; *Edwards v. Baltimore &c. Ins. Co.*, 3 Gill (Md.) 176; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. R. 323; *Cashau v. North Western &c. Ins. Co.*, 5 Biss. (U. S.) 476.

¹³⁹ *Central &c. Ins. Co. v. Oates*, 86 Ala. 558, 6 So. 83, 11 Am. St. 67; *L. 110; McNally v. Phoenix Ins. Co.*,

Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. 196; *Peoria &c. Ins. Co. v. Lewis*, 18 Ill. 553; *Provident &c. Ins. Co. v. Baum*, 29 Ind. 235; *Railway &c. Assur. Co. v. Burwell*, 44 Ind. 460; *Insurance Co. &c. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Baker v. German &c. Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Peele v. Provident Fund Soc.*, 147 Ind. 543, 46 N. E. 990; *Pennypacker v. Capital Ins. Co.*, 80 Iowa 56, 45 N. W. 408, 20 Am. St. 395; *Capital Ins. Co. v. Wallace*, 50 Kans. 453, 31 Pac. 1069; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.) 176; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. R. 323; *Kingsley v. New England &c. Ins. Co.*, 8 Cush. (Mass.) 398; *Rines v. German Ins. Co.*, (Minn.) 80 N. W. 839; *Fletcher v. German-American Ins. Co.*, (Minn.) 82 N. W. 647; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Erwin v. Springfield &c. Ins. Co.*, 24 Mo. App. 145; *Omaha &c. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Roumage v. Mechanics' &c. Ins. Co.*, 13 N. J.

case was stated as follows: "The provision in the condition of a policy that notice shall be forthwith given, it seems, will be construed as imposing no more than due diligence, under all the circumstances of the case; but there must be no laches or unnecessary procrastination or delay in the giving of the notice."¹⁴⁰ It has also been held that forthwith meant "due diligence under all the circumstances."¹⁴¹

§ 2327. **Change of location, vacation.**—Fire insurance policies usually contain stipulations against change of location, vacation, alienation, additional insurance, liens, etc. In actions on a policy containing any one or more of these provisions it is essential to entitle the plaintiff to recover that the evidence show that the loss did not occur during the existence of the forbidden hazard. It is not a question of whether the risk is increased or decreased, as the insurer by the terms of the policy reserves that question for its own determination. Under this principle the insured was held entitled to recover where insured chattels had been removed to another location without the consent of the insurer and subsequently with the consent of the insurer were removed to a different location when the loss occurred.¹⁴² The rule in relation to stipulations against change of location, vacancy and kindred subjects is stated by the Supreme Court of Ohio as follows: "The same view has been taken of stipulations against liability in case of the alienation of the title of the insured, of other insurance, of forbidden liens, or increased hazard from repairs, of the insured property being used in violation of law, of a ship navigating forbidden waters, of the use of the property for more hazardous purposes, of lighting with gasoline and other like conditions. With respect to all of the conditions enumerated, it has been considerably held that the avoidance intended by the stipulation is during, and only during, the existence of the forbidden hazard."¹⁴³

- 137 N. Y. 389, 33 N. E. 475; *Trippe v. Provident Fund Soc.*, 140 N. Y. 433; *Wood Insurance*, § 414.
 23, 35 N. E. 316, 37 Am. St. 529; ¹⁴⁰ *Inman v. Western &c. Ins. Co.*, 12 Wend. (N. Y.) 452.
Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 458; *Carey v. Farmers' Ins. Co.*, 27 Ore. 146; ¹⁴¹ *New York &c. Ins. Co. v. National &c. Ins. Co.*, 20 Barb. (N. Y.) 468.
Trask v. State &c. Ins. Co., 29 Pa. St. 188, 72 Am. Dec. 622; *American &c. Ins. Co. v. Hazen*, 110 Pa. St. 530, 1 Atl. 605; *People's &c. Asso. v. Smith*, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. 870; *Insurance Companies v. Boykin*, 12 Wall. (U. S.) 483; ¹⁴² *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. R. 455; *Ohio &c. Ins. Co. v. Burget*, 65 Ohio St. 119, 61 N. E. 712, 87 Am. St. 596.
¹⁴³ *Ohio &c. Ins. Co. v. Burget*, 65

§ 2328. **Vacancy—Proof.**—It has been held that the question of whether or not premises were vacant within the meaning of the policy at the time of the fire and the consequent increase of risk was one of fact.¹⁴⁴ The vacancy which is sufficient to forfeit must be shown to be permanent and not a temporary removal.¹⁴⁵ And where it was provided that the policy should be void if the dwelling house insured should be vacated or left unoccupied it was held in an action on the policy sufficient to defeat a recovery where the proof showed that the property was vacant at the time of the loss.¹⁴⁶ On the question of in-

Ohio St. 119, 61 N. E. 712, 87 Am. St. 596; Eureka Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57; Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248; Fireman's &c. Ins. Co. v. Holt, 35 Ohio St. 189, 35 Am. R. 601; Phoenix Ins. Co. v. Railroad Co., 28 Ohio St. 69; Knight v. Eureka &c. Ins. Co., 26 Ohio St. 664, 20 Am. R. 778; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. R. 612; Washington Ins. Co. v. Hayes, 17 Ohio St. 432; Herbert v. Insurance Co., 23 Ohio C. C. 225; Mutual &c. Ins. Co. v. Coatesville &c. Factory, 80 Pa. St. 407; Bryce v. Lorillard Ins. Co., 55 N. Y. 240; State Ins. Co. &c. v. Schreck, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524; Obermeyer v. Globe &c. Ins. Co., 43 Mo. 573; Hinckley v. Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. R. 445; Worthington v. Bearse, 12 Allen (Mass.) 382; United States F. &c. Ins. Co. v. Kimberly, 34 Md. 224; Lane v. Maine &c. Ins. Co., 12 Me. 44, 28 Am. Dec. 150, note; McClue v. Girard Ins. Co., 43 Iowa 349, 22 Am. R. 249, note.

¹⁴⁴ Phoenix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. R. 106; American Ins. Co. v. Foster, 92 Ill. 334, 34 Am. R. 134; Stupetski v. Transatlantic &c. Ins. Co., 43 Mich. 373, 5 N. W. 401; Carr v. Roger Williams

Ins. Co., 60 N. H. 513; Gates v. Madison &c. Ins. Co., 2 N. Y. 43; Williams v. People's &c. Ins. Co., 57 N. Y. 274; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. R. 111; Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. R. 116; Cornish v. Farm Bldgs. &c. Ins. Co., 74 N. Y. 295; New York &c. Ins. Co. v. Walden, 12 Johns. (N. Y.) 128; Grant v. Howard Ins. Co., 5 Hill (N. Y.) 10.

¹⁴⁵ Eddy v. Hawkeye Ins. Co., 70 Iowa 472, 30 N. E. 808, 59 Am. R. 444; Kimball v. Monarch Ins. Co., 70 Iowa 513, 30 N. W. 862; Springfield &c. Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. R. 111; Doud v. Citizens' Ins. Co., 141 Pa. St. 47, 21 Atl. 505; Stupetski v. Transatlantic &c. Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. R. 195; Shackleton v. Sun Fire Ins. Co., 55 Mich. 288, 21 N. W. 343, 54 Am. R. 379; Galveston Ins. Co. v. Long, 51 Tex. 89; Williams v. North-German Ins. Co., 24 Fed. 625; Herrman v. Merchants' Ins. Co., 81 N. Y. 184, 37 Am. R. 488; American &c. Ins. Co. v. Brighton Mfg. Co., 125 Ill. 131, 17 N. E. 771; 3 Joyce Ins., §§ 2225-2230.

¹⁴⁶ Insurance Co. v. Wells, 42 Ohio St. 519.

creased risk on account of buildings being vacant expert evidence is competent.¹⁴⁷

§ 2329. **Property removed—Burden on defendant.**—Where the defense relied upon in an action on a policy is that the property had been removed from the place where it was when insured, and that at the time of the loss it was not in fact at the place where it was when insured, the burden is upon the defendant to prove such a defense.¹⁴⁸

§ 2330. **Knowledge of violated condition—Waiver.**—A forfeiture which had occurred by reason of a change in the occupancy of the insured property, is waived where it is shown by the evidence that the insurer or its agents knew of such change, and that after the loss the insurer made no objection to the payment on the ground of the change, and directed the insured to make his proofs of loss, which he did at some expense.¹⁴⁹

§ 2331. **Loss within terms of policy—Goods damaged by removal or theft.**—There is some diversity in the holdings of the courts as to the liability of an insurance company for damages to goods or personal property occasioned by their removal from a burning building or from the burning of adjoining buildings. The courts holding the companies liable under such circumstances do not question the correctness of the rule, that insurers are liable only for direct and not for remote and consequential losses occasioned by any peril in the policy. In such cases the policy, usually, and the law require the insured to use reasonable diligence to preserve his property, and the insurer is not answerable for loss sustained in consequence of a neglect of this duty. The rule, therefore, as to liability under such circumstances is correctly stated as follows: "The circumstances as they ex-

¹⁴⁷ *Leitch v. Atlantic &c. Ins. Co.*, 66 N. Y. 100; *Cornish v. Farm Bldgs. &c. Ins. Co.*, 74 N. Y. 295; *M'Laflahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188.

¹⁴⁸ *Cochran v. Amazon Ins. Co.*, 7 Ohio Dec. (Reprint) 276.

¹⁴⁹ *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. R. 479; *Northwestern &c. Ins. Co. v. Germania &c. Ins. Co.*, 40 Wis. 446; *Gans v. St. Paul &c. Ins. Co.*, 43 Wis. 108, 28 Am. R. 535; *Appleton Iron Co. v. British &c. Asso.*, 46 Wis. 33, 1 N. W. 9; *Oshkosh &c. Co. v. Germania &c. Ins. Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233; *Jerdee v. Cottage Grove &c. Ins. Co.*, 75 Wis. 345, 44 N. W. 636; *Carey v. German &c. Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. 907.

isted at the time the removal was made, must determine the necessity for it; and whatever loss or damage the plaintiff necessarily sustained by the removal of the property insured when the danger of its destruction by fire was so direct and immediate that a failure to have made the removal while he had the power would have been gross negligence on his part, he is entitled to recover in this action. The fire, under such circumstances, may in a just sense be regarded as the proximate cause of the loss."¹⁵⁰ In such cases it is probably sufficient if the proof shows that the removal of the goods was reasonably necessary and, under an honest apprehension of a loss without such removal under all the circumstances of the particular case without regard to the actual and ultimate result.¹⁵¹ This rule also extends to the loss of goods by theft; that is where goods are removed in order to save them from an impending fire under the rules already given and are lost by theft in consequence of such removal, the company is liable.¹⁵² This rule of goods damaged by removal to prevent loss by fire coming within the terms of the policy, has been extended to cases where the evidence showed that buildings and personal property were purposely destroyed to prevent their burning and to prevent the spread of fire.¹⁵³

¹⁵⁰ *Case v. Hartford &c. Ins. Co.*, 13 Ill. 676; *Tilton v. Hamilton &c. Ins. Co.*, 1 Bosw. (N. Y.) 367; *Independent &c. Co. v. Agnew*, 34 Pa. St. 96, 75 Am. Dec. 638; *Whitehurst v. Fayetteville &c. Ins. Co.*, 6 Jones L. (N. Car.) 352; *White v. Republic F. Ins. Co.*, 57 Me. 91; *Stanley v. Western Ins. Co.*, L. R. 3 Exch. 71; *Thompson v. Montreal Ins. Co.*, 6 U. C. Q. B. 319; *Lewis v. Springfield &c. Ins. Co.*, 10 Gray (Mass.) 159; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Talmon v. Citizens' &c. Ins. Co.*, 16 La. Ann. 426; *Agnew v. Insurance Co.*, 3 Phila. Super. Ct. (Pa.) 193.

¹⁵¹ *Leiber v. Liverpool &c. Ins. Co.*, 6 Bush (Ky.) 639; *Balestracci v. Firemen's Ins. Co.*, 34 La. 844; *White v. Republic &c. Ins. Co.*, 57 Me. 91; 2 May Insurance, § 404; *Angell Insurance*, § 117; 1 Phillips

Insurance 645, 646; 1 Wood Insurance 265, 266.

¹⁵² *Leiber v. Liverpool &c. Ins. Co.*, 6 Bush (Ky.) 639; *Talmon v. Citizens' &c. Ins. Co.*, 16 La. Ann. 426; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Newmark v. Liverpool &c. Ins. Co.*, 30 Mo. 160, 77 Am. Dec. 608; *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278; *Independent &c. Co. v. Agnew*, 34 Pa. St. 96, 75 Am. Dec. 638; *Agnew v. Insurance Co.*, 7 Am. Law Reg. 168; *Whitehurst v. Fayetteville &c. Ins. Co.*, 6 Jones L. (N. Car.) 352; *Sling v. National Assur. Co.*, 7 Utah 441; 2 May Insurance, § 404.

¹⁵³ *Pentz v. Receivers Aetna &c. Ins. Co.*, 9 Paige (N. Y.) 568; *Mayor &c. v. Lord*, 17 Wend. (N. Y.) 285; *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367; *Greenwald v. Insurance Co.*, 3 Phila. (Pa.) 323.

§ 2332. **Loss within terms of policy—Lightning and wind.** Many policies contain what is known as lightning clauses, insuring against loss by fire from lightning. Under such conditions the proof must show that the loss actually occurred from fire; it is not sufficient to show a mere destruction of the building by lightning but the proof must show an actual burning. The rule on this subject is thus stated: "Unless, therefore, there be actual ignition, and the loss be the effect of such ignition, the insurers are not liable. Not that the identical property to which the damage occurred should be consumed, or even ignited, but there must be a fire or burning which is the proximate cause of the loss. It is immaterial how intense the heat may be, unless it be the effect of ignition, it is not within the terms of the policy."¹⁵⁴ But if a policy makes the insurer liable "for any loss or damage caused by lightning" it has been held that this language covers the known effects of lightning and is not confined to loss from combustion.¹⁵⁵ And it has been held that if an insured building is reduced to a mass of rubbish by a storm, by which its identity was destroyed and thereafter a fire broke out and the ruins of the building were thereby destroyed, there was no liability on the policy of insurance against fire. But the liability existed if the fire occurred while the building was still intact as such, although moved or damaged by the storm.¹⁵⁶

§ 2333. **Loss within terms of policy—Explosions.**—The proof must show that the loss comes within the terms of the policy. The fundamental rule is that the proximate and not the remote cause of the loss must be regarded in order to ascertain whether or not the loss is covered by the policy. A frequent application of this principle is found in cases where the policy provides that the company shall not be liable for loss caused by explosion of any kind unless fire ensues. An illustration of these principles under such a condition in the policy

¹⁵⁴ *Kenniston v. Merrimack &c.* 66 Mo. App. 153; *Fireman's Ins. Co. Ins. Co.*, 14 N. H. 341, 40 Am. Dec. 193; *Babcock v. Montgomery &c.* Ins. Co., 4 N. Y. 326, 6 Barb. (N. Y.) 637; *Austin v. Drew*, 4 Camp. 360, 6 Taunt. 437; *Andrews v. Union &c. Ins. Co.*, 37 Me. 256.

¹⁵⁵ *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433, 11 N. W. 894.

¹⁵⁶ *Farrell v. Farmers' &c. Ins. Co.*, 66 Mo. App. 153; *Fireman's Ins. Co. v. Congregation &c.*, 80 Ill. 558; *Huck v. Globe Ins. Co.*, 127 Mass. 306, 34 Am. R. 373; see, *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 38 N. E. 453; *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22, 35 N. E. 397; *Phoenix Ins. Co. v. Charleston Bridge Co.*, 65 Fed. 628; 2 May Insurance, § 406.

is found where a lighted match was applied to gunpowder or illuminating gas and an explosion followed which caused damages without combustion, it was held that the explosion was the proximate cause of the injury and the lighted match the remote cause, and in such case no loss occurs within the provision of the policy.¹⁸⁷ The question of whether or not the loss is attributable to fire or explosion may sometimes be answered by the determination of whether or not the fire is an incident to the explosion or whether the explosion is an incident to the fire. Thus, where an explosion is caused by a destructive fire already in progress the loss comes clearly within the general risk of the policy against fire only; and this is true whether the fire originated in the building where the insured property was located or out of it.¹⁸⁸

§ 2334. Loss within terms of policy—Damage by water, smoke and heat.—It is not always necessary to prove that the property covered by the policy of insurance was either injured or consumed by the fire. The rule is that the insurer is liable for all losses which result from the fire and can be fairly attributed to it.¹⁸⁹ Thus, where a stock of goods or personal property is damaged by the water used in an effort to extinguish the fire such damage is clearly within the protection

¹⁸⁷ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. R. 557; *Heuer v. Northwestern &c. Ins. Co.*, 144 Ill. 393, 33 N. E. 411; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 427; *Caballero v. Home &c. Ins. Co.*, 15 La. Ann. 217; *Trans-Atlantic &c. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. R. 403; *Scripture v. Lowell &c. Ins. Co.*, 10 Cush. (Mass.) 356; *Roe v. Columbus Ins. Co.*, 17 Mo. 301; *St. John v. American &c. Ins. Co.*, 11 N. Y. 516; *Briggs v. North American Ins. Co.*, 53 N. Y. 446; *United Life &c. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. R. 735; *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44; 1 Wood Insurance, § 104; 1 Beach Insurance, § 582; 2 May Insurance, §§ 413-416a.

¹⁸⁸ *Trans-Atlantic &c. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. R. 403;

Briggs v. North American Ins. Co., 53 N. Y. 446; *United Life &c. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. R. 735; *Heuer v. Northwestern Ins. Co.*, 144 Ill. 393, 33 N. E. 411; *Waters v. Merchants' &c. Ins. Co.*, 11 Pet. (U. S.) 213; *Dows v. Faneuil Hall Ins. Co.*, 127 Mass. 346, 34 Am. R. 384, note.

¹⁸⁹ *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Case v. Hartford F. Ins. Co.*, 13 Ill. 676, 680; *Ermentrout v. Girard &c. Ins. Co.*, 63 Minn. 305; *Babcock v. Montgomery Ins. Co.*, 6 Barb. (N. Y.) 637; *City F. Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367; *Hillier v. Allegheny &c. Ins. Co.*, 3 Pa. St. 470, 45 Am. Dec. 656, note; *Whitecross &c. Co. v. Savill*, L. R. 8 Q. B. 653; *Way v. Abington &c. Ins. Co.*, 166 Mass. 67, 43 N. E. 1032, 55 Am. St. 379.

of the policy. This rule is sustained by both reason and authority.¹⁶⁰ The rule is stated by Mr. May as follows: "And it can scarcely be doubted that in certain cases injury done to a building and its contents by heat, as by scorching paint, cracking glass and blistering pictures and furniture, or heating and thus destroying many articles of commerce, without actual ignition or visible burning, is within the risk."¹⁶¹

§ 2335. **Prohibited use of property or premises.**—Insurance policies provide against a change of the use of the premises and also against storing articles which are known as extra hazardous. However, it is not every change of use that will avoid a policy; the change must be actual and substantial; it must be sufficient to amount to the forbidden trade or business; but it is not essential that it be carried on for any considerable length of time. But the carrying on of a prohibited trade temporarily for the purpose of ordinary repairs, or the introduction into the building of the articles prohibited to be used for ordinary repairs or to be consumed in domestic or family use, is not sufficient to avoid the policy.¹⁶² Provisions against storing articles apply only to those cases where it is shown that the storing and safekeeping of the prohibited articles is the sole object of the deposit, or to the storing in a mercantile sense; they do not apply where the proof shows that the keeping is only incidental to the use, or that it is for

¹⁶⁰ *Case v. Hartford Ins. Co.*, 13 Ill. 676; *Geisek v. Crescent & C. Ins. Co.*, 19 La. Ann. 297; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *White v. Republic F. Ins. Co.*, 57 Me. 91; *Lewis v. Springfield Ins. Co.*, 10 Gray (Mass.) 159; *New York & C. Co. v. Traders' Ins. Co.*, 132 Mass. 377, 42 Am. R. 440; *City Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367; *Whitehurst v. Fayetteville & C. Ins. Co.*, 6 Jones L. (N. Car.) 352; *Hillier v. Allegheny Ins. Co.*, 3 Pa. St. 470, 45 Am. Dec. 656, note; *Independent Ins. Co. v. Agnew*, 34 Pa. St. 96, 75 Am. Dec. 638; *Thompson v. Montreal Ins. Co.*, 6 U. C. Q. B. 319; 3 *Joyce Insurance*, §§ 2824, 2832-2835; *Angell Insurance*, § 117.

¹⁶¹ *May Insurance*, § 402.

¹⁶² *Harris v. Columbian & C. Ins. Co.*, 4 Ohio St. 285; *Washington & C. Ins. Co. v. Merchants' & C. Ins. Co.*, 5 Ohio St. 450; *Beer v. Insurance Co.*, 39 Ohio St. 109; *Westfall v. Hudson River & C. Ins. Co.*, 12 N. Y. 289; *Pindar v. Kings Co. & C. Ins. Co.*, 36 N. Y. 648, 93 Am. Dec. 544; *Whitmarsh v. Conway & C. Ins. Co.*, 16 Gray (Mass.) 359; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Franklin & C. Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Birmingham & C. Ins. Co. v. Kroegher*, 83 Pa. St. 64, 24 Am. R. 147, note; *Carrigan v. Lycoming & C. Ins. Co.*, 53 Vt. 418, 38 Am. R. 687; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. St. 521; *Richards v. Protection Ins. Co.*, 30 Me. 273.

sale by retail.¹⁶³ And it is immaterial that the evidence shows that the fire started from a source entirely different from the prohibited use.¹⁶⁴ But it has been held that an insured could not prove the existence of a custom among dealers in the vicinity of keeping for sale at retail small quantities of the prohibited articles.¹⁶⁵

§ 2336. False swearing.—Most fire insurance policies provide that if the insured shall swear falsely or make a false oath or affidavit as to the amount of his loss or as to any material matter in making his proofs of loss, he shall forfeit his right of action or claim under the policy. It is not sufficient to defeat an action on a policy on this ground simply to show that matters stated in the proofs of loss are not true. In order to defeat the action it must be made to appear that the false swearing within the meaning of the policy was intentional and with the purpose of defrauding. The claim or action of the insured is not to be defeated or invalidated by reason of error or even an exaggerated statement as to the value of the property destroyed. In order to work a forfeiture the evidence must show that the statement was wilfully false concerning some material matter, and was made with the intent to deceive the insurer.¹⁶⁶ But if unreasonable

¹⁶³ *New York &c. Ins. Co. v. Langdon*, 6 Wend. (N. Y.) 623; *Williams v. Fireman's &c. Ins. Co.*, 54 N. Y. 569, 13 Am. R. 620; *Renshaw v. Missouri &c. Ins. Co.*, 103 Mo. 595, 15 S. W. 945, 23 Am. St. 904, note; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Rafferty v. New Brunswick Ins. Co.*, 18 N. J. L. 480, 38 Am. Dec. 525; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; but see to the contrary, *Macomber v. Howard &c. Ins. Co.*, 7 Gray (Mass.) 257; *Whitmarsh v. Charter Oak &c. Ins. Co.*, 2 Allen (Mass.) 581.

¹⁶⁴ *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530; *Westfall v. Hudson River &c. Ins. Co.*, 12 N. Y. 289; *Williams v. People's &c. Ins. Co.*, 57 N. Y. 274.

¹⁶⁵ *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452.

¹⁶⁶ *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 3 Sup. Ct. 507; *Huchberger v. Merchants' F. Ins. Co.*, 4 Biss. (U. S.) 265; *Putnam v. Phoenix Ins. Co.*, 4 Fed. 753; *Merrill v. Insurance Co. &c.*, 23 Fed. 245; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Sternfield v. Park &c. Ins. Co.*, 50 Hun (N. Y.) 262; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Jones v. Mechanics' Ins. Co.*, 36 N. J. 29; *Gerhauser v. North British Ins. Co.*, 7 Nev. 174; *Marion v. Great Republic Ins. Co.*, 35 Mo. 148; *Phoenix Ins. Co. v. Summerfield*, 70 Miss. 827; *Wall v. Howard Ins. Co.*, 51 Me. 32; *Erman v. Sun &c. Ins. Co.*, 35 La. Ann. 1095; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Rice v. Provincial Ins. Co.*, 7 U. C. C. P. 548; 2 May Insurance, § 477; 4 Joyce Insurance, §§ 3339-3344.

or exorbitant values are sworn to in the proofs of loss without any explanation as to why such values are given, this may be taken as evidence of intentional fraud; in other words an intention to deceive may be implied.¹⁶⁷ But it seems that false swearing will not work a forfeiture where the evidence shows that such false statement could not deceive the insurer to its injury.¹⁶⁸ In some jurisdictions it is held that the false swearing will not avoid the policy, provided the actual loss exceeds the entire amount of the insurance.¹⁶⁹ But where an overestimate of the value of the property was made by an agent it is no ground for avoiding the policy in the absence of evidence showing that the insured participated.¹⁷⁰

§ 2337. Certificate of nearest magistrate.—Many fire insurance policies require that in case of loss the insured shall procure a certificate of the nearest magistrate, a notary public, or, in some instances, a clergyman who shall neither be interested in the loss nor related to the insured, and who shall certify that he knows or believes that the loss was without fraud on the part of the insured, and that the loss is equal to the amount stated in the proofs to which such certificate is attached. Such a condition has frequently been held to be a reasonable requirement and must be complied with on the part of the insured as a condition precedent to any right of action upon the policy for such loss.¹⁷¹ Some cases hold that such a requirement must

¹⁶⁷ *Clark v. Phoenix Ins. Co.*, 36 Cal. 168.

¹⁶⁸ *Shaw v. Scottish Com'l Ins. Co.*, 1 Fed. 761; *Geib v. Insurance Co.*, 1 Dill. (U. S.) 443; *Huchberger v. Home Ins. Co.*, 5 Biss. (U. S.) 100; *Howell v. Hartford Ins. Co.*, 3 Ins. L. J. 659; *Marion v. Great Republic Ins. Co.*, 35 Mo. 148; *Sleeper v. New Hampshire Ins. Co.*, 56 N. H. 401; *Haigh v. De La Cour*, 3 Camp. 319; *Levy v. Baillee*, 7 Bing. 349; *Chapman v. Pole*, 22 L. T. (N. S.) 306; *Goulstone v. Royal Ins. Co.*, 1 Fost. & F. 276; *Britton v. Royal Ins. Co.*, 4 Fost. & F. 905; *Park v. Phoenix Ins. Co.*, 19 U. C. Q. B. 110; *Seghetti v. Queen Ins. Co.*, 10 L. C. Jur. 243.

¹⁶⁹ *Springfield &c. Ins. Co. v. Winn*, 27 Neb. 649; but see, *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266, 19 Atl. 396, 17 Am. St. 482.

¹⁷⁰ *Cumberland &c. Co. v. Schell*, 29 Pa. St. 31.

¹⁷¹ *Leadbetter v. Etna Ins. Co.*, 13 Me. 265, 29 Am. Dec. 505; *Davis v. Davis*, 49 Me. 282; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49, 17 Am. R. 65; *Gilligan v. Commercial F. Ins. Co.*, 20 Hun (N. Y.) 93; *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 462; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; see, *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475.

be strictly complied with, and that it is not sufficient to produce such a certificate signed by a magistrate, or other person required, who is not the nearest one of such officer or person required by the policy.^{171*} It is not required that the proof show that the magistrate certifying is the nearest by actual measurement. Such a provision must receive a reasonable construction. The rule on this subject was stated by the Supreme Court of Iowa as follows: "The provision must have a reasonable instead of a liberal construction. It does not, we think, require that the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken. Nor has it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer, nice distinctions as to the distance should not be indulged. A few feet more or less cannot be material."¹⁷² Where the insurer objects to the sufficiency of the certificate of an officer on the ground that there is a nearer one whose certificate it requires, it is held to be the duty of the insurer to give the name and the address of a nearer officer to enable the insured to comply with the demand.¹⁷³ Where two different kinds of officers are named the nearest of one kind is held to be a sufficient compliance with the requirement, although there may be a nearer one of the other kind.¹⁷⁴

§ 2338. **Proofs of loss.**—Fire insurance policies contain conditions to the effect that in case of loss the insured shall within a stated time furnish notice and proofs of the loss to the insurer. In case of loss and in an action upon such policy the insured must aver and prove that he did furnish the required proofs within the specified time. The burden of proving the notice and furnishing the proofs of loss within the time stated in the policy, or an excuse for failure to do so, is upon the insured.¹⁷⁵ A policy requiring the notice of loss to be served forth-

^{171*} *Leadbetter v. Etna Ins. Co.*, 13 Ins. Co., 30 Ore. 29, 46 Pac. 363; Me. 265, 29 Am. Dec. 505; *Worsley v. Wood*, 6 T. R. 710.

¹⁷² *Williams v. Niagara &c. Ins. Co.*, 50 Iowa 561; *Turley v. North American Ins. Co.*, 25 Wend. (N. Y.) 374; *Paltrovitch v. Phoenix Ins. Co.*, 68 Hun (N. Y.) 304; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 37 N. E. 639; *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. 324; *Schmurr v. State*

Ins. Co., 30 Ore. 29, 46 Pac. 363; *Ætna Ins. Co. v. People's Bank &c.*, 62 Fed. 222; *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315, 35 Am. R. 378; 2 May Insurance, § 466; 4 *Joyce Insurance*, §§ 3322-3328.

¹⁷³ *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 37 N. E. 639.

¹⁷⁴ *Oswalt v. Hartford F. Ins. Co.*, 175 Pa. 427, 34 Atl. 735.

¹⁷⁵ *Welsh v. Insurance Co.*, 71 Iowa 338, 32 N. W. 369; *Brock v. Des*

§ 2343. **Proofs of loss—Evidence for court.**—The Supreme Court of Pennsylvania has held with decided emphasis and with much plausibility that the evidence of having furnished the proofs of loss is for the court and is not entitled to go to the jury. Being purely a condition precedent the evidence is addressed to the court for it to determine whether the condition has been performed and the plaintiff has the right to maintain his action. Of this rule that court said: "The preliminary proofs are conditions precedent; what constitute them is determined by the contract, and, the proofs being in writing, that is a question for the court." Here the court first held that the proofs made by the plaintiffs were a substantial compliance with the requirements and conditions of the policy. If it had held that on the face of them they were not, that would have ended plaintiff's case, unless plaintiff offered to follow them with evidence that defendant had waived the service of such preliminary proofs by conduct which misled plaintiff and estopped defendant from insisting on the condition as a prerequisite; but having been decided by the court to be a sufficient compliance with the requirements of the policy, as the trial then stood, the plaintiff had the right to proceed to establish his claim to the satisfaction of the jury, not by exhibiting to them the proofs of loss, but by evidence independent of them.¹²² But it is the duty of the defendant to object to the introduction of the proofs of loss to the jury on the ground of incompetency, and failing to do this and failing to request the court to instruct the jury to disregard such evidence the company waived all objections.¹²³

§ 2344. **Proofs of loss—As admissions.**—The rule that proofs of loss are not evidence of value applies to the plaintiff in an action to recover on the policy. The reason of this rule is that the statements in such proofs of loss are ex parte and could be used as self serving declarations. But the rule does not apply to the defendant. The company can make such use of these proofs as it may desire. It can use them as admissions against the plaintiff and as such they are prima

¹²² *Cole v. Manchester &c. Assur.* 548, 1 Atl. 592; *Sutton v. American Co.*, 188 Pa. St. 345, 41 Atl. 1118; *&c. Ins. Co.*, 188 Pa. St. 380, 41 Atl. 537; *Cummins v. German &c. Ins. Co.*, 192 Pa. St. 359, 43 Atl. 1016; *v. Schreffler*, 42 Pa. St. 188, 82 Am. Dec. 501; *Lycoming Ins. Co. v. Schreffler*, 44 Pa. St. 269; *Kittanning Ins. Co. v. O'Neill*, 110 Pa. St. 548, 1 Atl. 592; *Sutton v. American &c. Ins. Co.*, 188 Pa. St. 380, 41 Atl. 537.

facie evidence against him and may be used on the part of the defendant company.¹⁹⁴ At most such proofs are but admissions by the plaintiff. Thus where a policy provided that if the assured placed other insurance on the property, without notice to the insurer, the policy should be void, it was held that an admission of other insurance in the proofs of loss was sufficient to prevent a recovery and that such admission was sufficient to prove the existence of the additional insurance.¹⁹⁵

§ 2345. Proofs of loss—As evidence of value.—Insurance policies usually require two kinds of proof of loss. The first is usually termed the preliminary proof, consisting, principally, of the information of the destruction of the goods or property. The second giving a detailed statement and an itemized account of the goods and property lost and their value. These must be furnished within the time and pursuant to the conditions of the policy, and are usually required to be verified by the oath of the insured. On the trial in an action on the policy the plaintiff is entitled to introduce in evidence the proofs of loss for the purpose of proving compliance with the terms of the policy and performance of the conditions precedent. But such proofs of loss are not evidence of ownership or of the value of the property lost, and are not to be taken as the basis or measure of recovery. On objection and request the defendant is entitled to an instruction by the court to the effect that the jury can consider only the proofs of loss for the one purpose and not as proof of value.¹⁹⁶ But if the pre-

¹⁹⁴ *North American &c. Ins. Co. v. Zaenger*, 63 Ill. 464; *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. R. 122; *Mutual &c. Co. v. Stibbe*, 46 Md. 302; *New York &c. Ins. Co. v. Watson*, 23 Mich. 486; *John Hancock Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119; *Keels v. Mutual &c. Asso.*, 29 Fed. 198; *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32; *Insurance Co. v. Higginbotham*, 95 U. S. 380.

¹⁹⁵ *Cumberland &c. Ins. Co. v. Giltinan*, 48 N. J. L. 495, 7 Atl. 424; *New York &c. Co. v. Watson*, 23 Mich. 486.

¹⁹⁶ *Southern Ins. Co. v. Lewis*, 42 Ga. 587; *Edgerly v. Farmers' Ins. Co.*, 48 Iowa 644; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9; *Mutual &c. Ins. Co. v. Stibbe*, 46 Md. 302; *Newmark v. Liverpool &c. Ins. Co.*, 30 Mo. 160, 77 Am. Dec. 608; *Browne v. Clay &c. Ins. Co.*, 68 Mo. 133; *Balle v. St. Joseph &c. Ins. Co.*, 73 Mo. 371; *Breckenridge v. American &c. Ins. Co.*, 87 Mo. 62; *Browne v. Hartford &c. Ins. Co.*, 46 Mo. App. 473; *Summers v. Home Ins. Co.*, 53 Mo. App. 521; *Crenshaw v. Pacific &c. Ins. Co.*, 63 Mo. App. 678; *Howard v. City Fire Ins. Co.*, 4 Den. (N. Y.) 502; *Madison &c. Bank v. Gould*,

liminary proofs are admitted without objection, or without request for an instruction to properly limit their effect, it has been held that the jury may consider them as proof of value.¹⁹⁷

§ 2346. **Proofs of loss—Correcting mistakes in.**—The rule that the proofs of loss may be taken as admissions against the insured is not without its exceptions and limitations. The proofs of loss constitute no part of the contract of insurance; they are not in the nature of a contract but simply an effort on the part of the insured after loss to comply with a condition precedent to entitle him to recover, and they serve as information to the insurer simply as to the probable amount of his liability but are in no way binding upon him even in that respect. Hence, for these as well as other reasons, the law permits the correction of any mistakes in the proofs of loss. Mr. Wood states the rule as follows: "When the assured has erroneously stated certain facts in his proofs of loss, without any fraudulent intent, as to the quantity of property destroyed or their value when the cost thereof is only stated in the proofs, as required by the insurer, or as to the occupancy of the property at the time of the loss or in reference to other insurance, he may show that the proofs are erroneous, and what the facts really are."¹⁹⁸ On this subject the Supreme Court of New York say: "The proofs of loss do not create the liability to pay the loss. They do no more in this aspect than to set running the time at the end of which the amount contracted for shall become payable, and at which action may be brought to enforce the liability. All the elements of an estoppel in pais are lacking."¹⁹⁹ And it is generally

- 5 Hill (N. Y.) 309; Farrell v. *Ætna* Ins. Co., 7 Baxt. (Tenn.) 542; Sexton v. Insurance Co., 9 Barb. (N. Y.) 191; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Milwaukee &c. Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12; Knight Templars &c. Co. v. Crayton, 110 Ill. App. 648; Commonwealth Ins. Co. v. Sennett, 41 Pa. St. 161; Kittanning Ins. Co. v. O'Neill, 110 Pa. St. 548, 1 Atl. 592; Cole v. Manchester &c. Ins. Co., 188 Pa. St. 345, 41 Atl. 593; Insurance Co. v. Newton, 22 Wall. (U. S.) 32; Hiles v. Hanover &c. Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. R. 637.
- ¹⁹⁷ Moore v. Protection &c. Ins. Co., 29 Me. 97.
- ¹⁹⁸ Wood Fire Insurance, § 427.
- ¹⁹⁹ McMaster v. President &c. Ins. Co., 55 N. Y. 222, 14 Am. R. 239; Parmelee v. Hoffman Ins. Co., 54 N. Y. 193; Irving v. Excelsior &c. Ins. Co., 1 Bosw. (N. Y.) 507; Campbell v. Charter Oak &c. Ins. Co., 10 Allen (Mass.) 213; *Ætna* Ins. Co. v. Stevens, 48 Ill. 31; Commercial Ins. Co. v. Huckberger, 52 Ill. 464; Parker v. Amazon Ins. Co., 34 Wis. 364; Stache v. St. Paul &c. Ins. Co.,

held that the plaintiff is not bound absolutely by the statement in the proofs of loss, nor do these estop him from showing the truth to be otherwise than as stated therein. So where he can show an innocent mistake made by him in his proofs of loss he is entitled to do so at the trial in an action on the policy.²⁰⁰ And it has been held that where the insured inadvertently omitted articles in the proofs of loss, he may in an action on a policy recover for the articles destroyed but so omitted from the proofs.²⁰¹

§ 2347. **Proofs of loss—Time sufficient.**—Where it was proper to submit the question of the reasonableness of the time in which the notice was given to a jury, and where it was shown that the delay in giving the notice was caused by a criminal suit against the insured on a charge of arson caused a delay of three months, the jury found that the proofs were sent as soon as possible.²⁰² But mere proof that the plaintiff was arrested on a charge of arson for destroying the property insured, or that he was imprisoned, is not a sufficient excuse for his failure to give the required notice under the policy.²⁰³ Notice sent within two days after the loss was held to be forthwith.²⁰⁴ And in

49 Wis. 89, 5 N. W. 36; 35 Am. R. 772, note; *Dogge v. Northwestern &c. Ins. Co.*, 49 Wis. 501, 5 N. W. 889; *Waldeck v. Springfield &c. Ins. Co.*, 53 Wis. 129, 10 N. W. 88; *Bachmeyer v. Mutual &c. Asso.*, 82 Wis. 255, 52 N. W. 101.

²⁰⁰ *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209; *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464; *Supreme Tent &c. v. Stensland*, 206 Ill. 124, 99 Am. St. 137; *Germania Ins. Co. v. Curran*, 8 Kans. 9; *Connecticut &c. Ins. Co. v. Siegel*, 9 Bush (Ky.) 450; *Campbell v. Insurance Co.*, 10 Allen (Mass.) 213; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531; *Miaghan v. Hartford F. Ins. Co.*, 24 Hun (N. Y.) 58; *McMaster v. President &c. Ins. Co.*, 55 N. Y. 222, 64 Barb. 536, 14 Am. R. 239; *Cummings v. Agricultural Ins. Co.*, 67 N. Y. 260, 23

Am. R. 111; *Pittsburg Ins. Co. v. Frazee*, 107 Pa. St. 521; *Smiley v. Citizens' &c. Ins. Co.*, 14 W. Va. 33; *Waldeck v. Springfield &c. Co.*, 56 Wis. 96; *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32; *Connecticut &c. Ins. Co. v. Schwenk*, 94 U. S. 593; *Behr v. Connecticut &c. Ins. Co.*, 2 Flap. (U. S.) 692; *Keels v. Mutual &c. Asso.*, 29 Fed. 198.

²⁰¹ *Ætna Ins. Co. v. Stevens*, 48 Ill. 31; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464; *Supreme Tent &c. v. Stensland*, 206 Ill. 124, 68 N. E. 1098; 99 Am. St. 137.

²⁰² *Home Ins. Co. v. Davis*, 98 Pa. St. 280.

²⁰³ *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142; *Edson v. Merchants' Ins. Co.*, 35 La. Ann. 353.

²⁰⁴ *Beatty v. Lycoming &c. Ins. Co.*, 66 Pa. St. 9; *Hovey v. American Ins. Co.*, 2 Duer (N. Y.) 554; *Peoria &c. Ins. Co. v. Lewis*, 18 Ill. 553.

another case it was held that a delay of thirty days was not sufficient to prevent the submission of the question to a jury.²⁰⁵ So, notice mailed on the eleventh and received on the fifteenth of a loss occurring on the tenth was held to be reasonable diligence.²⁰⁶ And notice given eight days after loss was held sufficient.²⁰⁷ And notice given twelve days after loss was held sufficient.²⁰⁸ And on the occasion of the great fire in Chicago notice of a loss on October eighth or ninth sent to the company November thirteenth was held sufficient.²⁰⁹ And notice given in fifteen days was held to be reasonable.²¹⁰ And where the insured delivered a notice to the agent a few days after the loss and the agent at once sent the notice to the company, it was held to be forthwith.²¹¹ So notice in four days has been held to answer the requirement of "immediate" notice.²¹² And notice given twenty days after loss has been held sufficient.²¹³ It has been held that a delay of ten days in giving notice was not, as a matter of law, unreasonable under the circumstances.²¹⁴ Where the insured was delirious and under the influence of opiates from December twentieth, the date of the injury, to February fourteenth, the date of the notice, it was held sufficient excuse for a strict compliance with the requirements.²¹⁵ Where an accident policy provided for notice within ten days from the date of the injury or death, it was held that a notice given within sixteen days was sufficient where it appeared from the evidence that the notice was given within five days after the beneficiary learned that the death was in fact accidental, and especially so where it appeared that the general agent of the company had immediate notice of the death by newspaper accounts.²¹⁶ And where an accident policy required an immediate notice of injury, and where it appeared that the injury happened in the city where the policy was issued and where the

²⁰⁵ *Ben Franklin Ins. Co. v. Flynn*, 98 Pa. St. 628.

²⁰⁶ *Schenck v. Mercer Co. & Ins. Co.*, 24 N. J. L. 447.

²⁰⁷ *New York & Ins. Co. v. National & Ins. Co.*, 20 Barb. (N. Y.) 468.

²⁰⁸ *Capitol Ins. Co. v. Wallace*, 48 Kans. 400, 29 Pac. 775; *Capitol Ins. Co. v. Wallace*, 50 Kans. 453, 31 Pac. 1070.

²⁰⁹ *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

²¹⁰ *Germania & Ins. Co. v. Decker*, 3 Ind. App. 361, 28 N. E. 868.

²¹¹ *Argall v. Insurance Co.*, 84 N. Car. 355.

²¹² *Hoffecker v. N. & Co.*, 5 Houst. (Del.) 101.

²¹³ *Phillips v. Protection Ins. Co.*, 14 Mo. 220.

²¹⁴ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475.

²¹⁵ *Manufacturers' & Co. v. Fletcher*, 5 Ohio C. C. 633.

²¹⁶ *Peele v. Provident & Soc.*, 147 Ind. 543, 44 N. E. 661.

agents of the company resided, it was held that a notice given six days after the injury was too late.²¹⁷

§ 2348. **Proofs of loss—Time insufficient.**—Many cases are found holding that the time in which the notice was given was insufficient under the circumstances. Thus where it appeared that the insured property was destroyed on the twenty-third day of February and notice of loss was given on the second day of April, it was held insufficient under a provision requiring notice forthwith.²¹⁸ An unexplained delay of twenty days,²¹⁹ and of eleven days,²²⁰ and twelve days,²²¹ and eighteen days,²²² and thirty-three days,²²³ and forty-eight days,²²⁴ have been held insufficient. So it was held that an unexplained delay of three months and nineteen days was not a compliance with the conditions of the policy.²²⁵ And it was held that a notice given fifty days after the loss without excuse was unreasonable.²²⁶ So, a notice four months after the fire was held too late.²²⁷ And notice served five months after the fire was insufficient.²²⁸ So, a delay of eight months was held no compliance with the condition to give notice "as soon as possible" where no excuse was given except inconvenience.²²⁹ And nine months was held to be an unreasonable delay.²³⁰ Where the evidence showed that the notice of loss was given twenty-two days after the fire, it was held to be a question for the jury to

²¹⁷ *Railway &c. Assur. Co. v. Burwell*, 44 Ind. 460.

²¹⁸ *Inman v. Western &c. Ins. Co.*, 12 Wend. (N. Y.) 452.

²¹⁹ *Whitehurst v. North Carolina &c. Ins. Co.*, 7 Jones L. (N. Car.) 433; *Edwards v. Lycoming &c. Ins. Co.*, 75 Pa. St. 378.

²²⁰ *Trask v. State &c. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. 570, 19 Atl. 793, 19 Am. St. 717; *Welsh v. London &c. Corp.*, 151 Pa. 607, 25 Atl. 142, 31 Am. St. 786.

²²¹ *Capitol Ins. Co. v. Wallace*, 50 Kans. 453, 31 Pac. 1070.

²²² *Sparrow v. Universal &c. Ins. Co.*, 17 Phila. (Pa.) 329.

²²³ *Quinlan v. Providence &c. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31.

²²⁴ *Brown v. London &c. Corp.*, 40 Hun (N. Y.) 101.

²²⁵ *Baker v. German F. Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348.

²²⁶ *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898.

²²⁷ *McEvers v. Lawrence*, 1 Hoffm. Ch. (N. Y.) 171; *Carey v. Farmers' Ins. Co.*, 27 Ore. 146, 40 Pac. 91.

²²⁸ *Sherwood v. Agricultural Ins. Co.*, 10 Hun (N. Y.) 593.

²²⁹ *Cameron v. Canada &c. Ins. Co.*, 6 Ont. 392.

²³⁰ *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

determine under all the circumstances of the case within a reasonable time.²³¹

§ 2349. Waiver—Recovery on proof of.—Where the plaintiff has been unable either to comply strictly with the terms requiring the proofs of loss, or where the proofs of loss furnished are defective, he may not fail in his action on the policy if he can prove in either event that the insurer has waived a strict compliance with the terms of the policy.²³² The difficulty is not so much in ascertaining what the rule is as it is in determining and proving facts sufficient to constitute the waiver. One principle as stated is that where the conduct of the insurer is such as to render the production or correction of the proofs of loss useless or unavailing; or if it is sufficient to induce in the mind of the insured a belief that such proofs will not be required or that the defective proofs furnished are either sufficient or satisfactory, this is sufficient to constitute a waiver.²³³ It is the rule that stipulations in a policy of insurance operating as forfeitures are strictly construed, and for this reason comparatively slight evidence of waiver has been held sufficient to prevent their enforcement.²³⁴

§ 2350. Waiver of proofs of loss—Burden.—The conditions of a policy of insurance requiring stated proofs of loss within a stipulated time are for the benefit of the insurer. While he has the right to insist upon the strict compliance of its terms, yet he is at liberty to waive them. And in lieu of proving performance on the part of the plaintiff he is equally entitled to recover if he shows by the proof that the insurer relieved him of furnishing such proofs. The burden is upon the plaintiff to prove such waiver and this he must do in lieu of proof of performance of the condition precedent, that is, instead of proving that he furnished the proofs of loss as required by the policy he must prove that the defendant waived such proof; the one is as essential as the other.²³⁵ And it has been held that where some proofs of loss have been furnished in an action on a policy the plaintiff may

²³¹ *Donahue v. Windsor Co. &c. Georgia &c. Ins. Co.*, 110 N. Car. 193, 14 S. E. 783, 28 Am. St. 678.

²³² See §§ 2338, 2341, 2355.

²³³ *State Ins. Co. v. Belford*, 2

²³⁴ *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. R. 77; *May Insurance*, § 468. *Kans. App.* 280, 42 Pac. 409; *Mispelhorn v. Farmers' Ins. Co.*, 53 Md. 473, 9 Ins. L. J. 411; *Battaille v. Merchants' Ins. Co.*, 3 Rob. (La.)

²³⁵ *Muse v. Assurance Co.*, 108 N. Car. 242, 13 S. E. 94; *Dibbrell v.* 384; 2 *May Insurance*, § 465.

aver compliance with the terms of the policies, and under such averment prove both the defective proofs of the loss and the waiver on the part of the insurer of any other or different proofs of loss, or, by showing that the defendant by its acts had attempted to adjust and settle the loss and is estopped to deny that the proofs were proper or sufficient.²³⁵ But in some jurisdictions the rule is established that evidence of waiver or excuse for non-performance of conditions of the policy is not admissible under an allegation that the insured had performed all the conditions of the contract.²³⁷

§ 2351. **Waiver—Question of law or fact.**—The question of waiver is usually one of fact and not of law, and is to be submitted to the jury under all the facts and circumstances of the case. It is always a question of fact whenever it is to be inferred from the evidence introduced on the trial or when it is to be established by the weight of the evidence.²³⁸ But when the facts are undisputed, the question of waiver becomes one of law for the court. Thus where it was an undisputed fact that appraisers had been demanded by the insurer to view the loss under the policy in the absence of proofs of loss, the court held as a matter of law that this was a waiver.²³⁹

§ 2352. **Waiver—Agent's authority.**—In proving a waiver of proofs of loss entirely or a waiver of defects in proofs of loss furnished it is necessary to prove that the agent making the waiver had sufficient authority to do so. The rule in reference to the authority of an agent to waive the payment of premiums²⁴⁰ does not apply to

²³⁵ *Blake v. Mutual Ins. Co.*, 12 Gray (Mass.) 265; *Butterworth v. Western Ins. Co.*, 132 Mass. 489; *Nickell v. Phenix Ins. Co.*, 144 Mo. 420, 46 S. W. 435.

²³⁷ *Hatch v. Coddington*, 32 Minn. 92, 19 N. W. 393; *Trainor v. Worman*, 34 Minn. 237, 25 N. W. 401; *Boon v. State Ins. Co.*, 37 Minn. 426, 34 N. W. 902; *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932; *Voak v. National Inv. Co.*, 51 Minn. 450, 53 N. W. 708; *Hand v. National & Ins. Co.*, 57 Minn. 519, 59 N. W. 538.

²³⁸ *Fitch v. Woodruff & Co. Iron Works*, 29 Conn. 91; *Savage & Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227; *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880; *Smith v. California Ins. Co.*, 87 Me. 190, 32 Atl. 872; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Robinson v. Pennsylvania & Ins. Co.*, 90 Me. 385, 38 Atl. 320; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Nashua & Co. R. Co. v. Paige*, 135 Mass. 145.

²³⁹ *Pretzfelder v. Merchants' Ins. Co.*, 123 N. Car. 164, 31 S. E. 470.

²⁴⁰ See, §§ 2299, 2300.

waiver of proofs of loss or other forfeitures. It is expressly held that a local agent authorized to issue policies cannot by his acts or declarations waive the provisions of a policy requiring proofs of loss.²⁴¹ It is a sufficient showing of authority to prove that the agent making the waiver was authorized to adjust the amount of the loss and empowered to negotiate any settlement of the claim of the insured under the policy.²⁴² Where an insurance company authorized its agent in adjusting a loss to waive one of the stipulations in the policy it was held that this necessarily involves and includes the authority to waive compliance with other stipulations in the policy.²⁴³

§ 2353. **Waiver—Implied from conduct.**—The rule does not require proof of an express agreement to waive. It is sufficient if the waiver may be inferred from the acts and conduct of the insurer where they are inconsistent with an intention to insist upon the strict performance of the condition.²⁴⁴ "While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either, if it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled

²⁴¹ *Hicks v. British &c. Assur. Co., Traders' Ins. Co.*, 4 Wyom. 419, 34 162 N. Y. 284, 56 N. E. 743; *Smaldone v. Insurance Co. &c.*, 162 N. Y. Pac. 1059, 62 Am. St. 47.

²⁴² *Dibrell v. Georgia &c. Ins. Co.*, 110 N. Car. 193, 14 S. E. 783, 28 Am. St. 678; *Hahn v. Guardians' Assur. Co.*, 23 Ore. 576, 37 Am. St. 709.

²⁴³ *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. R. 323; *Graves v.*

Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844; *Sergeant v. Liverpool &c. Ins. Co.*, 155 N. Y. 349, 49 N. E. 935; *Hicks v. British &c. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743; *Smaldone v. Insurance Co. &c.*, 162 N. Y. 580, 57 N. E. 168; *Kidder v. Knights Templars &c. Co.*, 94 Wis. 538, 69 N. W. 364; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa 457, 57 N. W. 952, 48 Am. St. 454; *Kahn v. Washington &c. Ins. Co.*, 12 Allen (Mass.) 391; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Owens v. Farmers' &c. Ins. Co.*, 57 Barb. (N. Y.) 518; *Dohn v. Farmers' &c. Ins. Co.*, 5 Lans. (N. Y.) 275; *Tayloe v. Merchants' &c. Ins. Co.*, 9 How. (U. S.) 390; *Goodwin v. Massachusetts &c. Ins. Co.*, 73 N. Y. 480; *Prentice v. Knickerbocker &c. Ins. Co.*, 77 N. Y. 483, 33 Am. R. 651; *Brink v. Hanover &c. Ins. Co.*, 80 N. Y. 108.

the insured into acting on a reasonable belief that the company has waived some provision of the policy."²⁴⁵

§ 2354. **Waiver by estoppel—Limitations.**—The rule adopted in New York in one line of cases is thus stated: "The doctrine of estoppel lays at the foundation of the law as to waiver. While one party has time and opportunity to comply with a condition precedent, if the other party does or says anything to put him off from his guard and to induce him to believe that the condition is waived, or that a strict compliance with it will not be insisted on, he is afterwards estopped from claiming non-performance of the condition. Unless there is some consideration for a waiver or some valid modification of the agreement between the parties which contains the condition, I think there can be no waiver of a condition precedent, except there be in the case an element of estoppel. At the time when the affidavit was drawn the plaintiff had forfeited his rights under his policy. Nothing that was then said or done induced him in any way to forego any of his rights or to omit the performance, on his part, of anything required by his policy; and, hence, furnished no estoppel against the defendant."²⁴⁶ The limitation of this doctrine of waiver by estoppel was thus stated by the New York court: "But it should not be extended so as to deprive a party of his defense, merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must,

²⁴⁵ *Kiernan v. Dutchess Co. &c.* Y. 480; *Prentice v. Knickerbocker Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. 392; *Ronald v. Mutual &c. Asso.*, 132 N. Y. 378, 30 N. E. 739; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *Robinson v. Pennsylvania &c. Ins. Co.*, 90 Me. 385, 38 Atl. 320; *Wheaton v. North British &c. Ins. Co.*, 76 Cal. 415, 18 Pac. 435, 9 Am. St. 216, note; *Butterworth v. Western Ins. Co.*, 132 Mass. 489; *Welch v. London &c. Corp.*, 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. 786; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 26 Atl. 27, 39 Am. St. 637; *New York &c. Ins. Co. v. Eggleston*, 96 U. S. 572; *Dezell v. Fidelity &c. Ins. Co.*, 176 Mo. 253.

²⁴⁶ *Underwood v. Farmers' &c. Ins. Co.*, 57 N. Y. 500; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Clark v. New England &c. Ins. Co.*, 6 Cush. (Mass.) 342; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. R. 323; *Goodwin v. Massachusetts &c. Ins. Co.*, 73 N

in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."²⁴⁷

§ 2355. **Waiver—Denial of all liability.**—The rule is that proof of a distinct denial of all liability and refusal to pay, on the ground that there is no liability, is sufficient evidence of a waiver of the condition requiring proofs of loss, and is equivalent to a declaration that the insurer will not pay though the proofs of loss be furnished.²⁴⁸

§ 2356. **Waiver—Receiving and acting on defective proofs.** Thus where the plaintiff shows that he did furnish certain proofs of loss within the time specified, and that the defendant company received such proofs without objecting to their form or the time of service and acted upon such proofs and retained them until after the expiration of the time specified in the policy for making such proofs, it has been held a sufficient compliance. Under such circumstances it is held to be the duty of the insurer to make prompt objections and to point out any existing defects and thus give the insured an oppor-

²⁴⁷ *Devens v. Mechanics' &c. Ins. Co.*, 83 N. Y. 168; *McCoy v. Northwestern &c. Asso.*, 92 Wis. 578, 66 N. W. 697; *Kidder v. Knights Templar &c. Co.*, 94 Wis. 538, 69 N. W. 364.

²⁴⁸ *Knickerbocker &c. Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314; *Norwich &c. Co. v. Western &c. Ins. Co.*, 34 Conn. 561; *Robinson v. Pennsylvania &c. Ins. Co.*, 90 Me. 385, 38 Atl. 320; *Allegre v. Maryland Ins. Co.*, 6 H. & J. (Md.) 408; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Shaw v. Republic &c. Ins. Co.*, 69 N. Y. 286; *Brink v. Hanover &c. Ins. Co.*, 80 N. Y. 108; *People v. Empire &c. Ins. Co.*, 92 N. Y. 105; *Hicks v. British &c. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743; *Lum v. United States &c. Ins. Co.*, 104 Mich.

397, 62 N. W. 562; *Douville v. Farmers' &c. Ins. Co.*, 113 Mich. 158, 71 N. W. 517; *Hahn v. Guardian Assur. Co.*, 23 Ore. 576, 32 Pac. 683; *Dial v. Valley Mut. &c. Asso.*, 29 S. Car. 560, 8 S. E. 27; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213, 15 S. E. 562; *Stepp v. National &c. Asso.*, 37 S. Car. 417, 16 S. E. 134; *Portsmouth Ins. Co. v. Reynolda*, 32 Gratt. (Va.) 613; *Harriman v. Queen &c. Ins. Co.*, 49 Wis. 71, 5 N. W. 12; *May Insurance*, §§ 469, 573; *King v. Hekla &c. Ins. Co.*, 58 Wis. 508, 17 N. W. 297; *Campbell v. American &c. Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Groos v. Milwaukee &c. Ins. Co.*, 92 Wis. 656, 66 N. W. 712; *Cooper v. Insurance Co. &c.*, 96 Wis. 362, 71 N. W. 606.

tunity to correct the defects.²⁴⁹ It has been expressly held that the retention of the proofs, without giving any notice of objection to them, when delivered in time, will be deemed to be an acceptance of them as sufficient, both as to form and substance. And the insurer will be estopped from claiming the proofs were not delivered in time, when the delay has been induced by the conduct of its agents having authority to act in that regard.²⁵⁰ And it has been held that retaining proofs of loss for forty-eight days without objection was a waiver.²⁵¹ So it was held that where notice was not served within the time specified, but after proofs of loss were furnished and held five months without objection, it was sufficient evidence of waiver.²⁵² And it has been held that where the insurer received the proofs of loss of property by fire, or proof of death, and retains them without objection, it is too late to raise objections at the time of the trial.²⁵³ But by mere failure to object to proofs of loss the insurer does not thereby admit the full amount of loss as set out in the proofs.²⁵⁴

§ 2357. **Waiver—By silence.**—It is a controverted question and one over which the courts are divided as to whether proof of silence alone is sufficient to constitute a waiver. The weight of the authorities is that mere silence on the part of the insurer is not sufficient proof of a waiver.²⁵⁵ The rule as to silence being a waiver is thus stated by the Pennsylvania court: "But where no word or act has been said or done by the assurer to mislead the insured or throw him off his guard,

²⁴⁹ *Bumstead v. Dividend &c. Ins. Co.*, 12 N. Y. 81; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472, 9 Am. R. 506; *O'Connor v. Hartford Fire Ins. Co.*, 31 Wis. 160; *Bammessel v. Brewers' Fire Ins. Co.*, 49 Wis. 463; *Badger v. Phoenix Ins. Co.*, 49 Wis. 396, 5 N. W. 845; *Vergeront v. German Ins. Co.*, 86 Wis. 425, 56 N. W. 1096.

²⁵⁰ *Bell v. Lycoming &c. Ins. Co.*, 19 Hun (N. Y.) 238.

²⁵¹ *Capitol Ins. Co. v. Wallace*, 50 Kans. 453, 31 Pac. 1070.

²⁵² *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 37 Am. St. 529.

²⁵³ *Peoria &c. Ins. Co. v. Lewis*, 18 Ill. 553; *Continental &c. Ins. Co. v.*

Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. R. 810, note; *Grand Lodge &c. Aid v. Besterfield*, 37 Ill. App. 522; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

²⁵⁴ *Kuznik v. Orient Ins. Co.*, 73 Ill. App. 201; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *Joyce Insurance*, § 3769.

²⁵⁵ *Ayres v. Hartford &c. Ins. Co.*, 17 Iowa 176, 85 Am. Dec. 553; *Texas Banking Co. v. Hutchins*, 53 Tex. 61, 37 Am. R. 750; *Donahue v. Windsor Co. &c. Ins. Co.*, 56 Vt. 374; *Adreveno v. Mutual &c. Asso.*, 38 Fed. 806; *Beatty v. Lycoming Co. &c. Ins. Co.*, 66 Pa. St. 9, 5 Am. R. 318; *McManus v. Aetna Ins. Co.*, 6 Allen (N. B.) 315.

mere silence is not enough to infer waiver."²⁵⁶ And it has been held that mere silence, an entire failure to object to the proof of loss, would not be a waiver of compliance with the conditions of the policy in this respect.²⁵⁷ But the rule seems to be that where the silence has the effect to mislead the assured it is then sufficient to constitute waiver.²⁵⁸

§ 2358. Waiver—Insurer cannot change grounds of objections. Where the insurer places his refusal to pay upon one ground it cannot afterwards insist on the failure of the insured to comply with other terms of the policy.²⁵⁹ On this subject the court of appeals of New York say: "They may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it. If a company intends to avail itself of the technical objection that the proofs are not filed in time, common fairness requires that it should refuse to receive them on that ground, or at least promptly notify the assured of their determination, otherwise the objection should be regarded as waived."²⁶⁰ Or as otherwise stated: "If there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to payment on that ground, if they do not call for a document, for instance, or make objection on the ground of its absence or imperfections, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived."²⁶¹ And it has been held that making objec-

²⁵⁶ *Mueller v. South Side F. Ins. Co.*, 176 Mo. 253; *Omaha &c. Ins. Co.*, 87 Pa. St. 399; *Beatty v. Lycoming Co. &c. Ins. Co.*, 66 Pa. St. 9, 5 Am. R. 318.

²⁵⁷ *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74.

²⁵⁸ *Williamsburg &c. Ins. Co. v. Cary*, 83 Ill. 453; *Anson v. Winnesheik Ins. Co.*, 23 Iowa 84; *Westchester &c. Ins. Co. v. Earle*, 33 Mich. 143; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Diehl v. Adams Co. &c. Ins. Co.*, 58 Pa. St. 443, 452, 98 Am. Dec. 302.

²⁵⁹ *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Dezell v. Fidelity &c.*

Ins. Co., 176 Mo. 253; *Omaha &c. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746; *Home &c. Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125.

²⁶⁰ *Brink v. Hanover &c. Ins. Co.*, 80 N. Y. 108.

²⁶¹ *McMasters v. Westchester &c. Ins. Co.*, 25 Wend. (N. Y.) 379; *Bumstead v. Dividend &c. Ins. Co.*, 12 N. Y. 81; *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.) 583; *St. Louis &c. Ins. Co. v. Kyle*, 11 Mo. 273;

tions on other grounds than the insufficiency of the proofs of loss is an admission that the proofs were insufficient.²⁶² But it is not sufficient proof of waiver where the defendant sets up other consistent defenses in addition to that of the failure to furnish preliminary proof.²⁶³

§ 2359. **Waiver of proofs of loss—Illustrations.**—Where an insurance company by its agents demanded and obtained possession of the stock of goods in question and the books of the insured, soon after the fire, and retained them for a month and during that time was engaged, with the assistance of the insured, in trying to ascertain the amount of the loss, this was held to be sufficient waiver of the proof of loss and to excuse the making of such proof in the manner and within the time specified in the policy.²⁶⁴ And it is held sufficient to amount to a waiver when the insurer with knowledge of all the facts, requires the insured by virtue of the terms of the policy to do some act or incur some expense or trouble inconsistent with the claim that the contract had become inoperative in consequence of the breach of

Continental &c. Ins. Co. v. Rogers, 119 Ill. 474, 19 N. E. 242, 59 Am. R. 810, note; *Kuzik v. Orient Ins. Co.*, 73 Ill. App. 201; *Peoria &c. Co. v. Lewis*, 18 Ill. 553.

²⁶² *Russ v. Butterfield*, 6 Cush. (Mass.) 242; *Underhill v. Chenango &c. Ins. Co.*, 2 Comst. (N. Y.) 53; *O'Neil v. Buffalo F. Ins. Co.*, 3 Comst. (N. Y.) 122; *Child v. Sun &c. Ins. Co.*, 3 Sandf. (N. Y.) 26; *Ætna F. Ins. Co. v. Tyler*, 16 W. R. 385; *Blake v. Exchange &c. Ins. Co.*, 12 Gray (Mass.) 265; *Franklin F. Ins. Co. v. Coats*, 14 Md. 285, 293; *Charleston Ins. Co. v. Neve*, 2 McM. (S. Car.) 237; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Taylor v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Hartford &c. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Noyes v. Washington Co. Ins. Co.*, 30 Vt. 659; *Peoria &c. Ins. Co. v. Whitehill*, 25 Ill. 382; *Vos v. Robinson*, 9 Johns. (N. Y.) 192; *Lumbermans' &c. Ins. Co. v. Bell*, 166 Ill.

400, 45 N. E. 130, 57 Am. St. 140; *German &c. Ins. Co. v. Ward*, 90 Ill. 550; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 162; *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Keenan v. Mutual Ins. Co.*, 12 Iowa 126; *Carson v. German &c. Ins. Co.*, 62 Iowa 433, 17 N. W. 650; *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa 325, 30 N. W. 585; *Bloom v. State Ins. Co.*, 94 Iowa 359, 62 N. W. 810; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. R. 323; *Clark v. New England &c. Ins. Co.*, 6 Cush. (Mass.) 343; *Underhill v. Agawam &c. Ins. Co.*, 6 Cush. (Mass.) 440; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351.

²⁶³ *Farmers' Ins. Co. v. Frick*, 29 Ohio St. 466; *Jones v. Mechanics' F. Ins. Co.*, 36 N. J. L. 29, 13 Am. R. 405.

²⁶⁴ *Billings v. German Ins. Co.*, 34 Neb. 502, 52 N. W. 397; *St. Paul &c. Ins. Co. v. Gottelf*, 35 Neb. 351, 53 N. W. 137.

some of the conditions.²⁶⁵ And it is held to be a waiver where the insurer induces the insured to believe that no proofs will be required, for the reason that the company's agent himself collected the proofs.²⁶⁶ Or if with knowledge of any forfeiture any negotiations or transactions are had with the assured and the insurer recognizes the continued validity of the policy or does acts based thereon, or requires the insured to do any act or incur any expense or suffer any trouble, the forfeiture is waived.²⁶⁷ If after the receipt of defective proofs the insurer proceeds to negotiate with the insured for a settlement under the policy without making any reference to such defective proofs, it is held sufficient to establish a waiver of such defects.²⁶⁸ So, where the insurer enters into a written submission to arbitration it is held that this of itself will constitute a waiver of proofs as to the amount of loss.^{269*} And an examination under oath of the insured before proof of loss are furnished, is sufficient evidence of a waiver of such proofs.²⁶⁹

²⁶⁵ *Goodwin v. Massachusetts &c. Ins. Co.*, 73 N. Y. 480; *Brink v. Hanover &c. Ins. Co.*, 80 N. Y. 108; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Jones v. Howard*, 117 N. Y. 103, 22 N. E. 578; *Roby v. American &c. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 37 Am. St. 529; *Cannon v. Home Ins. Co.*, 53 Wis. 593, 11 N. W. 11; *Oshkosh &c. Co. v. Germania &c. Ins. Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233; *Jerdee v. Cottage Grove &c. Ins. Co.*, 75 Wis. 345, 44 N. W. 636; *Dick v. Equitable &c. Ins. Co.*, 92 Wis. 46, 65 N. W. 742; *Kidder v. Knights Templars &c. Co.*, 94 Wis. 538, 69 N. W. 364; *Fraser v. Aetna &c. Ins. Co.*, 114 Wis. 510, 90 N. W. 476; *Travelers' Ins. Co. v. Edwards*, 122 U. S. 457, 7 Sup. Ct. 1249.

^{269*} *Kennedy v. Home Ins. Co.*, (Tenn.) 6 Ins. L. J. 359.

²⁶⁷ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Roby v. American &c. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Armstrong v. Agricultural &c. Ins. Co.*, 139 N. Y. 560, 29 N. E. 991; *Allen v. Vermont &c. Ins. Co.*, 12 Vt. 366; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. R. 479; *Gans v. St. Paul Ins. Co.*, 43 Wis. 109, 28 Am. R. 535; *Insurance Co. v. Norton*, 96 U. S. 234.

²⁶⁸ *Blake v. Exchange &c. Ins. Co.*, 12 Gray (Mass.) 265; *Clark v. New England &c.*, 6 Cush. (Mass.) 342; *Home Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 129. ^{269*} *Carroll v. Girard F. Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; *Bammessel v. Brewers' &c. Ins. Co.*, 43 Wis. 463.

²⁶⁹ *Priest v. Citizens' Ins. Co.*, 3 Allen (Mass.) 602; *Wyman v. Peoples Ins. Co.*, 1 Allen (Mass.) 301; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. R. 670; *Badger v. Phoenix Ins. Co.*, 49 Wis. 396, 5 N. W. 848.

§ 2360. **Waiver—Time within which acts must be done.**—This doctrine of waiver has its limitations with respect to the time within which the acts are done constituting the waiver. It is not alone sufficient to show that the insurer denied all liability or did any other act which would ordinarily constitute a waiver; but it must also be shown that such declarations or acts were made or done within the time in which the proofs of loss were required to be furnished by the terms of the policy. It seems evident that the statements made or acts done long after the time could not of themselves constitute a waiver. This rule has been stated as follows: "To constitute a waiver there should be shown some official act or declaration by the company during the currency of the time dispensing with it."²⁷⁰ "While the party bound to perform has still time and opportunity for so doing, if something be said or done by the other party by which the former is induced to believe that the condition is waived, or that strict compliance will not be insisted upon, the latter is estopped from claiming non-performance of the condition; but that an estoppel cannot be founded on facts occurring after forfeiture of the contract because of non-performance."²⁷¹

§ 2361. **Defective proofs—Duty of insurer.**—The objection that no proof of loss was made under the terms of the policy, and hence the policy has been forfeited, cannot be made or claimed by the insurer where some proofs were furnished but which were defective. Where a forfeiture is claimed for failure to comply with the condition of the policy which requires some notice of loss to be given, a clear case must be made, and if any doubt exists the condition is construed most strongly against the insurer. And where defective proofs of loss are received and retained by the insurer without objection it will not be heard to claim a forfeiture on the ground that no proofs whatever were furnished.²⁷² When the insurer receives proofs of loss and objects to them as being insufficient or defective, it is its duty to return them to the insured with its objections thereto within a reasonable time,

²⁷⁰ Beatty v. Lycoming Co. &c. Ins. Co., 66 Pa. St. 9, 5 Am. R. 318; Co., 57 N. Y. 500; Blossom v. Lycoming F. Ins. Co., 64 N. Y. 162; Groes v. Milwaukee &c. Ins. Co., 92 Wis. 656, 66 N. W. 712; Westchester &c. Ins. Co. v. Coverdale, (Kans. App.) 58 Pac. 1029. Bell v. Lycoming F. Ins. Co., 19 Hun (N. Y.) 238.

²⁷² Martin v. Manufacturers' &c. Co., 151 N. Y. 94, 45 N. E. 377.

²⁷¹ Underwood v. Farmers' &c. Ins.

and failing to do this its objections will be unavailing.²⁷³ And it has been held that where the proofs are deemed by the insurer to be insufficient it is its plain duty to give immediate notice of its objections and to point out the supposed defects.²⁷⁴ During the consideration of the proofs of loss it is the duty of the insurer to act with good faith toward the insured, and proof that it has failed to make known to the insured its dissatisfaction, or fails to demand further proof before the liability becomes fixed, is sufficient proof of waiver.²⁷⁵

§ 2362. **Total loss—Question of fact.**—In actions on policies of insurance covering buildings it frequently becomes important under the terms of the policy to determine whether the loss is partial or total. This question becomes strictly a matter of evidence depending entirely on the proofs, and is therefore a question for the jury to determine under all the facts and circumstances of the case. The courts have generally held that the evidence on the question of whether the loss was total or partial is competent and admissible.²⁷⁶ It is held sufficient evidence of a total loss to show that the specific character of the building or property insured was gone.²⁷⁷ The reason of this rule is founded on the principle that a policy of insurance upon a building is upon the building as such, and not upon the materials of which it is composed.²⁷⁸

²⁷³ Union Ins. Co. v. Barwick, 36 Neb. 223, 54 N. W. 519.

²⁷⁴ Gould v. Insurance Co., 134 Pa. 586, 19 Atl. 793; Davis & Co. v. Kittanning Ins. Co., 138 Pa. 73, 20 Atl. 838, 21 Am. St. 904; Carpenter v. Allemannia F. Ins. Co., 156 Pa. 37, 26 Atl. 781.

²⁷⁵ Harris v. Phoenix Ins. Co., 35 Conn. 310.

²⁷⁶ Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. R. 77; Aranzamendi v. Louisiana Ins. Co., 2 La. 432; Palatine v. Weiss, 22 Ky. L. R. 994, 59 S. W. 509; Brady v. Northwestern Ins. Co., 11 Mich. 426; Northwestern & Co. Ins. Co. v. Rochester & Co. Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108; Ampleman v. Citizens' Ins. Co., 35 Mo.

App. 308; Saltus v. Ocean Ins. Co., 12 Johns. (N. Y.) 107; Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. R. 664; Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068; Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12; Great Western Ins. Co. v. Fogarty, 19 Wall. (U. S.) 640; Rosetto v. Gurney, 11 C. B. 176; Grainger v. Martin, 2 Best & Sm. 456; Moss v. Smith, 9 Man. Gr. & S. 93; Adams v. McKenzie, 13 C. B. (N. S.) 442.

²⁷⁷ Judah v. Randall, 2 Cal. Cas. (N. Y.) 324.

²⁷⁸ Nave v. Home & Co. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394; Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. R. 373.

§ 2363. **Total loss—Test.**—One test for determining the question of total loss has been stated thus: "If the property or any part of it was so damaged by fire as to render it useless for the purpose for which it had been used, then that is a destruction within the meaning of the law. If rendered useless for the purpose for which the property was used, the plaintiff's right to recover insurance for what was so insured was complete. If what remained of the property so injured, was of any value the insurer was entitled to it."²⁷⁹ Or if the evidence shows that the portion of the building remaining unconsumed, no matter how great, is so injured or weakened that it must be torn down, or that such remaining part cannot be utilized in rebuilding without incurring greater expense than if it were not so utilized, it is held to be a total loss.²⁸⁰ And if the evidence shows that that part of the building which remains is liable to fall and is consequently regarded as dangerous to the persons who have a right to walk and be in close proximity to the ruins as to be exposed to peril it is a total loss.²⁸¹ Where a policy of insurance covered a mill including its machinery, condition for the payment of a certain amount in case the property was wholly destroyed; and where it appeared from the evidence that at the time of the fire a part of the machinery had been removed for repairs, and the building and remaining machinery was burned, it was held to be a total loss; but the value of the machinery not destroyed was to be deducted from the amount of the policy.²⁸² And on this question it is proper to prove the cost of repairing and reconstructing the building to its original usefulness, strength and utility; the value of the material still uninjured remaining in the building as well as the value of the building after the fire; the per cent or portion of the material remaining in the building and uninjured, the portion of the building that had been destroyed; the fact or the probability that the building could be removed and rebuilt without tearing it down; together with any other facts and circumstances which would tend to prove that by replacing the damaged portion the building could be made as good as new.²⁸³

²⁷⁹ *Manchester &c. Assur. Co. v. Feibleman*, 118 Ala. 308, 23 So. 759.

²⁸⁰ *O'Keefe v. Liverpool &c. Ins. Co.*, 140 Mo. 558, 41 S. W. 922; *Germania Ins. Co. v. Eddy*, 36 Neb. 461, 54 N. W. 856; *Harriman v. Queen Ins. Co.*, 49 Wis. 71, 5 N. W. 12; *Seyk v. Millers Ins. Co.*, 74 Wis. 67, 41 N. W. 443.

²⁸¹ *Hamburg &c. Ins. Co. v. Garlington*, 66 Tex. 103, 18 S. W. 337.

²⁸² *Havens v. Germania &c. Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 45 Am. St. 570.

²⁸³ *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 37 S. W. 1068, 59 Am. St. 797, note; *Northwestern Ins. Co. v. Rochester &c. Ins. Co.*, 85 Minn. 48,

remain portions of the walls of the building that could be used for rebuilding, and that such remaining walls or portions thereof, were sufficient to support that part of a building of the same value, weight and dimensions and construction as the building burned, and that by using such walls the building could be rebuilt for a less sum of money than if they were not used, then the building was not wholly destroyed.²⁸⁷ And this rule as to the loss not being total has been applied when the evidence established the fact that the remnant of the building standing was reasonably adapted for use as a basis upon which to restore the building to the condition it was in before the fire; and whether it is so adapted was held to depend upon the question whether a reasonably prudent owner would proceed to restore the building to its original condition by utilizing the remaining parts in the absence of any insurance.²⁸⁸

Life.

§ 2368. **Life insurance—Nature of contract.**—In many respects there is great similarity between life and fire insurance so far as it relates to the application, payment of premiums, the policy and warranties. But while fire insurance is essentially a contract of indemnity, in the ordinary life policy this is not the case. The undertaking in life insurance is usually to pay a sum certain in the event of the death of the assured. In other words a life insurance policy is in its essential features a valued policy.²⁸⁹ "The contract commonly called life-assurance, when properly considered is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same,

²⁸⁷ *Ampleman v. Citizens' Ins. Co., &c. Ins. Co. v. Board &c.*, 49 W. Va. 35 Mo. App. 308; *Ampleman v.* 360.

North British &c. Ins. Co., 35 Mo. App. 317; *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672. ²⁸⁹ *Bevin v. Connecticut &c. Ins. Co.*, 23 Conn. 244; *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576; *St. John v. American &c. Ins. Co.*, 2

Royal Ins. Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068; *Providence Duer (N. Y.)* 419; *Scott v. Dickson*, 108 Pa. St. 6.

on the other. This species of insurance in no way resembles a contract of indemnity."²⁹⁰

§ 2369. **Contract of life insurance—When indemnity.**—The rule that a policy of life insurance is in its nature a valued policy and is not in the nature of an indemnity has its exception. This exception seems to have grown out of a statute in England and has been followed by some courts in this country. The basis of the principle of insurance by one on the life of another is the insurable interest that the former has in the latter; and where this insurable interest is a pecuniary consideration only the rule as laid down by the English statute and followed by some American cases is that "in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life, or other event."²⁹¹ This principle was stated by the Supreme Court of the United States as follows: "In cases where the insurance is effected merely by way of indemnity, as where a creditor insured the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt."²⁹² And no greater sum can be allowed even where the beneficiary pays the premiums unless an agreement to that effect between the assured and the beneficiary is proved and the difference between the actual debt and the amount of money received from the insurer belongs to the estate of the assured.²⁹³ But the beneficiary is entitled to retain out of the money received by him on the policy the premiums and assessments which he has paid.²⁹⁴

§ 2370. **Contract of life insurance—Not indemnity.**—But the better rule seems to be that when the proof sufficiently shows an in-

²⁹⁰ *Dalby v. India &c. Assur. Co., Union &c. Ins. Co.*, 144 U. S. 621, 15 C. B. 365; see, *St. John v. American &c. Ins. Co.*, 13 N. Y. 38; *Briggs v. McCullough*, 36 Cal. 542; *Endowment &c. Asso. v. State*, 35 Kans. 253; *State v. Merchants' &c. Soc.*, 72 Mo. 146.

²⁹¹ *Halford v. Kymer*, 10 Bar. & Cr. 724.

²⁹² *Connecticut &c. Ins. Co. v. Schaefer*, 94 U. S. 457; *Warnock v. Davis*, 104 U. S. 775; *Crotty v.*

Union &c. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749.

²⁹³ *Gilbert v. Moose*, 104 Pa. St. 74; *Ruth v. Katterman*, 112 Pa. St. 251, 3 Atl. 833; *Kerr v. Lauser*, 174 Pa. 608, 34 Atl. 350; *Selgrist v. Schmoltz*, 113 Pa. St. 326, 6 Atl. 47; *Bruce v. Garden*, 22 L. T. (N. S.) 595; *Cammack v. Lewis*, 15 Wall. (U. S.) 643.

²⁹⁴ *Riner v. Riner*, 166 Pa. St. 617, 31 Atl. 347; *Kerr v. Lauser*, 174 Pa. 608, 34 Atl. 350.

insurable interest this is sufficient to support a recovery for the full amount. Stated in another form, the amount named in the policy is the sum agreed upon as liquidated damages in consideration of the insurable interest and the premiums paid.²⁹⁵ As otherwise stated the rule as established is that a creditor may take a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of the insurance with interest thereon during the period of the expectancy of the life of the assured according to standard tables; and if the assured should die before the expiration of such expectancy the creditor is entitled to the full amount of the policy provided its disproportion is not so great as to warrant the finding that the contract was a wager.²⁹⁶

§ 2371. **Burden of proof—Plaintiff.**—In an action on a life insurance policy, as in other cases, the burden of proof is upon the plaintiff to make out affirmatively the allegations of his complaint. The burden is upon him to present a case in all respects conforming to the terms under which the risk was assumed. It is not sufficient to prove merely a substantial conformity, but it seems that it must be exact and literal, and this has been held to include not only the material particulars, but to extend also to those that are immaterial.²⁹⁷ Proof of all warranties is made a condition precedent to the insurer's liability on the policy.²⁹⁸ Where a policy is payable to the assured, his executors, administrators and assigns on the death of the assured, the action must be by the executors or administrators as it is held that the cestui que trust cannot maintain the action on his own behalf.²⁹⁹ In an action upon a life policy procured by the beneficiary upon the life of the assured, the burden is upon the plaintiff or beneficiary to prove an insurable interest in the life of the assured and in the absence of such proof there can be no recovery. This rule applies both to the

²⁹⁵ *Bevin v. Connecticut &c. Ins. Co.*, 23 Conn. 244; *Lord v. Dall*, 12 Mass. 115; *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Amick v. Butler*, 111 Ind. 578, 12 N. E. 518.
²⁹⁶ *Ulrich v. Reinohl*, 143 Pa. 238, 22 Atl. 862; *Shaffer v. Spangler*, 144 Pa. St. 223, 22 Atl. 865; *Wheeland v. Atwood*, 192 Pa. St. 237, 43 Atl. 946.

²⁹⁷ *Campbell v. New England &c. Ins. Co.*, 98 Mass. 381.

²⁹⁸ *American &c. Ins. Co. v. Day*, 39 N. J. L. 89; *Dimick v. Metropolitan &c. Ins. Co.*, 67 N. J. L. 367; *National Bank v. Insurance Co.*, 95 U. S. 673; *Moulor v. American &c. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466.

²⁹⁹ *Balley v. New England &c. Ins. Co.*, 114 Mass. 177.

pleading and proof.³⁰⁰ But where the insurance company contracts with the person whose life is insured to pay the sum insured to another person, it has been held in an action on such a policy that it was not necessary for the payee to prove that he had an insurable interest in the life insured.³⁰¹ And it has been held that the policy on its face is valid, and makes a prima facie case and could only be avoided upon proving, by parol, a want of such insurable interest.³⁰² The rule established by the decisions in New Jersey is that in an action on such a policy the assured is not required to prove that he had an insurable interest in the life of the assured.³⁰³

§ 2372. Burden of proof—Defendant.—Where the insurer sets up as a defense to an action on a life policy that the insured made untrue answers to certain questions in the application, the burden of proving such allegations is upon the defendant.³⁰⁴ The burden of proving the falsity of representations upon which the policy was issued is held to be upon the defendant.³⁰⁵ Where the insurer asserts in an affirmative plea that the assured was not a sound or insurable life, the burden was upon the defendant to establish this defense.³⁰⁶

³⁰⁰ *Ruse v. Mutual &c. Ins. Co.*, 23 N. Y. 516; *Guardian &c. Ins. Co. v. Hogan*, 80 Ill. 35; *Bloomington &c. Asso. v. Blue*, 120 Ill. 121, 11 N. E. 331; *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116; *Trinity College v. Travelers' Ins. Co.*, 113 N. Car. 244, 18 S. E. 175; *Clark v. Allen*, 11 R. I. 439; *Crotty v. Union &c. Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749; *Singleton v. St. Louis &c. Ins. Co.*, 66 Mo. 63; *Freeman v. Fulton &c. Ins. Co.*, 38 Barb. (N. Y.) 247; *Continental &c. Ins. Co. v. Volger*, 89 Ind. 572; *Elkhart &c. Asso. v. Houghton*, 103 Ind. 286, 2 N. E. 763; *Burton v. Connecticut &c. Ins. Co.*, 119 Ind. 207, 21 N. E. 746; *Nye v. Grand Lodge &c.*, 9 Ind. App. 131, 36 N. E. 429; *People's &c. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772; *Vanormer v. Hornberger*, 142 Pa. St. 575, 21 Atl. 887.

³⁰¹ *Nye v. Grand Lodge &c.*, 9 Ind. App. 131, 36 N. E. 429; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772; *Campbell v. Insurance Co.*, 98 Mass. 381; *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 92, 30 S. E. 327; 1 *May Insurance*, § 112; 2 *May Insurance*, § 399e; 2 *Beach Insurance*, § 853; *Bliss Insurance*, § 26.

³⁰² *Lewis v. Phoenix &c. Ins. Co.*, 39 Conn. 100.

³⁰³ *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Martin v. Franklin &c. Ins. Co.*, 38 N. J. L. 140; *Vivar v. Knights of Pythias*, 52 N. J. L. 455, 20 Atl. 36; *Sun Ins. Office v. Merz*, 63 N. J. L. 365, 43 Atl. 693.

³⁰⁴ *Supreme Lodge &c. v. Matejowsky*, 92 Ill. App. 385; *Penn &c. Ins. Co. v. Wiler*, 100 Ind. 92.

³⁰⁵ *Clapp v. Massachusetts Ben. Asso.*, 146 Mass. 519, 16 N. E. 433.

³⁰⁶ *Trenton &c. Ins. Co. v. Johnson*, 24 N. J. L. 576.

The burden is on the defendant to prove clauses in a policy limiting the liability of the insurer, as they are made for his benefit.³⁰⁷ And some courts hold that the beneficiary is not required to prove the truth of statements though warranties, but the burden is on the insurer to show their falsity.³⁰⁸ On this rule as to the burden of proof the Supreme Court of Illinois say that "it is not necessary for the plaintiff, in an action on the policy to either allege or prove such matters as appear in the application only. To be availed of as a defense, without regard to whether they are warranties or representations merely, their falsity, or breach by the assured, must be set up and proved by defendant as a matter of defense."³⁰⁹ In an action on a policy where the defendant claimed a mutual mistake, the burden of proof was held to be on the insurer to show that such mutual mistake actually existed.³¹⁰

§ 2373. *Prima facie case.*—In making a *prima facie* case the plaintiff is not required to prove more than the allegations of his petition; in some instances he is not required to prove all the statements in his pleading. Thus, he must aver performance of all precedent conditions; but it is very generally held that breaches both of warranties and representations are matters of defense. The plaintiff has made a *prima facie* case when he proves the making of the policy and its terms, the payment of the premiums, the death of the assured, the giving of the preliminary notice if required, and making proofs thereof to the company. Proof of these facts will entitle him to recover.³¹¹ The

³⁰⁷ *Clay &c. Ins. Co. v. Wusterhausen*, 75 Ill. 275; *Guardian &c. Ins. Co. v. Hogan*, 80 Ill. 35; *Gooding v. United States L. Ins. Co.*, 46 Ill. App. 307; *Metropolitan L. Ins. Co. v. McKenna*, 73 Ill. App. 283; *Commonwealth v. Hart*, 11 Cush. (Mass.) 130, 134; *Sohier v. Norwich Ins. Co.*, 11 Allen (Mass.) 336; *Freeman v. Insurance Co.*, 144 Mass. 572, 12 N. E. 372.

³⁰⁸ *Grangers' Ins. Co. v. Brown*, 57 Miss. 308; *Mobile &c. Ins. Co. v. Morris*, 3 Lea (Tenn.) 101; *Piedmont &c. Ins. Co. v. Ewing*, 92 U. S. 377; see, § 2374.

³⁰⁹ *Continental &c. Ins. Co. v. Rog-*

ers, 119 Ill. 474, 10 N. E. 242; *Roach v. Kentucky &c. Co.*, 28 S. Car. 431, 6 S. E. 286; *Dial v. Valley &c. Asso.*, 29 S. Car. 560, 8 S. E. 27.

³¹⁰ *Dodd v. Gloucester &c. Ins. Co.*, 127 Mass. 151.

³¹¹ *Continental &c. Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408; *Federal L. Asso. v. Smith*, 86 Ill. App. 427; *Merchants' &c. Ins. Co. v. Dunbar*, 88 Ill. App. 574; *Supreme Lodge &c. v. Matejowsky*, 92 Ill. App. 385; *Sweeney v. Metropolitan &c. Ins. Co.*, 19 R. I. 171, 36 Atl. 9; *O'Rourke v. John Hancock &c. Ins. Co.*, 23 R.

introduction of the policy in evidence is proof of the contract and payment of premiums.

§ 2374. **Proof of warranties—Burden and presumptions.**—Generally speaking statements in an application for life insurance are held to be warranties of fact. They are held to have the same force and binding effect as if they had been embodied in the policy itself. As to all such warranties the burden of proof is upon the plaintiff to show the truth in all particulars, and evidence to this effect must be produced to the satisfaction of the jury. But the question is whether it is necessary to produce affirmative evidence in order to meet either a general or specific denial. The rule as to such proof is stated by a recent Connecticut case as follows: "But it does not follow that affirmative evidence must necessarily be produced by the plaintiff to meet a denial, whether such denial be general or specific. There is a natural presumption of fact in favor of the truth of solemn acts and declarations of one since dead, in entering into a contract of this peculiar description, under which the policy has been issued and premiums received. It would have been proper for the trial court to instruct the jury that, in the absence of countervailing proof, they might take this presumption into consideration as tending to support the plaintiff's case. It was not evidence in her favor but it might supply the want of evidence or call for evidence from the defendant."³¹² The Supreme Court of Rhode Island held that while the burden of proving warranties was upon the assured this burden might be lifted by presumption merely, and that a *prima facie* case might thus be made out by the plaintiff and that such a presumption, or slight proof, might make a *prima facie* case until something appeared to controvert it; but that this rule of convenience does not relieve the plaintiff from the burden the law casts upon him. But as this court said, "they may be sustained *prima facie* by the presumption of truth which attaches to a man's solemn acts and declarations in the course of a contract." The rule of procedure, as stated in this case, is that "the plaintiff must prove certain essential facts, like the issue of the policy, payment of premiums, death of the assured, notice as required and the general performance of conditions; but to say, because answers

I. 457, 50 Atl. 334; *Spruill v. North- Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *western &c. Ins. Co.*, 120 N. Car. *Ward v. Metropolitan &c. Ins. Co.*, 141, 27 S. E. 39. 66 Conn. 227, 33 Atl. 902; *Kelsey v.*

³¹² *Hennessy v. Metropolitan &c. Universal &c. Ins. Co.*, 35 Conn. 225.

are warranties, that the truth of every one must be proved by witnesses before recovery, as claimed by the defendant, would be manifestly unreasonable."³¹³ This rule as to the burden of proving warranties is expressly placed on the same principle as proof of seaworthiness of vessels in marine insurance, and that in such cases in the absence of proof either way, seaworthiness is to be presumed.³¹⁴

§ 2375. Warranties and representations—Material and immaterial.—A discussion of the nature of warranties and representations is not properly within the scope of this work. The discussion and authorities are limited mainly to such proof of the falsity as will be sufficient to avoid a policy. It is sufficient on the part of the insurer to defeat an action by proving that a representation or warranty in the application was false. It has been said by one court that material statements, whether warranties or representations, if proved to be untrue, are sufficient to avoid the policy.³¹⁵ Other courts have held that the representations and warranties must be literally true or the policy will be avoided; and it can make no difference whether such representations or warranties are material or immaterial.³¹⁶ The rule as laid down by some courts is that warranties are in the nature of conditions precedent, and no proof will be admitted to show that the fact

³¹³ *Sweeney v. Metropolitan &c. Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *Ins. Co.*, 19 R. I. 171, 36 Atl. 9; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Barnewall v. Church*, 1 Cal. Cas. (N. Y.) 217; *Sweeney v. Metropolitan &c. Ins. Co.*, 19 R. I. 171, 36 Atl. 9.

³¹⁴ *Kelsey v. Universal &c. Ins. Co.*, 35 Conn. 225.

³¹⁵ *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Mutual &c. Ins. Co. v. Cannon*, 48 Ind. 264; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Ohio &c. Ins. Co. v. Bevis*, 18 Ind. App. 17, 46 N. E. 928; *Union &c. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Chrisman v. State Ins. Co.*, 16 Ore. 283, 290.

³¹⁶ *Henessy v. Metropolitan &c. Ins. Co.*, 98 Mass. 394; *Van Valkenburg v. Insurance Co.*, 70 N. Y. 605; *Swick v. Home &c. Ins. Co.*, 2 Dill. (U. S.) 160; *Moulor v. American &c. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866; *Joyce Insurance*, § 3790; *Beach Insurance*, § 1315.

warranted was either material or immaterial.³¹⁷ And it has been held that the fact that the falsity of the warranty was wholly unconnected with the cause of death is immaterial and that evidence offered on this subject is inadmissible.³¹⁸ And it is held that statements made by the assured in his application will not avoid the policy where they are incorrect and untrue, if they are not material to the risk and were made in good faith believing them to be true.³¹⁹ Mr. May in his work on insurance says: "Honest errors manifestly and undoubtedly immaterial ought to be excluded by the law."³²⁰ But it has been held that immaterial answers honestly made, though shown to be false, will not be sufficient to defeat an action on the policy.³²¹ The Kentucky court holds that misrepresentations in the application must be material to the risk in order to avoid the policy.³²²

§ 2376. **Declarations and statements of insured—Admissibility.** The declarations of the insured made prior to the date of the application for the policy are not admissible in evidence for the purpose of proving breach of the warranty. But where such facts are proved by other evidence such declarations are proper for the purpose of showing knowledge of the insured.³²³ And the rule is that statements and admissions of the assured made after the policy was issued are not admissible in an action on the policy by the beneficiary.³²⁴ But the

³¹⁷ *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Aloe v. Mutual &c. Asso.*, 147 Mo. 561, 49 S. W. 553.

³¹⁸ *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507.

³¹⁹ *Hermany v. Fidelity &c. L. Asso.*, 151 Pa. 17, 24 Atl. 1064.

³²⁰ 1 May Insurance, § 151.

³²¹ *Continental &c. Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242.

³²² *Mutual &c. Ins. Co. v. Davless*, 87 Ky. 541, 9 S. W. 812.

³²³ *Kelsey v. Universal &c. Ins. Co.*, 35 Conn. 225; *Penn. &c. Ins. Co. v. Wiler*, 100 Ind. 92; *Beckett v. Northwestern &c. Asso.*, 67 Minn. 299; *Hale v. Life &c. Ins. Co.*, (Minn.) 68 N. W. 182; *Swift v. Massachu-*

setts &c. Ins. Co., 63 N. Y. 186; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Dilleber v. Home &c. Ins. Co.*, 69 N. Y. 256; *Mulliner v. Guardian Ins. Co.*, 1 T. & C. (N. Y.) 448; *Terwilliger v. Supreme Council &c.*, 49 Hun (N. Y.) 305; *Union &c. L. Ins. Co. v. Cheever*, 36 Ohio St. 201; *Union &c. Ins. Co. v. Buxer*, 62 Ohio St. 385, 57 N. E. 66; *Mobile &c. Ins. Co. v. Morris*, 3 Lea (Tenn.) 101; *Valley &c. Asso. v. Teewalt*, 79 Va. 421; *Union &c. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421; *Schwarzbach v. Ohio Valley &c. Union*, 25 W. Va. 622; *Aveson v. Kinnaird*, 6 East 188; 1 May Insurance, § 214.

³²⁴ *Washington &c. Ins. Co. v. Haney*, 10 Kans. 525; *American &c. Ins. Co. v. Day*, 39 N. J. L. 89; *Grangers' &c. Ins. Co. v. Brown*, 57

declarations of the assured are admissible in evidence when made in connection with the contract of insurance, or when they are so near contemporaneous therewith as to constitute a part of the *res gestae*.³²⁵ In Connecticut it was held that letters written and declarations made by the assured to third persons shortly before the application, in which the assured stated herself to be in bad health, were admissible in evidence in an action on the policy by the beneficiary.³²⁶

§ 2377. Declarations and statements of claimant—Admissibility. This rule excluding declarations and statements of the assured does not apply to declarations and statements made by the beneficiary. As to such statements they come within the ordinary rule of the admissibility of admissions of a party against his interest. Hence any statement by the claimant or beneficiary as to the nature of the risk or the cause of the death, or otherwise antagonistic to his interest, may be proved in an action on the policy. Thus where a life policy was issued on the application of a husband in favor of his wife, in an action by her on such policy, it was held that statements made by her in a verified petition for divorce were admissible in evidence against her for the purpose of showing false statements in the application.³²⁷

§ 2378. Disease—Proof sufficient to avoid policy.—The applicant for life insurance is usually required to answer certain questions touching the disease of specific organs of the body. These answers are usually warranties the falsity of which will avoid the policy. But the question is as to what is sufficient proof of disease of any such organ to render such statement false. It is not sufficient to prove mere acci-

Miss. 308; *Rawls v. American &c. Ins. Co.*, 27 N. Y. 282; *McGinley v. United States &c. Ins. Co.*, 8 Daly (N. Y.) 390; *Fraternal &c. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Dial v. Valley &c. Asso.*, 29 S. Car. 560, 8 S. E. 27; *Mobile &c. Ins. Co. v. Morris*, 3 Lea (Tenn.) 101; *Southern &c. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Valley &c. Asso. v. Treewalt*, 79 Va. 421; *Schwarzbach v. Ohio Valley &c. Union*, 25 W. Va. 622; *Cahen v. Continental &c. Ins. Co.*, 69 N. Y. 300, 309. But this rule does not apply to declarations made by the holder of a mutual benefit certificate; *Thomas v. Grand Lodge &c.*, 12 Wash. 500, 41 Pac. 882; *Smith v. National &c. Soc.*, 51 Hun (N. Y.) 575.

³²⁵ *Swift v. Massachusetts &c. Ins. Co.*, 63 N. Y. 186; *Edington v. Mutual &c. Ins. Co.*, 67 N. Y. 185; *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397; *Aveson v. Kinnaird*, 6 East 188.

³²⁶ *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225.

³²⁷ *Furniss v. Mutual &c. Ins. Co.*, 14 Jones & Spen. (N. Y.) 467.

dental disorder or ailment affecting any one of the organs inquired about, nor is it sufficient to prove an ailment or disorder which lasted only for a brief period and that was unattended by substantial injury, inconvenience or prolonged suffering. To be sufficient to avoid the policy the proof must show that there was "some affection or ailment of some one or more of the organs inquired about in the application, which ailment was of a character so well defined and marked as materially to derange for a time the function of such organ." Nor is it necessary to prove the knowledge of the applicant of such diseased or disordered condition. If the diseased condition is proved to have existed according to the rule stated, the falsity of the warranty sufficient to avoid the policy is established regardless of the applicant's knowledge of his condition.²²⁸ Courts will not permit a forfeiture of the policy, nor suffer a defeat and recovery after death if it is shown that in some remote time in the past the assured was, whether conscious or unconscious of the fact, afflicted with some one of the diseases enumerated in the application to which he was required to make a categorical answer, and which he represented to be true.²²⁹

§ 2379. **Insurable interest—Necessary.**—It is absolutely essential to support a policy of insurance in favor of one person on the life of another that the former have an insurable interest in the life of the latter. In the absence of an insurable interest such contracts are regarded as wagering contracts, and are declared to be void. The reason

²²⁸ *Continental &c. Ins. Co. v. Pythias v. Rosenfeld*, 92 Tenn. 503, Young, 113 Ind. 159, 15 N. E. 220; 22 S. W. 204; *Insurance Co. v. Illinois &c. Ben. Society v. Winthrop*, 85 Ill. 537; *Mutual &c. Ins. Co. v. Wise*, 34 Md. 582; *Brown v. Metropolitan &c. Ins. Co.*, 65 Mich. 306, 32 N. W. 610; *Pudritzky v. Supreme Lodge &c.*, 76 Mich. 428, 43 N. W. 373; *Hann v. National Union*, 97 Mich. 513, 56 N. W. 834; *Peacock v. New York &c. Ins. Co.*, 20 N. Y. 293; *Fitch v. American &c. Co.*, 59 N. Y. 557; *Cushman v. United States &c. Ins. Co.*, 70 N. Y. 72; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; *Ritzler v. World &c. Ins. Co.*, 42 N. Y. Super. 409; *French v. Mutual &c. Asso.*, 111 N. Car. 391, 16 S. E. 427; *Knights of*

Pythias v. Rosenfeld, 92 Tenn. 503, 22 S. W. 204; *Insurance Co. v. Lauderdale*, 94 Tenn. 622, 30 S. W. 732; *Rand v. Life Assur. Soc.*, 97 Tenn. 291, 37 S. W. 7; *Knights of Pythias v. Cogbill*, 99 Tenn. 28, 41 S. W. 340; *Powers v. Northeastern &c. Asso.*, 50 Vt. 630; *Connecticut &c. Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119; *Fidelity &c. Asso. v. Miller*, 92 Fed. 63; *Baumgart v. Modern Woodmen &c.*, 85 Wis. 546, 55 N. W. 713.

²²⁹ *Moulor v. American &c. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Fidelity &c. Asso. v. Jeffords*, 107 Fed. 402; *Northwestern &c. Ins. Co. v. Woods*, 54 Kans. 663, 39 Pac. 139.

for this rule was stated by the New York court thus: "Policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies; because temptations to tamper with life are more mischievous than incitements to mere pecuniary fraud."³²⁰

§ 2380. **Incurable interest—Nature.**—The Supreme Court of the United States in defining insurable interest say: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and the wife in the life of her husband. . . . In all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity to expect some benefit or advantage from the continuance of the life of the assured."³²¹ This principle, substantially, is held by courts in other jurisdictions.³²² Of the nature of this interest the New Jersey court has said: "The interest required need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life, and therefore the reciprocal interests of husband and wife, parent and child and brother and sister, in the lives of each other, are sufficient to support the contract."³²³ It is expressly held in some jurisdictions that an insurable interest must be a pecuniary interest regardless of the relationship between the assured and the beneficiary.³²⁴ In the absence of both the con-

³²⁰ *Ruse v. Mutual &c. Ins. Co.*, 23 N. Y. 516; *Franklin &c. Ins. Co. v. Hazzard*, 41 Ind. 116.

³²¹ *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. (U. S.) 643.

³²² *Gilbert v. Moose*, 104 Pa. St. 78; *Corson's Appeal*, 113 Pa. St. 445, 6 Atl. 213; *U. B. Mutual Aid Soc. v. McDonald*, 122 Pa. St. 324, 15 Atl. 439; *Trinity College v. Travelers' Ins. Co.*, 113 N. Car. 244, 18 S. E. 175; *Keystone &c. Asso. v. Norris*, 115 Pa. St. 446, 8 Atl. 638.

³²³ *Trenton v. Mutual &c. Ins. Co.*, 24 N. J. L. 576.

³²⁴ *Continental &c. Ins. Co. v. Volger*, 89 Ind. 572; *Amick v. Butler*,

tractual relation and of blood or marriage, there can be no insurable interest regardless of the good object, motive or intention of the parties.³³⁵

§ 2381. **Insurable interest—Proof of relationship.**—The question naturally arises as to whether or not the mere proof of relationship is sufficient proof of an insurable interest in the absence of all other evidence. The authorities are not agreed upon the proposition. It was said by the Connecticut court: "We think it a correct legal proposition, that the mere relationship of a brother is not such an interest as will support a policy of insurance. The interest required to make such a contract valid must be of a pecuniary nature."³³⁶ And the Supreme Court of Maine said: "But a father, as such, has no insurable interest, resulting merely from that relation, in the life of a child of full age."³³⁷ But a Maine case holds the doctrine that a father has such an interest in the life of a minor child as would support a policy of insurance on its life.³³⁸ The Supreme Court of Illinois held "that the mere relation of father and son did not constitute an insurable interest of the son in the life of the father, unless the son had a well founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father."³³⁹ The rule as deduced from the authorities may be said to be that the mere proof of relationship will be of little importance except as it may tend to give rise to circumstances which justify a well founded expectation of pecuniary advantage from the continuance of the life insured, or risk of loss from its termination.³⁴⁰ On this subject the Supreme Court

111 Ind. 578, 12 N. E. 518; *Burton v. Connecticut & Ins. Co.*, 119 Ind. 207, 21 N. E. 746; *People's Mut. & Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809; *Cisna v. Sheibley*, 88 Ill. App. 385; *Chicago & Soc. v. Dyon*, 79 Ill. App. 100; *Rombach v. Piedmont & Ins. Co.*, 35 La. Ann. 233; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Lord v. Dall*, 12 Mass. 115; *Charter Oak & Ins. Co. v. Brant*, 47 Mo. 419, 424; *Gamb's v. Covenant & Ins. Co.*, 50 Mo. 44, 48; *Reserve & Ins. Co. v. Kane*, 81 Pa. St. 154; *Keystone & Asso. v. Norris*, 115 Pa. St. 446, 8 Atl. 638; *Hal-*

ford v. Kymer, 10 B. & C. 724; 3 Kent Com. 368.

³³⁶ *Trinity College v. Travelers' Ins. Co.*, 113 N. Car. 244, 18 S. E. 175; *U. B. Mutual & Soc. v. McDonald*, 122 Pa. St. 324, 15 Atl. 439.

³³⁷ *Lewis v. Phoenix & Ins. Co.*, 39 Conn. 100; *Rombach v. Piedmont & Ins. Co.*, 35 La. Ann. 233.

³³⁸ *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

³³⁹ *Mitchell v. Union Life Ins. Co.*, 45 Me. 104.

³⁴⁰ *Guardian & Ins. Co. v. Hogan*, 80 Ill. 35.

³⁴¹ *Guardian & Ins. Co. v. Hogan*,

of Indiana say: "The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority." In this case it was held that in an action by a daughter on a policy on the life of her mother, she must allege and prove a pecuniary interest in the life of the mother.³⁴¹ The Massachusetts court has not decided expressly whether proof of relationship alone is sufficient, but the cases generally show such interest aside from the relation.³⁴²

§ 2382. **Insurable interest—Implied from relation.**—There may be certain cases in which the insurable interest will be implied or presumed from relationship; and this implication or presumption arises when such relationship is proved. The rule deduced from the books is thus stated by the Louisiana court: "When the insurable interest arises, or is implied from relationship, it will be deemed to exist when the relationship is such that the insuree has a legal claim upon the insured for service or support. Even though such legal claim does not exist, yet where from the personal relations of the two, and the kindness and good feeling displayed from the insured to the insuree, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former, or to fear loss from his death, an insurable interest will be held to exist."³⁴³ The Supreme Court of Illinois concedes that some authorities tend in the direction "that the mere relationship, as between father and son reciprocally, is a sufficient foundation upon which to rest an insurable interest."³⁴⁴ In an early case in Massachusetts the court held to the rule that there must be an insurable interest, and where it was shown that a sister without property who had been for several years supported and educated by her brother, and who stood toward her in place

80 Ill. 35; *Insurance Co. v. Bailey*, (Mass.) 399; *Forbes v. American &c. Ins. Co.*, 15 Gray (Mass.) 249; *May Insurance*, § 107; *Bliss Life Insurance*, *Stevens v. Warren*, 101 Mass. 564. § 31.

³⁴¹ *Continental &c. Ins. Co. v. Volger*, 89 Ind. 572; *People's &c. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809.

³⁴² *Rombach v. Piedmont &c. Ins. Co.*, 35 La. Ann. 233; *Bliss Life Insurance*, § 31; *May Life Insurance*, §§ 74, 106.

³⁴³ *Guardian &c. Ins. Co. v. Hogan*, 80 Ill. 35.

³⁴⁴ *Lord v. Dall*, 12 Mass. 115; *Loomis v. Eagle &c. Ins. Co.*, 6 Gray

of a parent, she was held to have an insurable interest in his life. The court indicated that this relation was equivalent to that of the parent and child and assumed that proof of the relation of parent and child would imply an insurable interest.³⁴⁵ Under the rule established in Missouri, proof that the beneficiary was the wife of the assured is sufficient to imply the insurable interest, as the law requires the husband to support the wife.³⁴⁶ Where there is a mutual interest, a moral obligation existing between the assured and the beneficiary, it is held to be sufficient to rebut the presumption of wager in a contract of life insurance.³⁴⁷ But it has been expressly held that a moral claim is not sufficient to constitute an insurable interest in behalf of one in the position of a creditor.³⁴⁸ The inference drawn from all the adjudications is that in cases of husband and wife, and parent and minor child, proof of the relation alone is sufficient proof of insurable interest; and in all other cases the claimant must prove some pecuniary interest in addition to the relation in order to recover.

§ 2383. Insurable interest—Continuation.—The question has arisen as to whether or not proof of an insurable interest at the time the policy was issued alone is sufficient to sustain a recovery without proof of insurable interest at the time of the death of the assured. Or, otherwise stated, can there be a recovery on such a policy where the insurable interest which existed at the time the policy was issued ceased before the death of the assured? It has been held that the insurable interest contemplated as sufficient to sustain the contract of insurance is that which existed at the time the insurance was effected, and not that which might exist at the time of the death of the assured. Under the English statute on this subject it was held that the insurable interest referred to the time of effecting the insurance and not to the time of the death.³⁴⁹ And the United States Supreme Court held that the English statute indicated the proper rule to be observed in this country, and under this principle held that a divorced wife was entitled to the proceeds of a policy on the life of her husband

³⁴⁵ Lord v. Dall, 12 Mass. 115.

³⁴⁶ Guardian &c. Ins. Co. v. Hogan,

³⁴⁷ Gambs v. Covenant &c. Ins. Co., 80 Ill. 35.

50 Mo. 44; Ullis v. Robison, 73 Mo. 201; Equitable &c. Ins. Co. v. Patterson, 41 Ga. 338.

³⁴⁸ Dalby v. Life Ins. Co., 15 C. B. 365; 1 May Insurance, §§ 101, 115-117.

³⁴⁹ Cronin v. Vermont &c. Ins. Co., 20 R. I. 571, 40 Atl. 497.

during the existence of the marriage state.³⁵⁰ The rule seems to be that it is only necessary to prove an insurable interest at the time the policy was issued. This rule has been fully stated as follows: "The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception, and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of the recovery."³⁵¹

§ 2384. Insurance of one's life for benefit of another.—The rule established in some jurisdictions is that on a policy of life insurance obtained by a person on his own life in favor of another, the latter may maintain an action on the policy without proving that the assured had an insurable interest in him as such beneficiary.³⁵² The Supreme Court of Illinois, in speaking of the assured's right in this respect, said: "Bailey had an insurable interest in his own life, and had a clear right to procure a policy on his life, and, unless some principle of public policy is violated, he could make it payable, in case of death, to any person whom he might desire."³⁵³ The Supreme Court of Con-

³⁵⁰ *Connecticut &c. Ins. Co. v. Provident L. &c. Co. v. Baum*, 29 Ind. 236.

These holdings are perfectly consistent with the rule that a contract of life insurance is not an indemnity but is a contract to pay a certain sum in the event of death. But it is evident that it is not consistent with the proposition that such insurance is a mere indemnity.

³⁵¹ *Rawls v. American Ins. Co.*, 36 Barb. (N. Y.) 357; *Rawls v. American &c. Ins. Co.*, 27 N. Y. 282; *Hoyt v. New York &c. Ins. Co.*, 3 Bosw. (N. Y.) 440; *Scott v. Dickson*, 108 Pa. St. 6; *Corson's Appeal*, 113 Pa. St. 438, 6 Atl. 213; *Mowry v. Home Ins. Co.*, 9 R. I. 346; *Clark v. Allen*, 11 R. I. 439; *Cronin v. Vermont &c. Ins. Co.*, 20 R. I. 571, 40 Atl. 497; *Phoenix Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Campbell v. New England &c. Ins. Co.*, 98 Mass. 381;

³⁵² *Campbell v. New England &c. Ins. Co.*, 98 Mass. 381; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24; *Vivar v. Knights of Pythias*, 52 N. J. L. 455, 20 Atl. 36; *Crosswell v. Connecticut &c. Asso.*, (N. Car.) 28 S. E. 200; *Albert v. Mutual &c. Ins. Co.*, (N. Car.) 30 S. E. 327; *Northwestern &c. Asso. v. Jones*, 154 Pa. 99; 26 Atl. 253; *Overbeck v. Overbeck*, 155 Pa. St. 5, 25 Atl. 646; *Provident &c. Ins. Co. v. Baum*, 29 Ind. 236; *Elkhart &c. Asso. v. Houghton*, 103 Ind. 286, 2 N. E. 763; *Robinson v. United States &c. Asso.*, 68 Fed. (U. S.) 825.

³⁵³ *Bloomington &c. Asso. v. Blue*, 120 Ill. 121, 11 N. E. 331; *Rockhold v. Canton &c. Soc.*, 129 Ill. 440, 21 N. E. 794; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Danielson v. Wilson*, 73 Ill. App. 287; *Moore v.*

necticut said of this right of the assured: "But surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it, and we know of no law to prevent him making it payable, in case of his death, to the person to whom he was affianced, and if such policy is delivered, as a gift, to the party to whom payable, we know of no law to prevent such a gift being effectual."⁵⁵⁴ In a case where it appeared that an elderly man had befriended a young girl by sending her to school, paying her expenses, sending her to commercial college, and otherwise befriending her, it was held that an insurance policy on his own life payable to himself and assigned to the girl was valid and gave her a right of action on the policy.⁵⁵⁵

§ 2385. **Assignment to one having no insurable interest.**—From the rule requiring insurable interest in order to sustain a contract of insurance the question has arisen whether or not after such insurance was effected it could be assigned to a third person who had no insurable interest in the life of the assured. The courts are almost equally divided on this subject. But reason, and the weight of authority, are in favor of such an assignment. Many cases hold that insurance taken by one on the life of another in good faith, where there is an insurable interest, may be lawfully assigned to one having no insurable interest in the life of the assured.⁵⁵⁶ Where a policy is valid at the time it is taken, it may be subsequently assigned to one having no interest in the life of the assured when not used as a cloak for a wager.⁵⁵⁷ But some courts have held that policies though valid between the insured

Chicago &c. L. Soc., 76 Ill. App. 433; Rawls v. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

⁵⁵⁴ Lemon v. Phenix &c. L. Co., 38 Conn. 294.

⁵⁵⁵ Carpenter v. United States &c. Ins. Co., 161 Pa. St. 9, 28 Atl. 953.

⁵⁵⁶ Fitzpatrick v. Hartford &c. Ins. Co., 56 Conn. 116, 13 Atl. 673; Bowen v. National &c. Asso., 63 Conn. 460, 27 Atl. 1059; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657; Rittler v. Smith, 70 Md. 261, 16 Atl. 890; Mutual &c. Ins. Co. v. Allen, 138 Mass. 24; Dixon v. National &c. Ins. Co., 168 Mass. 48, 46 N. E. 430; Murphy v. Red, 64 Miss. 614, 60 Am. R. 68; St. John v. American &c.

Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Valton v. National &c. Assur. Co., 20 N. Y. 32; Olmsted v. Keyes, 85 N. Y. 593; Wright v. Mutual L. Asso., 118 N. Y. 237, 23 N. E. 186, 16 Am. St. 749; Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 70 Am. St. 424; Fuller v. Kent, 13 N. Y. App. Div. 529; Eckel v. Renner, 41 Ohio St. 232; Clark v. Allen 11 R. I. 439, 23 Am. R. 496; Crosswel v. Connecticut &c. Ind. Asso., 51 S. Car. 103, 28 S. E. 200; Strike v. Wisconsin &c. Ins. Co., 95 Wis. 583, 70 N. W. 819; Mutual &c. Ins. Co. v. Anderson, 1 N. Brun. Eq. 466.

⁵⁵⁷ Nye v. Grand Lodge &c., 9 Ind. App. 131, 36 N. E. 429.

and beneficiary cannot be assigned to one having no insurable interest in the life of the assured.³⁵⁸ The rule established in Missouri is that where a life policy is assigned to a person who pays the premiums but who has no insurable interest it gives him no interest in the policy except to the extent of the payments.³⁵⁹

§ 2386. **Death of the assured—Proof.**—The death of the assured is a fact to be proved to the satisfaction of the insurer, or of the court in an action on the policy. Ordinarily this is not difficult, as where death results from disease or from injury or disaster, and is susceptible of direct and positive identification and proof. But many cases arise where there is a sudden disappearance of the assured and no means of identifying the body or making positive proof of the death. In such cases the proof must be wholly circumstantial, and death may be inferred from circumstances. No more conclusive evidence is required in such cases than is ordinarily necessary in proving a fact in any civil action. The rule on this subject has been stated as follows: "The fact of death, like many other facts, may be established by circumstantial evidence. It may be determined by a process of reasoning, by presumptions and inferences drawn from facts established by direct evidence. . . . It not infrequently happens, in the administration of justice, that there is no direct evidence of the *factum probandum*, and it becomes necessary to resort to inferences to determine it. It has been found to be a wise and safe rule to require the circumstantial evidence to come so close to the fact by proof that it must be the immediate and direct inference therefrom."³⁶⁰ Proof of the sudden disappearance of the assured and failure after search to discover him, and the further proof that he was in such physical and mental

³⁵⁸ *Helmetag v. Miller*, 76 Ala. 183, 52 Am. R. 316; *Franklin v. Hazzard*, 41 Ind. 116, 13 Am. R. 313; *Missouri Co. v. Sturges*, 18 Kans. 93, 26 Am. R. 761; *Bayse v. Adams*, 81 Ky. 368; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. (U. S.) 643; *Stevens v. Warren*, 101 Mass. 564; *Price v. Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Cawthorn v. Perry*, (Tex.) 13 S. W. 268; *Lewy v. Gillard*, (Tex.) 13 S. W. 304; *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. R. 570; *Downey v. Hoffer*, 110 Pa. St. 109, 20 Atl. 655; *Vanormer v. Hornberger*, 142 Pa. St. 575, 21 Atl. 887; *Carpenter v. United States & Co.*, 161 Pa. St. 9, 28 Atl. 943, 41 Am. St. 880; *Heusner v. Mutual & Co. Ins. Co.*, 47 Mo. App. 336; *Insurance Co. v. Rosenheim*, 56 Mo. App. 27; *Mutual & Co. Ins. Co. v. Richards*, 99 Mo. App. 88.

³⁵⁹ *Mutual & Co. Ins. Co. v. Richards*, 99 Mo. App. 88.

³⁶⁰ *Supreme Council & Co. v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

condition as to excite the anxiety of his friends, and the fact that if living he could not have readily gone unnoticed, were held sufficient circumstances to justify the inference of death.³⁶¹ Proof of the fact that the assured went to a lake to bathe; that his clothing was found near the water; that there were footprints in the sand leading to the water; that the bottom of the lake at the particular point was dangerous, and that other persons had been drowned at the same place, were held circumstances sufficient to infer the death of the assured in the absence of proof that the body was found and identified.³⁶²

§ 2387. **Proofs of death—Purpose and effect.**—Life insurance policies, like fire insurance, required notice and proofs of death to be furnished within stated times by the beneficiary or some one in his behalf. This requirement must be strictly complied with, or a showing that it has been waived. These proofs may be used as admissions against the beneficiary. The rule is that such preliminary proofs are admissible as prima facie evidence of the facts stated therein against the assured and on behalf of the company.³⁶³ But the rule is that the proofs of loss are not conclusive evidence against the claimant.³⁶⁴

³⁶¹ *John Hancock &c. Ins. Co. v. Moore*, 34 Mich. 41. N. W. 399; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851;

³⁶² *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Supreme Council &c. v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105; *Tisdale v. Connecticut &c. Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136, and 28 Iowa 12; *John Hancock &c. Ins. Co. v. Moore*, 34 Mich. 41; *Hancock v. American &c. Ins. Co.*, 62 Mo. 26; *Insurance Co. v. Rosch*, 23 Ohio C. C. 491. Voelkel v. Supreme Tent &c., 116 Wis. 202, 92 N. W. 1104. For a valuable note on this question with the collection of many authorities, see, *John Hancock Mutual Ins. Co. v. Dick*, (Mich.) 44 L. R. A. 846.

³⁶³ *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32; *Crotty v. Union &c. Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. 749; *National &c. Asso. v. Sturtevant*, 78 Hun (N. Y.) 572; *Goldschmidt v. Mutual &c. Ins. Co.*, 102 N. Y. 486, 7 N. E. 408; *Hayes v. Union &c. Assur. Co.*, 44 U. C. Q. B. 360; *Hanna v. Connecticut &c. Ins. Co.*, 150 N. Y. 526, 44 N. E. 1099; *Bachmeyer v. Mutual &c. Asso.*, 82 Wis. 255, 52 N. W. 101; *Bachmeyer v. Mutual &c. Asso.*, 87 Wis. 325, 58 N. Y. 222, 14 Am. R. 239; *Spencer v. Citizens' &c. Ins. Co.*, 142 N. Y. 505, 37 N. E. 617; *Hanna v. Connecticut &c. Ins. Co.*, 150 N. Y. 526, 44 N. E. 1099; *Redmond v. Industrial &c. Asso.*, 150 N. Y. 167, 44 N. E. 769; *Knights Templar &c. Co. v. Crayton*, (Ill.) 70 N. E. 1066; *Bradley v. John Hancock &c. Ins. Co.*, 20 App. Div. (N. Y.) 22; *Fisher v. Fidelity &c. Asso.*, 188 Pa. St. 1, 41 Atl. 467; *Lebanon &c. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Boyle v. Royal Ins. Co.*, 52 N. Car. 373; *Planters' &c. Ins. Co. v. Deford*, 38 Md. 382; *Beckett v. Northwestern*

But in the absence of evidence to contradict the statements in the proofs of loss the prima facie case thus made becomes conclusive.³⁶⁵ And where there is an agreement in the policy that the contents of the proof of death shall be evidence of the facts therein stated, this is held to be binding on the beneficiary and will not permit him to contradict statements in the proofs of loss.³⁶⁶ Distinction has been made in the effect of the proofs of death when introduced in evidence by the beneficiary and by the insurer. When offered by the claimant they are admitted for the purpose of showing compliance with the provisions of the policy. When offered by the defendant they are admissible as declarations made by the claimant, and are prima facie evidence of the facts stated on behalf of the company and against the claimant.³⁶⁷ But ordinarily the prima facie effect of such proofs may be defeated or overcome by showing a mistake in the proofs of loss.³⁶⁸

§ 2388. **Proofs of death—Prima facie case.**—In making a prima facie case it is necessary for the plaintiff to offer in evidence the proofs of death for the purpose of showing that the conditions of the policy have been complied with. But it has been held that they are not admissible for any other purpose and are not to be taken as evidence of the cause of the death. The reason of this is that at most such statements as to the cause of the death are only matters of opinion or hearsay.³⁶⁹ As shown by cases cited in a preceding section such proof is

&c. Asso., 67 Minn. 298, 69 N. W. 923; Bankers' &c. Asso. v. Lisco, 47 Neb. 340, 66 N. W. 412; Cotton &c. Ins. Co. v. Edwards, 74 Ga. 220; American &c. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395; John Hancock &c. Ins. Co. v. Dick, (Mich.) 44 L. R. A. 846; Bachmeyer v. Mutual &c. Asso., 82 Wis. 255; Walther v. Mutual &c. Ins. Co., 65 Cal. 417, 4 Pac. 413; Home &c. Asso. v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332; Travelers' &c. Ins. Co. v. Nittgerhouse, 11 Ind. App. 155, 38 N. E. 1110; Leman v. Manhattan &c. Ins. Co., 46 La. Ann. 1189, 49 Am. St. 348; Modern Woodmen &c. v. Kozak, 63 Neb. 146, 88 N. W. 248; Sargent v. Home &c. Asso., 35 Fed. 711.

³⁶⁵ National &c. Asso. v. Sturte-

vant, 78 Hun (N. Y.) 572; Schmitt v. National L. Asso., 84 Hun (N. Y.) 128; Proppe v. Metropolitan &c. Ins. Co., 13 Misc. (N. Y.) 266.

³⁶⁶ Proppe v. Metropolitan &c. Ins. Co., 13 Misc. (N. Y.) 266.

³⁶⁷ United States &c. Ins. Co. v. Kielgast, 26 Ill. App. 567; Mutual &c. Ins. Co. v. Stibbe, 46 Md. 302.

³⁶⁸ Beckett v. Northwestern &c. Asso., 67 Minn. 298, 69 N. W. 923; National &c. Asso. v. Sturtevant, 78 Hun (N. Y.) 572; Trudden v. Metropolitan &c. Ins. Co., 50 N. Y. App. Div. 473.

³⁶⁹ Fidelity &c. Asso. v. Ficklin, 74 Md. 183, 21 Atl. 680; Travelers' Ins. Co. v. Nicklas, 88 Md. 470, 41 Atl. 906.

for the court.³⁷⁰ A statement in such proofs that the assured committed suicide will not ordinarily estop the plaintiff in an action on the policy from showing what the facts actually were in that regard.³⁷¹ Thus in a case where the widow of the assured, with no intention to defraud or mislead, signed and verified the proofs of death in which the statement was made that the remote cause of such death was suicide by strangulation, it was held in an action by her on the policy, proper to introduce evidence tending to show that the cause of death was not suicide.³⁷² And in an action on a policy it was held that the proofs of death are not prima facie evidence to show the cause of the death, when made by a third person without the authority of the plaintiff.³⁷³ In the absence of other evidence or explanation the statement of the age of the insured in the proofs of loss is sufficient to establish that fact.³⁷⁴

§ 2389. **Physician's certificate as evidence.**—Many life policies require the beneficiary to furnish with his proofs of death a statement or certificate of the attending physician as to the cause of the death or of the disease of which the assured died. Such statements or certificates are admissible in evidence for the purpose of showing compliance with the requirement of the policy in that regard, but as a rule are not binding upon the beneficiary. In an action on the policy the issues are to be tried and determined from the evidence adduced at the trial, and not by ex parte statements made in the absence of the claimant; and it has been held that in making such statements the physician is not the agent of the claimant.³⁷⁵ The most that can be said of such statements or certificates is that they might suggest to the company the propriety of refusing payment, but they cannot

³⁷⁰ See § 2343.

³⁷¹ *Modern Woodmen v. Davis*, 184 Ill. 236, 56 N. E. 300; *Supreme Tent &c. v. Stensland*, 206 Ill. 124, 68 N. E. 1098; *Union &c. Ins. Co. v. Payne*, 105 Fed. (U. S.) 172.

³⁷² *Walther v. Mutual &c. Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *Supreme Tent &c. v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. 137; *Leman v. Manhattan Ins. Co.*, 46 La. Ann. 1189, 15 So. 388, 49 Am. St. 348; *John Hancock &c. Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9;

Parmalee v. Hoffman &c. Ins. Co., 54 N. Y. 193; *Home &c. Asso. v. Sargent*, 144 U. S. 691; *Supreme Lodge &c. v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532.

³⁷³ *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906; *Fidelity &c. Asso. v. Ficklin*, 74 Md. 172, 183, 21 Atl. 680.

³⁷⁴ *Schmitt v. National L. Asso.*, 84 Hun (N. Y.) 128.

³⁷⁵ *Bentz v. Northwestern &c. Asso.*, 40 Minn. 202, 41 N. W. 1037, 2 L. R. A. 784.

be considered a bar to the action.³⁷⁶ Such a certificate of the attending, or other physician, attached to and made a part of the proofs of loss is admissible in evidence, and under the rule is prima facie evidence of the facts therein stated; and where uncontradicted or where there is an agreement in the policy that the proofs of loss shall be taken as evidence of the matter stated then such certificate becomes conclusive and if the certificate of the physician shows that the insured's death was due to any prohibited cause or disease there can be no recovery on the policy.³⁷⁸ And this rule is carried to the extent that where it was shown by the evidence that the statements of the applicant in regard to his health were false there could be no recovery on the policy by the beneficiary, notwithstanding the fact that such statements may have been innocently made, even where the proof showed that the falsity of the statements had no agency whatever in producing the death of the assured.³⁷⁹ But such certificates or statements do not estop the claimant from showing that death was from another cause than that stated in such certificate.³⁸⁰

³⁷⁶ *Insurance Co. v. Rodel*, 95 U. S. 232.

³⁷⁸ *Volker v. Metropolitan &c. Ins. Co.*, 1 Misc. (N. Y.) 374; *Proppe v. Metropolitan &c. Ins. Co.*, 13 Misc. (N. Y.) 266; *Helwig v. Mutual &c. Ins. Co.*, 132 N. Y. 331, 30 N. E. 834.

³⁷⁹ *Miles v. Connecticut &c. Ins. Co.*, 3 Gray (Mass.) 580; *First Nat. Bank v. Ins. Co., &c.*, 50 N. Y. 45; *Foot v. Phoenix Ins. Co.*, 61 N. Y. 571; *Cushman v. United States &c. Ins. Co.*, 63 N. Y. 404; *Baker v. Home &c. Ins. Co.*, 2 Hun (N. Y.) 402; *Wright v. Equitable &c. Soc.*, 50 How. Pr. (N. Y.) 367; *Ritzler v. World &c. Ins. Co.*, 10 Jones & S. (N. Y.) 409; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 9 Atl. 766, 60 Am. R. 661; *Galbraith v. Arlington &c. Ins. Co.*, 12 Bush (Ky.) 29; *Powers v. Northeastern &c. Asso.*, 50 Vt. 630; *Ætna &c. Ins. Co. v. France*, 91 U. S. 510; *Phoenix &c. Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500.

³⁸⁰ *Railway &c. Asso. v. Robinson*,

147 Ill. 138, 35 N. E. 168; *Bentz v. Northwestern &c. Asso.*, 40 Minn. 202, 41 N. W. 1037; *Supreme Lodge &c. v. Jagers*, 62 N. J. L. 96, 40 Atl. 783; *Parmalee v. Hoffman &c. Ins. Co.*, 54 N. Y. 193; *Cushman v. United States &c. Ins. Co.*, 70 N. Y. 72; *Redmond v. Industrial &c. Asso.*, 150 N. Y. 167, 44 N. E. 769; *Buffalo &c. Co. v. Knights Templar &c. Asso.*, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839; *Chinnery v. United States &c. Ins. Co.*, 15 App. Div. (N. Y.) 515; *Kipp v. Metropolitan &c. Ins. Co.*, 41 App. Div. (N. Y.) 298; *Boylan v. Prudential Ins. Co.*, 18 Misc. (N. Y.) 444; *Insurance Co. v. Schmidt*, 40 Ohio St. 112; *De Camp v. New Jersey &c. Ins. Co.*, 2 Sween. (N. Y.) 481; *Ætna &c. Ins. Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. 720; *Dreier v. Continental &c. Ins. Co.*, 24 Fed. 670; *Keels v. Mutual &c. Asso.*, 29 Fed. 198; *Sargent v. Home Ins. Co.*, 35 Fed. 711.

§ 2390. **Proofs of death—Coroner's verdict as evidence.**—The adjudications on the admissibility of the coroner's verdict as evidence in actions on life policies are not in entire accord. The reason for the lack of harmony may be found in the requirements of the policy as to proofs of loss. Where the policy sued upon requires the claimant to file with his proofs of death a copy, either verified or certified, of the coroner's verdict, it is held that such verdict is admissible in evidence as a part of the proofs of loss; and if admitted without objection it is to be considered in all its parts, and effect must be given to all it proves or tends to prove.³⁸¹ But the general rule is that the verdict of the coroner's inquest furnished under the policy as a part of the proofs of death will not bind the claimant as an admission either that such verdict is true or that the evidence contained was actually given.³⁸² The claimant is not estopped from proving that the cause of death was other than suicide where the coroner's verdict showed such to be the case.³⁸³ Especially is this true where the claimant in writing expressly declined to be bound by the coroner's verdict.³⁸⁴ Nor can it be regarded, ordinarily, as a representation made by the claimant, and therefore it is not, as a rule, binding on her.³⁸⁵ The correct rule undoubtedly is that such verdict is only admissible as a part of the proofs of death, and is not to be considered as evidence by the jury in determining the question of the cause of the death of the assured.³⁸⁶ It has been held by some courts that coroner's verdicts

³⁸¹ *Lawrence v. Mutual &c. Ins. Co.*, 5 Ill. App. 280; *Grand Lodge &c. v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. 123; *Knights Templar &c. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066.

³⁸² *United States &c. Ins. Co. v. Kielgast*, 26 Ill. App. 567; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866; *United States &c. Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Cox v. Royal Tribe*, 42 Ore. 365, 71 Pac. 73, 95 Am. St. 752, note; *Germania &c. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. 215; *Wasey v. Travelers' &c. Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *Union Cent. &c. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

³⁸³ *Sargent v. Home &c. Asso.*, 35 Fed. 711; *Leman v. Manhattan &c. Ins. Co.*, 46 La. Ann. 1189, 15 So. 388.

³⁸⁴ *Fisher v. Fidelity &c. Ins. Co.*, 188 Pa. 1, 41 Atl. 467.

³⁸⁵ *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. 244; *Anderson v. Supreme Council*, 135 N. Y. 107, 31 N. E. 1092; *Beach Insurance*, §§ 1216, 1217.

³⁸⁶ *Dougherty v. Pacific &c. Ins. Co.*, 154 Pa. 385, 25 Atl. 739; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866; *Mutual &c. Ins. Co. v. Stibbe*, 46 Md. 302, 312; *Fidelity &c. Asso. v. Ficklin*, 74 Md. 172, 183, 21 Atl. 680; *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906; *Cook v. Insurance Co.*, 84 Mich. 12, 47 N.

may be prima facie but not conclusive evidence of the fact found.³⁸⁷ Some courts hold that they may be admitted as admissions of the beneficiary against his interest.³⁸⁸

§ 2391. **Suicide—Presumptions.**—Life insurance policies usually contain a clause providing that the policy shall be void if the assured "shall die by his own hand or act." In an action on such a policy the plaintiff is only required to make out the prima facie case under the rules heretofore given, which is sufficient to make a prima facie case and entitle the plaintiff to recover. The presumption of law is always against suicide; this presumption is so strong that the courts usually require some evidence of an intention of suicide, as the intent is regarded as the gist of the act. This presumption against suicide is also strong enough to rebut the usual and natural inferences that might arise from conditions and circumstances ordinarily pointing to suicide. Thus where the assured was found dead, lying on his back with a pistol in his right hand which was lying across his breast, and there was a pistol or gunshot wound in his right temple, this was held insufficient evidence of suicide. In all such cases the law presumes that the wound which caused the death was the result of accident.³⁸⁹ This

W. 568; *Goldschmidt v. Mutual &c. Ins. Co.*, 102 N. Y. 486, 7 N. E. 408; *Buffalo &c. Co. v. Knights Templars &c.*, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839; *Louis v. Connecticut &c. Ins. Co.*, 58 App. Div. (N. Y.) 137; *Insurance Co. v. Schmidt*, 40 Ohio St. 112.

³⁸⁷ *Walther v. Mutual &c. Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *United States &c. Ins. Co. v. Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Fein v. Covenant &c. Asso.*, 60 Ill. App. 274; *Knights of Honor v. Fletcher*, 78 Miss. 377, 28 So. 872; *Fletcher v. Woodmen &c.*, 81 Miss. 249, 32 So. 923; *Insurance Co. v. Higginbotham*, 95 U. S. 380.

³⁸⁸ *Insurance Co. v. Newton*, 89 U. S. 32; *Insurance Co. v. Higginbotham*, 95 U. S. 380; *Keels v. Mutual &c. Life Asso.*, 29 Fed. 198; *Sharland v. Washington &c. Ins. Co.*,

101 Fed. (U. S.) 206; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851; *Cox v. Royal Tribe*, 42 Ore. 365, 71 Pac. 73; *Walther v. Mutual &c. Ins. Co.*, 65 Cal. 417, 4 Pac. 413.

³⁸⁹ *Union &c. Ins. Co. v. Payne*, 105 Fed. 172; *Stephenson v. Bankers' &c. Asso.*, 108 Iowa 637, 79 N. W. 459; *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. 244; *Guardian &c. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. R. 180; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 54; *Home &c. Asso. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332; *Leman v. Manhattan &c. Ins. Co.*, 46 La. Ann. 1189, 15 So. 338, 49 Am. St. 348; *Boynton v. Equitable &c. Soc.*, 105 La. 202, 29 So. 490; *Mutual &c. Ins. Co. v. Wiswell*, 56 Kans. 765, 44 Pac. 996;

rule is carried to the extent that where it is evident that the death resulted from accident or suicide and the evidence fails to show which was the cause, or where from all the evidence in the case the cause of death may be equally referred either to accident or intention, the law will presume that the death was accidental and not intentional.³⁰⁰ Where a body is found and there is no direct or positive evidence as to the cause of the death, the law will presume that it was caused neither by suicide nor murder.³⁰¹ And it has been held that where the evidence is equally balanced, or so nearly so as to leave the question in doubt, the finding should be against the theory of suicide.³⁰² The presumption is that the death of the insured was not voluntary.³⁰³

Travelers' &c. Ins. Co. v. Niterhouse, 11 Ind. App. 155, 38 N. E. 1110; *Union Cent. &c. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Keels v. Mutual &c. Asso.*, 29 Fed. 198; *Ingersoll v. Knights &c.*, 47 Fed. 272; *Connecticut &c. Ins. Co. v. McWhirter*, 73 Fed. 444; *Fidelity &c. Asso. v. Miller*, 92 Fed. 63; *Knights &c. v. Beck*, 94 Fed. 751; *Standard &c. Ins. Co. v. Thornton*, 100 Fed. 582, 49 L. R. A. 116; *Dennis v. Union &c. Ins. Co.*, 84 Cal. 570, 24 Pac. 120; *Carnes v. Iowa State Asso.*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. 306; *Hale v. Life &c. Co.*, 61 Minn. 516, 63 N. W. 1108, 52 Am. St. 616; *Fidelity &c. Co. v. Weise*, (Ill.) 29 Ins. L. J. 74; *Couadeau v. American &c. Co.*, 95 Ky. 280, 25 S. W. 6; *Merrett v. Preferred &c. Asso.*, 98 Mich. 338, 57 N. W. 169; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685; *Walcott v. Metropolitan Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923; 1 May Insurance, § 325; 4 Joyce Insurance, § 3773.

³⁰⁰ *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906; *Ingersoll v. Knights &c.*, 47 Fed. 272.

³⁰¹ *Stephenson v. Bankers' &c.*

Asso., 108 Iowa 637, 79 N. W. 459; *Royal Arcanum v. Brashears*, 89 Md. 624, 43 Atl. 866; *Connecticut &c. Ins. Co. v. McWhirter*, 73 Fed. (U. S.) 444; *Rens v. Northwestern &c. Asso.*, 100 Wis. 266, 75 N. W. 991; *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 33 Am. St. 923; *Beckett v. Northwestern &c. Asso.*, 67 Minn. 298, 69 N. W. 923; *Agen v. Metropolitan &c. Ins. Co.*, 105 Wis. 217, 80 N. W. 1020, 76 Am. St. 905.

³⁰² *Mutual &c. Ins. Co. v. Wiswell*, 56 Kans. 765, 44 Pac. 996, 35 L. R. A. 258; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. R. 410, note; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Keels v. Mutual &c. Asso.*, 29 Fed. 198; *Freeman v. Travelers' &c. Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731; 17 Am. St. 184; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 24 Atl. 992.

³⁰³ *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 24 Atl. 992; *Travelers' &c. Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110.

one's own life. And if the circumstances proved to establish the theory of suicide leave a reasonable hypothesis that death resulted in any other manner the evidence will be regarded as insufficient. A general rule might be formulated to the effect that the preponderance required of the insurer in order to overcome the proof and presumptions against suicide must be such as to exclude with reasonable certainty any hypothesis of death by accident or by the act of another.⁴⁰³ Thus it was held insufficient to defeat an action on a policy, providing that it shall be void if the assured shall die by his own hand, to prove that death was caused by taking poison, and that the insured was sane at the time, for the reason that if the poison was taken by mistake or unintentionally the claimant would be entitled to recover.⁴⁰⁴ And it has been held that proof of death resulting from insanity does not prove death by suicide. In the absence of other evidence if the proof shows death by insanity, the legal presumption is that it is a natural death from a natural cause and not from an act of self-destruction.⁴⁰⁵

§ 2395. Suicide—Effect of insanity.—An action on a life policy which provides that it shall be void in case the assured dies by his own hand or act is not necessarily defeated by proof that the death of the assured was caused by his own hand or act. The law has engrafted upon such policies the further condition that the self-destruction must be intentional and that the assured, in order to bring such death within the prohibition of the policy, must have been sane at the time of taking his life; such self-destruction when the assured is insane will not defeat the action. The extent or degree of insanity at the time of the death, and to render the insurer liable, is thus stated: "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to un-

⁴⁰³ *Gooding v. United States Ins. Co.*, 46 Ill. App. 307; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Sovereign Camp &c. v. Haller*, 24 Ind. App. 108, 56 N. E. 255; *Jones v. United States &c. Asso.*, 92 Iowa 652, 61 N. W. 485; *Leman v. Manhattan Ins. Co.*, 46 La. Ann. 1189, 15 So. 338; *Boynton v. Life Assur. Co.*, 105 La. 202, 29 So. 490; *Hale v. Life &c. Co.*, 65 Minn. 548, 68 N. W. 182; *Cox v. Royal Tribe*, 42 Ore. 365, 71 Pac. 73, 95 Am. St. 752, note.

⁴⁰⁴ *Penfold v. Universal &c. Ins. Co.*, 85 N. Y. 317; *Pierce v. Travelers' &c. Ins. Co.*, 34 Wis. 389; *Bachmeyer v. Mutual &c. Asso.*, 87 Wis. 325, 58 N. W. 399.

⁴⁰⁵ *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923.

derstand the moral character, the general nature, the consequence and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."⁴⁰⁶ The Massachusetts Supreme Court said: "A party cannot be said to die by his own hand, in the sense in which those words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control."⁴⁰⁷ The most recent expression of the Massachusetts Supreme Court on this subject is thus stated: "We are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent efficient cause of the death that im-

⁴⁰⁶ *Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 564; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. R. 676; *Phadenhauer v. Germania &c. Ins. Co.*, 7 Heisk. (Tenn.) 567, 19 Am. R. 623, note; *Scheffer v. National &c. Ins. Co.*, 25 Minn. 534; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Connecticut &c. Ins. Co. v. Groom*, 86 Pa. St. 92, 27 Am. R. 689; *Estabrook v. Union &c. Ins. Co.*, 54 Me. 224, 89 Am. Dec. 743; *Breasted v. Farmers' &c. Ins. Co.*, 8 N. Y. 299, 59 Am. Dec. 482, note; *Mutual &c. Ins. Co. v. Davless*, 87 Ky. 541, 9 S. W. 812; *Van Zandt v. Mutual &c. Ins. Co.*, 55 N. Y. 169, 14 Am. R. 215; *De Gogorza v. Knickerbocker &c. Ins. Co.*, 65 N. Y. 232; *Newton v. Mutual &c. Ins. Co.*, 76 N. Y. 426, 32 Am. R. 335; *Phillips v. Louisiana &c. Ins. Co.*, 26 La. Ann. 404, 21 Am. R. 549; *Bigelow v. Berkshire &c. Ins. Co.*, 93 U. S. 284; *Insurance Co.*

v. Rodel, 95 U. S. 232; *Manhattan &c. Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99; *Connecticut &c. Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *Ritter v. Mutual &c. Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. 300; *Hathaway v. National &c. Ins. Co.*, 48 Vt. 335; *Manhattan &c. Ins. Co. v. Beard*, (Ky.) 66 S. W. 35; *Mutual &c. Ins. Co. v. Davless*, 87 Ky. 541, 9 S. W. 812; *Supreme Council &c. v. Heineman*, (Ky.) 78 S. W. 406; *Hunziker v. Supreme Lodge &c.*, (Ky.) 78 S. W. 201; *Isett v. American &c. Ins. Co.*, (Pa.) 1 Ins. L. J. 715; *Gay v. Union &c. Ins. Co.*, 9 Blatch. (U. S.) 142.

⁴⁰⁷ *Dean v. American &c. Ins. Co.*, 4 Allen (Mass.) 96; *Cooper v. Massachusetts Ins. Co.*, 102 Mass. 227, 3 Am. R. 451, note.

mediately ensues."⁴⁰⁸ This rule does not apply where the policy provides that it should be void if the assured died by his own hand whether sane or insane.⁴⁰⁹

§ 2396. **Suicide—Burden of proof as to insanity.**—Under the rule given that proof of self-destruction alone is not sufficient of itself to defeat an action on a life policy, and under the further rule that it should be made to appear that the self-destruction was intentional and not accidental, the burden of proof is upon the insurer setting up suicide as a defense not only to prove the self-destruction, but it has been held that the insurer also has the burden of showing that the assured had requisite capacity, that he was in fact sane at the time of taking his life. Upon this issue, however, the insurer will have the benefit of the presumption of sanity which may obtain in cases of suicide as well as in cases of crime.⁴¹⁰ It is then incumbent on the beneficiary to offer proof sufficient to prevent the operation of the clause, and the claimant must prove that the assured was insane at the time the act was committed; it was held insufficient to prove that he was insane at times, and in the absence of proof of insanity at the precise time when the act was committed the jury may infer sanity as

⁴⁰⁸ *Daniels v. New York &c. R. Co.*, 183 Mass. 393, 67 N. E. 424; *Dean v. American &c. Ins. Co.*, 4 Allen (Mass.) 96; *Cooper v. Massachusetts &c. Ins. Co.*, 102 Mass. 227, 3 Am. R. 451, note.

⁴⁰⁹ *Adkins v. Columbia &c. Ins. Co.*, 70 Mo. 27, 35 Am. R. 410; *Haynie v. Knight Templars &c.*, 139 Mo. 416, 41 S. W. 461; *Sparks v. Life Ins. Co.*, 61 Mo. App. 109; *De Gogorza v. Knickerbocker &c. Ins. Co.*, 65 N. Y. 232; *Insurance Co. v. Maguire*, 19 Ohio C. C. 502; *Pagenhardt v. Insurance Co.*, 4 Ohio N. P. 169; *Spruill v. Northwestern &c. Ins. Co.*, 120 N. Car. 141, 27 S. E. 39; *Tritschler v. Benefit Asso.*, 180 Pa. St. 205, 36 Atl. 734; *Chapman v. Republic &c. Ins. Co.*, 6 Biss. (U. S.) 238; *Pierce v. Travelers' &c. Ins. Co.*, 34 Wis. 389; *Kelley v. Mutual &c. Ins. Co.*, 75 Fed. 637; *Union Cen-*

tral &c. Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277; but see, *Dickerson v. Northwestern &c. Ins. Co.*, 200 Ill. 270, 65 N. E. 694; *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 24 Atl. 992.

⁴¹⁰ *Phillips v. Louisiana &c. Ins. Co.*, 26 La. Ann. 404; *Knickerbocker &c. Ins. Co. v. Peters*, 42 Md. 414; *Schultz v. Insurance Co.*, 40 Ohio St. 217, 48 Am. R. 676; *Dickerson v. Northwestern &c. Ins. Co.*, 200 Ill. 270, 65 N. E. 694; *Weed v. Mutual &c. Ins. Co.*, 70 N. Y. 561; *Mutual &c. Ins. Co. v. Wiswell*, 56 Kans. 765, 44 Pac. 996; *Mutual &c. Ins. Co. v. Simpson*, (Tex.) 28 S. W. 837; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Home &c. Asso. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332; *Phillips v. Louisiana &c. Ins. Co.*, 26 La. 404, 21 Am. R. 549.

no inference of insanity can be drawn from the fact of suicide.⁴¹¹ Where an applicant answered that there was no hereditary insanity in his family to his knowledge, it was held necessary to defeat an action on the policy to prove: (1) the alleged insanity of a member of the family; (2) that it was hereditary; (3) that both of these facts were known to the applicant at the time he answered the questions.⁴¹² Where it was shown that the assured took carbolic acid for the purpose of frightening his wife into giving him money, it was held that the death resulting was not suicide or self-destruction within the meaning of the policy and did not prevent a recovery by the beneficiary.⁴¹³ It is held that the mere fact that a man commits suicide does not raise a presumption of his insanity at the time, yet such fact in connection with other evidence is pertinent to the issue of insanity.⁴¹⁴

§ 2397. **Suicide—Fraud on insurer.**—The rule that fraud vitiates all contracts has been applied to life insurance policies. An action on an insurance policy which contains no provision against forfeiture on account of suicide is subject to be defeated on proof that the insurance was procured with the fraudulent purpose of committing suicide in order to make the insurance available for the beneficiary. The Supreme Court of New York, in a comparatively recent case in an action involving this question, said of the evidence: "These acts and declarations all occurred before the plaintiff took his policy as collateral, and when they affected no one but Tyler himself. They tended to show the origin and progress of the fraudulent intent, the manner of its growth and the motive from which it sprung. They indicate a sane and deliberate purpose moving steadily to its result, and constitutes a part of the history of the fraud. They were contemporaneous with fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life which he knew he could not continuously maintain. They show the motive of the fraud and mark its progress, and harmonize so completely with all which afterward occurred as to constitute, with that, elements of the single transaction, the fraudulent conduct which

⁴¹¹ *Knickerbocker &c. Ins. Co. v. Peters*, 42 Md. 414; *Weed v. Mutual &c. Ins. Co.*, 70 N. Y. 561. ⁴¹³ *Courtemanche v. Supreme Court &c.*, (Mich.) 98 N. W. 749.

⁴¹² *Insurance Co. v. Gridley*, 100 U. S. 614; *National Bank v. Insurance Co.*, 95 U. S. 673. ⁴¹⁴ *Karow v. Continental Ins. Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. R. 17; *Bachmeyer v. Mutual &c. Ins. Co.*, 87 Wis. 325, 58 N. W. 399.

raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestae*, and did not transcend its limits. Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true; but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud."⁴¹⁵

Accident and Casualty.

§ 2398. **Accident and casualty insurance.**—In its essential contract features accident or casualty insurance does not differ greatly from that of other classes of insurance. It is defined to be "a contract whereby one for a consideration agrees either (1) to indemnify another against personal injury resulting from accident, or (2) to pay another a certain sum of money in case of death caused by accident. It is said that accident insurance is intended to indemnify for injury resulting from accident or to compensate by payment of a fixed sum where death results to the insured in consequence of accident, and that the contract closely resembles that of life insurance."⁴¹⁶ As defined by the Massachusetts Supreme Court, "a policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means."⁴¹⁷ "Casualty insurance has been defined as an insurance against loss through accidents or casualty resulting in bodily injury or death."⁴¹⁸ In general practice and the common application of insurance, casualty insurance is applied to certain lines of personal property and

⁴¹⁵ *Smith v. National Ben. Soc. &c., &c.*, (Ky.) 78 S. W. 201; *Hopkins v. Northwestern &c. Co.*, 94 Fed. 729; 123 N. Y. 85, 25 N. E. 197; *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300; *New York &c. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877; *Hatch v. Mutual Life*, 120 Mass. 550; *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 46 Am. R. 332; *Amicable Society v. Bolland*, 4 Bligh. (N. S.) 194; *Mooney v. Ancient Order &c.*, (Ky.) 72 S. W. 288; *Hunziker v. Supreme Lodge &c.*, (Ky.) 78 S. W. 201; *Hopkins v. Northwestern &c. Co.*, 94 Fed. 729; but see, *Seiler v. Economic &c. Asso.*, 105 Iowa 87, 74 N. W. 941, 43 L. R. A. 537.

⁴¹⁶ *Joyce Insurance*, § 8; *Black w Dict.* 632.

⁴¹⁷ *Employers' &c. Corp. v. Merrill*, 155 Mass. 404, 29 N. E. 529.

⁴¹⁸ 1 *Joyce Damages*, § 9; *State v. Federal &c. Co.*, 48 Minn. 110, 50 N. W. 1028.

sometimes to domestic animals, while accident insurance is applied more especially to injuries to persons.⁴¹⁹

§ 2399. Accident—Meaning.—Where injury or death occurs to one insured against accidents it is essential that the injury received or causing the death comes within the terms of the policy. There can be no recovery unless the proof shows that the injury or accident received is covered by the policy, and for this reason it becomes important to know the judicial meaning of the term accident. The definition approved by one court is that “an accident is an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency. And “accident” signifies, happening by chance or unexpectedly, taking place not according to the usual course of things; casual; fortuitous. . . . If then these words, as used in the policy, are to be understood in their plain and ordinary meaning as thus defined, they include death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things.”⁴²⁰ As stated by other courts, “the happening of an event without the aid and design of a person, and which is unforeseen.” One test applied was that if the death was the result of accident, or was unnatural, this was sufficient to import an external and violent agency as the cause.⁴²¹ The definition given by Bouvier and generally approved is, “an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency.”⁴²² Mr. Biddle’s definition has been approved where he says: “An injury may be said objectively to be accidental, though subjectively it is not; and, if

⁴¹⁹ *Employers’ &c. Corp. v. Merrill*, 112 N. Y. 472, 20 N. E. 347, 8 Am. 155 Mass. 404, 29 N. E. 529. St. 758, note.

⁴²⁰ *North American &c. Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. R. 212; *Mutual &c. Asso. v. Barry*, 131 U. S. 100, 9 Sup. Ct. 775; *Burkhard v. Travelers’ Ins. Co.*, 102 Pa. St. 262, 48 Am. R. 205; *Hey v. Guarantors’ Liability &c. Co.*, 181 Pa. 220, 224, 37 Atl. 402, 59 Am. St. 644.

⁴²¹ *Paul v. Travelers’ &c. Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 8 Am. St. 758, note.

⁴²² *Carnes v. Iowa &c. Asso.*, 106 Iowa 281, 76 N. W. 683; *Supreme Council &c. v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. R. 298, note; *McGlinchey v. Casualty Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. 190; *Lovelace v. Travelers’ &c. Asso.*, 126 Mo. 104, 28 S. W. 877, 47 Am. St. 638.

it occur without the agency of the insured, it may logically be termed accidental, though it was designedly brought about by another person."⁴²³ This principle was applied in a case where an assured was hanged by a mob.⁴²⁴ The abstract term "accident" has received a definition and construction in a great variety of cases, most of which have a direct bearing on the word as used in policies of insurance of this class.⁴²⁵

⁴²³ 2 Biddle Insurance, § 829.

⁴²⁴ Fidelity &c. Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206.

⁴²⁵ Grant v. Moseley, 29 Ala. 302; Equitable &c. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869; Simpson v. Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Standard &c. Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; St. Louis &c. R. Co. v. Barnett, 65 Ark. 255, 45 S. W. 550; Standard &c. Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. 112; Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455; McGuire v. Drew, 83 Cal. 229, 23 Pac. 312; State v. Becker, 9 Houst. (Del.) 411, 33 Atl. 178; Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856; Morris v. Platt, 32 Conn. 75; Southard v. Railway &c. Co., 34 Conn. 574; Bostwick v. Stiles, 35 Conn. 195, 198; Cobb v. Preferred &c. Asso., 96 Ga. 818, 22 S. E. 976; Atlanta &c. Asso. v. Alexander, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; Travelers' &c. Asso. v. Stone, 50 Ill. App. 222; Kellar v. Shippee, 45 Ill. App. 377; Healey v. Mutual &c. Asso., 133 Ill. 556, 9 L. R. A. 371; Mutual &c. Asso. v. Tugle, 39 Ill. App. 509; Owens v. Travelers' Ins. Co., (Ind.) 13 Ins. L. J. 648; Nave v. Flack, 90 Ind. 205; Wabash &c. R. Co. v. Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193; Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. R. 298, note; Northwestern L. Ins. Co.

v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. R. 192; Conner v. Citizens' &c. R. Co., 146 Ind. 430, 45 N. E. 662; Peele v. Provident &c. Soc., 147 Ind. 543, 44 N. E. 661; Brummit v. Furness, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. 215; Newman v. Railway &c. Asso., 15 Ind. App. 29, 42 N. E. 650; Harless v. United States, Morris (Iowa) 169; Jones v. United States &c. Asso., 92 Iowa 652, 61 N. W. 485; Meyer v. Fidelity &c. Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. 374; Carnes v. Iowa &c. Asso., 106 Iowa 281, 76 N. W. 683, 68 Am. St. 306; Feder v. Iowa &c. Asso., 107 Iowa 538, 78 N. W. 252, 70 Am. St. 212; Osborne v. Van Dyke, 113 Iowa 557, 85 N. W. 784; Payne v. Fraternal &c. Asso., 119 Iowa 342, 93 N. W. 361; Blue Wing, The, v. Buckner, 12 B. Mon. (Ky.) 246; Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. 484; American &c. Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 42 Am. St. 374; Couadeau v. American &c. Co., 95 Ky. 280, 25 S. W. 6; American &c. Co. v. Carson, 99 Ky. 441, 36 S. W. 169, 59 Am. St. 473; Railway &c. Asso. v. Johnson, 109 Ky. 261, 58 S. W. 694, 95 Am. St. 370; Omberg v. United States &c. Asso., 101 Ky. 303, 40 S. W. 909, 72 Am. St. 413; Konrad v. Union &c. Co., 49 La. Ann. 636, 21 So. 721; Vose v. Bradstreet, 27 Me. 156; McGlinchey v. Fidelity &c. Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. 190; Pick-

§ 2400. **Accidental cause—Accidental death.**—The language used in different accident policies is not always the same. Some policies

ering v. Cassidy, 93 Me. 139, 44 Atl. 683; Life Ins. &c. Co. v. Martin, 32 Md. 310; Brown v. Kendall, 6 Cush. (Mass.) 292; Tuttle v. Travelers' &c. Ins. Co., 134 Mass. 175; Lothrop v. Thayer, 138 Mass. 466, 52 Am. R. 286; Employers' &c. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529; Keene v. New England &c. Assur., 161 Mass. 149, 36 N. E. 891; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913, note; Blackstone v. Standard &c. Ins. Co., 74 Mich. 592, 42 N. W. 156; Fidelity &c. Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206; Henry v. Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214; Lovelace v. Travelers' &c. Asso., 126 Mo. 104, 28 S. W. 877, 47 Am. St. 638; Phelan v. Travelers' Ins. Co., 38 Mo. App. 640; Collins v. Fidelity &c. Co., 63 Mo. App. 253; Wendall v. Chicago &c. R. Co., 100 Mo. App. 556, 75 S. W. 689; Railway &c. Asso. v. Drummond, 56 Neb. 235, 76 N. W. 562; Zimmerman v. Fremont &c. Bank, 59 Neb. 661, 81 N. W. 849; Western &c. Asso. v. Holbrook, (Neb.) 94 N. W. 816; Rodey v. Travelers' Ins. Co., 3 N. Mex. 316, 9 Pac. 348; Armijo v. Abeytia, 5 N. Mex. 533, 25 Pac. 777; Smith v. Erie R. Co., 67 N. J. L. 636, 52 Atl. 634; Herbert v. Herbert, 49 N. J. Eq. 68, 60 Am. R. 584, note; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. R. 410, note; Penfold v. Universal L. Ins. Co., 85 N. Y. 317, 319, 39 Am. R. 660; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 8 Am. St. 758, note; Wehle v. United States &c. Asso., 153 N. Y. 116, 47 N. E. 35, 60 Am. St. 598; Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. 630; Hill v. Hartford &c. Ins. Co., 22 Hun (N. Y.) 187; Bacon v. United States &c. Asso., 44 Hun (N. Y.) 599; Tucker v. Mutual &c. Co., 50 Hun (N. Y.) 50, 4 N. Y. S. 505; Williams v. United States &c. Asso., 60 Hun (N. Y.) 580, 14 N. Y. S. 728; Martin v. Equitable &c. Asso., 61 Hun (N. Y.) 467, 16 N. Y. S. 279; Mennelley v. Employers' &c. Corp., 72 Hun (N. Y.) 477, 25 N. Y. S. 230; Devan v. Commercial &c. Asso., 92 Hun (N. Y.) 256, 36 N. Y. S. 931; Guldenkirch v. United States &c. Asso., 5 N. Y. S. 428; Duncan v. Preferred &c. Asso., 13 N. Y. S. 620; Bailey v. Interstate &c. Co., 8 App. Div. (N. Y.) 127, 40 N. Y. S. 513; Appel v. Aetna &c. Ins. Co., 86 App. Div. (N. Y.) 83; Crutchfield v. Richmond &c. R. Co., 76 N. Car. 320; Raiford v. Wilmington &c. R. Co., 130 N. Car. 597, 41 S. E. 806; Keck v. American &c. Co., 131 N. Car. 277, 42 S. E. 610; United States &c. Asso. v. Hubbell, 56 Ohio St. 516, 47 N. E. 544; Moody v. Insurance Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. 699; Interstate &c. Co. v. Bird, 18 Ohio C. C. 488; McCarty v. New York &c. R. Co., 30 Pa. St. 247; North American &c. Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. R. 212; Pollock v. United States &c. Asso., 102 Pa. St. 230, 48 Am. R. 204; Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262, 48 Am. R. 205; Pennsylvania R. Co. v. Ralordon, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; Pickett v. Pacific &c. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661; Hey v. Guarantors' &c. Co., 181 Pa. St. 220, 59 Am. St. 644; Alexander v. Bailey, 2 Lea (Tenn.) 636; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am.

insure against death from an accidental cause, while the contract in others is against an accidental death. The proof in a given case might establish death from an accidental cause and not be sufficient proof of an accidental death. Thus, in a case where a man purposely took morphine but not with suicidal intention, but death resulted, it was held that while the death was accidental the cause of the death was not accidental, for he intended to do the very thing he did. The morphine was taken by design; the result was unforeseen and unintended.⁴²⁶ A United States Circuit Judge observed this distinction in charging the jury where he said: "The term accident is here used in its ordinary, popular sense, and in that sense it means happening by chance, unexpectedly; taking place not according to the usual course of things, or not as expected. In other words, if a result is such as follows from ordinary means voluntarily employed, in a not unusual or

St. 685; *Miller v. American &c. Ins. Co.*, 92 Tenn. 167, 21 S. W. 39; *Union Casualty &c. Co. v. Harroll*, 98 Tenn. 591, 40 S. W. 1080; *Lott v. Kaiser*, 61 Tex. 665; *Maryland &c. Co. v. Hudgins*, (Tex.) 72 S. W. 1047; *United States &c. Asso. v. Newman*, 84 Va. 52, 3 S. E. 805; *Schneider v. Provident &c. Ins. Co.*, 24 Wis. 28, 1 Am. R. 157; *Button v. American &c. Asso.*, 92 Wis. 83, 65 N. W. 861, 53 Am. St. 900; *McCarthy v. Travelers' Ins. Co.*, 8 Biss. (U. S.) 362; *Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 Sup. Ct. 494; *Accident Ins. Co. v. Crandall*, 120 U. S. 527, 7 Sup. Ct. 685; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *United States &c. Asso. v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755; *National &c. Soc. v. Dolph*, 38 C. C. A. 1, 94 Fed. 743; *Ripley v. Railway &c. Co.*, 20 Fed. Cas. 823; *Barry v. United States &c. Asso.*, 23 Fed. 712; *Crandall v. Accident Ins. Co.*, 27 Fed. 40; *Tennant v. Travelers' Ins. Co.*, 31 Fed. 322; *Dozier v. Fidelity &c. Co.*, 46 Fed. 446, 13 L. R. A. 114; *Robinson v. United States &c. Asso.*, 68 Fed. 825; *Taliaferro v. Travelers' &c. Asso.*, 80 Fed. 368; *Breed v. Glasgow &c. Co.*, 92 Fed. 760; *Travelers' Ins. Co. v. Mellick*, 65 Fed. 178, 27 L. R. A. 629; *Travelers' Ins. Co. v. Selden*, 78 Fed. 285; *Western &c. Asso. v. Smith*, 85 Fed. 401, 40 L. R. A. 653; *Ætna &c. Ins. Co. v. Vandecar*, 86 Fed. 282; *Magann v. Segal*, 92 Fed. 252; *Miller v. Fidelity &c. Co.*, 97 Fed. 836; *Manufacturers' &c. Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620; *Hendrick v. Employers' &c. Co.*, 62 Fed. 893; *Buckl &c. Co. v. Atlantic &c. Co.*, 116 Fed. 1; *Isitt v. Railway Pass. &c. Co.*, L. R. 22 Q. B. 504; *Sinclair v. Maritime &c. Co.*, 3 E. & E. 478; *Theobald v. Railway Pass. &c. Soc.*, 10 Exch. 45; *Trew v. Assurance Co.*, 6 H. & N. 839; *Winspear v. Accident Ins. Co.*, L. R. 6 Q. B. 42; *Reynolds v. Insurance Co.*, 22 L. T. N. S. 820; *Martin v. Travelers' Ins. Co.*, 1 Fost. & Fin. 505; *Lawrence v. Accident &c. Co.*, L. R. 7 Q. B. 216; *Fenwick v. Schmalz*, L. R. 3 Com. P. 313; *Cornish v. Insurance Co.*, L. R. 23 Q. B. 453.

⁴²⁶ *Carnes v. Iowa &c. Asso.*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. 306.

unexpected way, then, I suppose, it cannot be called a result affected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces injury then the injury has resulted from accident or through accidental means."⁴²⁷ So it was stated in another case: "A person may do a certain act, the result of which act may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental."⁴²⁸

§ 2401. **Injury or death—Presumptions.**—The same rule obtains in accident insurance as in life insurance on the question of presumptions. And when proof is made of an injury it is presumed that such injury was not self inflicted. This presumption stands in favor of the plaintiff when his proof shows the fact of the injury, and it devolves upon the defendant to overcome this presumption. The rule is stated thus: "It is true that when an injury is shown the presumption arises that it was not self inflicted, and to defeat a recovery the defendant must negative this presumption; but, in cases where the very foundation of the action is accidental injury, the presumption which the law raises is only an aid to the other evidence on the subject, and does not operate to shift the burden of proof on the entire issue to the defendant."⁴²⁹ Thus, death may be presumed from facts and circumstances which clearly indicate drowning, in the absence of any proof of actual death or the finding of the body.⁴³⁰ And where a person is found drowned, the presumption is that it was accidental; and in such case the presumption is against suicide or voluntary self destruction.⁴³¹ So where death may be attributed either to suicide or

⁴²⁷ *Barry v. United States &c. Asso.*, 23 Fed. 712. 10 N. E. 726; *Whitlatch v. Fidelity &c. Co.*, 149 N. Y. 45, 43 N. E. 405;

⁴²⁸ *Clidero v. Insurance Co.*, 29 *Travelers' Ins. Co. v. McConkey*, 127 Scott. L. R. 303; *American &c. Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, U. S. 661, 8 Sup. Ct. 1360.

⁴²⁹ *Supreme Council v. Boyle*, 10 59 Am. St. 473; 3 *Joyce Insurance*, Ind. App. 301, 37 N. E. 1105. § 2863.

⁴³⁰ *Taylor v. Pacific &c. Ins. Co.*, 95 Ky. 280, 25 S. W. 6; *Mallory v. 110 Iowa 621, 82 N. W. 326; Carnes Travelers' Ins. Co.*, 47 N. Y. 52, 7 v. *Iowa &c. Asso.*, 106 Iowa 281, 76 Am. R. 410, note; *De Van v. Commercial Travelers' &c. Asso.*, 92 Hun N. W. 683, 68 Am. St. 306; *Simpson (N. Y.) 256; Landon v. Preferred v. Davis*, 119 Mass. 269, 20 Am. R. &c. Ins. Co., 43 App. Div. (N. Y.) 324; *Perley v. Perley*, 144 Mass. 104,

accident, it has been held that the presumption of law is against suicide and in favor of accident.⁴⁸² The presumption is that an injury is caused by accidental means rather than it was the result of design either on the part of the assured or of any other person.⁴⁸³ The rule which governs appellate courts is that where the evidence leaves the manner of death in doubt, the appellate court will sustain the finding of the trial court.⁴⁸⁴

§ 2402. Burden of proof.—In actions on an accident policy to recover for an injury or the death of the assured the burden of proof is upon the claimant to prove (1) the injury or death of the assured; (2) that such injury or death resulted from an accidental cause. It is held to be sufficient, however, that where the claimant has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is upon the insurer to establish as a defense that the assured was within some of the exceptions of the policy.⁴⁸⁵ The rule as stated in a later Iowa case is: "To entitle the plaintiff

487; *Knickerbocker &c. Ins. Co. v. Jordon*, 7 Cin. Law Bul. (Ohio) 71, 6 Ohio Dec. (Reprint) 1145; *Insurance Co. v. Rosch*, 23 Ohio C. C. 491; *United States &c. Asso. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544; *Reynolds v. Accidental Ins. Co.*, 22 L. T. N. S. 820; an exception to this rule is found in, *Johns v. Northwestern &c. Asso.*, 90 Wis. 332, 63 N. W. 276.

⁴⁸² *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Burnham v. Interstate &c. Co.*, 117 Mich. 142, 75 N. W. 445; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913, note; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. R. 410, note; *Peck v. Equitable &c. Asso.*, 52 Hun (N. Y.) 255; *Union &c. Co. v. Goddard*, (Ky.) 76 S. W. 832; *Starr &c. Co. v. Sibley*, 57 Ill. App. 315; *Jones v. United States &c. Asso.*, 92 Iowa 652, 64 N. W. 485; *Meadows v. Pacific &c. Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50

Am. St. 427, note; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 802; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; 38 N. E. 1110; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731, 17 Am. St. 184; *Walcott v. Metropolitan &c. Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923; *Warner v. United States &c. Asso.*, 3 Utah 431; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360.

⁴⁸³ *Peck v. Equitable &c. Asso.*, 52 Hun (N. Y.) 255.

⁴⁸⁴ *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110.

⁴⁸⁵ *Carnes v. Iowa &c. Asso.*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. 306; *Mutual &c. Ins. Co. v. Wiswell*, 56 Kans. 765, 44 Pac. 996; *Badenfeld v. Massachusetts &c. Asso.*, 154 Mass. 77, 27 N. E. 769; *Hess v. Masonic &c. Asso.*, 112 Mich. 196, 70 N. W. 460; *Couadeau v. American &c. Ins. Co.*, 95 Ky. 280, 25 S. W. 6.

to recover at all, he must prove by a preponderance of the evidence that his was an accidental injury, because the policy only insured him against such injuries."⁴³⁶ Until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of the accidental death, and some inconsistent with it, a case is not made out.⁴³⁷

§ 2403. *Injury within terms of policy.*—The plaintiff must show in an action on an accident policy not only that the injury but that the disability complained of was within the meaning and the definition of the contract. And under some contracts he must show also that the injury sustained by him resulted from the exposure incident to his occupation as named in the contract of insurance. It is not sufficient under such policies to prove pain, suffering or inconvenience as there is no undertaking to indemnify against these; the indemnity is against loss of time in the business in which the assured was engaged. Under this rule it was held that a person insured as a retired gentleman could not recover for injuries received while operating a buzz saw.⁴³⁸ Under this rule it is not sufficient, however, to defeat an action to show that the act resulting in the injury was either outside of the terms of the policy or unlawful, unless it is also made to appear that the natural and reasonable consequences of such violation increased the risk.⁴³⁹ In other words there must be some casual connection between the violation of law and the injury received.⁴⁴⁰ And

⁴³⁶ *Taylor v. Pacific &c. Ins. Co.*, Tenn. 256, 16 S. W. 723, 25 Am. St. 110 Iowa 621, 82 N. W. 326.

⁴³⁷ *Merrett v. Preferred &c. Asso.*, 98 Mich. 338; *Burnham v. Interstate &c. Co.*, 117 Mich. 142, 75 N. W. 445.

⁴³⁸ *Knapp v. Preferred &c. Asso.*, 53 Hun (N. Y.) 84.

⁴³⁹ *National &c. Asso. v. Bowman*, 110 Ind. 355, 11 N. E. 316; *Conboy v. Railway Officials &c. Asso.*, 17 Ind. App. 62, 46 N. E. 363; *Jones v. United States &c. Asso.*, 92 Iowa 652, 61 N. W. 485; *Bradley v. Mutual &c. Ins. Co.*, 45 N. Y. 422, 6 Am. R. 115; *Lehman v. Great Eastern &c. Co.*, 7 App. Div. (N. Y.) 424, 39 N. Y. S. 912; *Insurance Co. v. Bennett*, 90

⁴⁴⁰ *Gresham v. Equitable &c. Ins. Co.*, 87 Ga. 497, 13 S. E. 752, 27 Am. St. 263; *United States &c. Asso. v. Millard*, 43 Ill. App. 148; *Bloom v. Franklin &c. Ins. Co.*, 97 Ind. 478, 49 Am. R. 469; *National &c. Asso. v. Bowman*, 110 Ind. 355, 11 N. E. 316; *Jones v. United States &c. Asso.*, 92 Iowa 652, 61 N. W. 485; *Prader v. National &c. Asso.*, 95 Iowa 149, 63 N. W. 601; *Eaton v. Atlas &c. Ins. Co.*, 89 Me. 570, 26 Atl. 1048; *Cluff v. Insurance Co.*, 13 Allen (Mass.) 308; *Hatch v. Insurance Co.*, 120 Mass. 550, 21 Am. R. 541, note; *Utter v. Travelers' Ins.*

where the insured was described as having a twofold occupation, it was held that he must prove total disability from the prosecution of any and every kind of business pertaining to either of the two.⁴⁴¹

§ 2404. **Burden of proof on defendant.**—The general rule is that the burden of proof is upon the defendant to prove a failure to comply with the terms of the policy on the part of the assured; or that the injury or death was intentional and not accidental where it is made to appear that such injury or death was by violence; or that the assured did not use due care or diligence.⁴⁴² Thus where a policy provided that it should be void if the assured committed suicide, in an action on such policy it was held that the burden was upon the insurer to show that the assured did take his own life.⁴⁴³ And where a policy provided that the insurance should not extend to intentional injuries inflicted by himself or other persons, it was held that the burden was on the insurer to prove that the condition had been violated.⁴⁴⁴ So where it appeared that a holder of an accident policy came to death by accidental drowning, it was sufficient to bring within the terms of the policy that it was "through external, violent and accidental means," and it was held that the burden was upon the de-

Co., 65 Mich. 553, 32 N. W. 812; Griffin v. Western &c. Asso., 20 Neb. 620, 31 N. W. 122, 57 Am. R. 848; Bradley v. Insurance Co., 45 N. Y. 422, 432, 6 Am. R. 115; Cornwell v. Fraternal &c. Asso., 6 N. Dak. 201, 69 N. W. 191; Insurance Co. v. Bennett, 90 Tenn. 257, 25 Am. St. 685; Duran v. Standard &c. Ins. Co., 63 Vt. 467, 22 Atl. 530; Travelers' Ins. Co. v. Seaver, 19 Wall. (U. S.) 531; Robinson v. United States &c. Asso. 68 Fed. 825.

⁴⁴¹ Ford v. United States &c. Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700.

⁴⁴² Standard &c. Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530; National Ben. &c. Asso. v. Bowman, 110 Ind. 355, 11 N. E. 316; Sutherland v. Standard &c. Ins. Co., 87 Iowa 505, 54 N. W. 453; Jones v. United States &c. Asso., 92 Iowa 652, 61 N. W.

485; Freeman v. Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372; Badenfeld v. Massachusetts &c. Asso., 154 Mass. 77, 27 N. E. 769; Keene v. New England &c. Asso., 161 Mass. 149, 36 N. E. 891; Anthony v. Mercantile &c. Asso., 162 Mass. 354, 38 N. E. 973, 44 Am. St. 367; Guldenkirch v. United States &c. Asso., 5 N. Y. S. 428; Dougherty v. Pacific &c. Ins. Co., 154 Pa. 385, 25 Atl. 739; Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. 184.

⁴⁴³ Traphagen v. Fidelity &c. Co., 10 N. Y. St. 716; Whitlatch v. Fidelity &c. Co., 71 Hun (N. Y.) 146, 24 N. Y. S. 537; Williams v. United States &c. Asso., 82 Hun (N. Y.) 268, 31 N. Y. S. 343.

⁴⁴⁴ Guldenkirch v. United States &c. Asso., 5 N. Y. S. 428.

fendant to prove that the death resulted from the "voluntary exposure to unnecessary danger," to defeat a recovery.⁴⁴⁵ Where the insurance is against bodily injuries, and where the terms of the policy required the assured to use diligence for his personal safety, in an action for an injury it was held that the burden of proof was on the defendant to show that the assured did not use such diligence.⁴⁴⁶

§ 2405. Voluntary exposure to unnecessary danger—Burden.

A very general provision in accident policies is that injury or death must not be the result of "voluntary exposure to unnecessary danger." In an action on such a policy the plaintiff is only required to prove the injury. The fact of the accident having been established, it was held that the burden was then upon the defendant to prove that the death of the assured was caused by his voluntary exposure to the unnecessary danger.⁴⁴⁷ A construction of this provision is given by the Supreme Court of Ohio as follows: "A literal construction of the words 'voluntary exposure to unnecessary danger' might embrace any exposure not actually required by the circumstances, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of ordinary care. But it must be borne in mind that language of exceptions in such policies limiting the liability of the company, are to be construed favorably to the insured, and doubts and ambiguities resolved against the insurer. The words of the exception are not, therefore, to be literally interpreted. We think reason, as well as the clear weight of authority, leads to the conclusion that the words of the exception should be held to relate to dangers of a substantial character which the assured realized. The voluntary exposure requires an exercise of

⁴⁴⁵ *United States &c. Asso. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544.

⁴⁴⁶ *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372.

⁴⁴⁷ *Follis v. Accident Asso.*, 94 Iowa 435, 62 N. W. 807, 58 Am. St. 408; *Jones v. United States &c. Asso.*, 92 Iowa 654, 61 N. W. 485; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Keene v. New England &c. Asso.*, 161 Mass. 149, 36 N. E. 891; *Provident &c. Co. v. Martin*, 32 Md. 310; *Meadows v. Pacific &c. Ins. Co.*, 129 Mo. 76, 31

S. W. 578, 50 Am. St. 427, note; *Stone v. United States &c. Co.*, 24 N. J. L. 371; *Duncan v. Preferred &c. Asso.*, 13 N. Y. S. 620; *Guldenkirch v. United States &c. Asso.*, 5 N. Y. S. 428; *Schneider v. Provident &c. Ins. Co.*, 24 Wis. 28, 1 Am. R. 157; *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 544; *Tooley v. Railway &c. Co.*, 3 Biss. (U. S.) 399; *Cotten v. Fidelity &c. Co.*, 41 Fed. 506; *Pacific &c. Ins. Co. v. Snowden*, 58 Fed. 342.

the will; the party must intentionally and consciously assume the risk. This necessarily involves knowledge that the danger exists, and that the risk will follow an attempt to brave it. The act done may be voluntary, but it cannot involve 'voluntary exposure' unless the exposure is understood. Before the party can voluntarily expose himself to danger he must know of its existence."⁴⁴⁸

§ 2406. Voluntary exposure—Proof of intention.—In order to defeat an action on a policy containing the provision against voluntary exposure, the defendant must prove something more than mere contributory negligence or the want of ordinary care on the part of the assured. A voluntary exposure means more than the lack of ordinary care and proof either of negligence or the want of ordinary care will not be sufficient to bring the assured within the exception of voluntary exposure. There is a great difference between approaching an unknown or unexpected danger and the exposure to the same. On this it has been said: "The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which permitted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown the injury is accidental."⁴⁴⁹ To defeat an action on a policy containing this clause the defendant must prove that the assured intentionally did some act which reasonable and ordinary prudence would pronounce dangerous.⁴⁵⁰

§ 2407. Voluntary exposure—Effect of negligence.—Where a contract of insurance is general, insuring a person against accidents occurring by accidental violence without any exceptions, proof of contributory negligence is not sufficient to defeat the action.⁴⁵¹ But it

⁴⁴⁸ *United States &c. Asso. v. Hubbard &c. Ins. Co.*, 87 Iowa 505, 54 N. W. 453; *Follis v. United States &c. Asso.*, 94 Iowa 435, 62 N. W. 807, 58 Am. St. 408; *Smith v. Aetna &c. Ins. Co.*, 115 Iowa 217, 88 N. W. 368, 91 Am. St. 153; *Payne v. Fraternal &c. Asso.*, 119 Iowa 342, 93 N. W. 361; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. R. 205.

⁴⁴⁹ *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. R. 205; *Equitable &c. Ins. Co. v. Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267, note; *Lehman v. Great Eastern &c. Co.*, 39 N. Y. S. 912.

⁴⁵⁰ *Equitable &c. Ins. Co. v. Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267, note; *Sutherland v. Stand-*

⁴⁵¹ *Champlain v. Railway &c. Co.*, 6 Lans. (N. Y.) 71; *Providence &c. Ins. Co. v. Martin*, 32 Md. 310; *Freeman v. Travelers' Ins. Co.*, 144 Mass.

was held by the Massachusetts Supreme Court "if a person voluntarily places himself in a position where he is exposed to an obvious danger and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of the policy was not intended and understood to be applicable to such a case."⁴⁵² The same rule substantially is stated by Mr. Joyce where he says "if the insured voluntarily places himself in such a position where from the surrounding circumstances a person of ordinary prudence and caution would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such an act."⁴⁵³ Thus in an action to recover on an accident policy where it provides that the insurance does not cover death resulting from the exposure to unnecessary danger and the proof showed that the insured jumped from a moving train in the night time, it was held that such an act constituted more than ordinary negligence, and was consistent only with a conscious disregard of personal safety and that no recovery could be had.⁴⁵⁴ But it has been held that where the proof shows that the injury was the result of the assured's own negligence that it was not accidental.⁴⁵⁵

§ 2408. Voluntary exposure—Proof sufficient.—No general rule can be stated as to what is sufficient proof to show a voluntary exposure to known, obvious, or unnecessary danger within the meaning of a policy containing such terms. The rule stated in a previous section that such exposure must be intentional is not intended to measure

572, 12 N. E. 372; *Keene v. New England &c. Asso.*, 161 Mass. 149, 36 N. E. 891; *Wilson v. Northwestern &c. Asso.*, 53 Minn. 470, 55 N. W. 626; *Spruill v. North Carolina &c. Ins. Co.*, 1 Jones L. (N. Car.) 126; *Schneider v. Provident &c. Ins. Co.*, 24 Wis. 28, 1 Am. R. 157; *Fidelity &c. Co. v. Chambers*, (Va.) 24 S. E. 896; *Lehman v. Great Eastern &c. Co.*, 39 N. Y. S. 912; *Traders' &c. Co. v. Wagley*, 74 Fed. 457; *Anthony v. Mercantile &c. Co.*, 162 Mass. 354, 38 N. E. 973; *Schneider v. Provident &c. Ins. Co.*, 24 Wis. 28, 1 Am. R. 157; *Provident &c. Co. v. Martin*, 32 Md. 310.

⁴⁵² *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. R. 316, note.

⁴⁵³ 3 Joyce Insurance, § 2624.

⁴⁵⁴ *Shevlin v. American &c. Asso.*, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52; *Sargent v. Central &c. Ins. Co.*, 112 Wis. 29, 87 N. W. 796, 88 Am. St. 946; *Follis v. United States &c. Asso.*, 62 Iowa 807, 62 N. W. 807; *Piper v. Mercantile &c. Asso.*, 161 Mass. 589, 37 N. E. 759.

⁴⁵⁵ *Morel v. Mississippi &c. Ins. Co.*, 4 Bush (Ky.) 535; this case is criticized by Mr. May, and is clearly against the weight of authority, *May Insurance*, § 530.

the evidence of what shall constitute such intention. Nor is the mere proof that the accident did happen sufficient to justify the finding of voluntary exposure; yet this may be said to be the principal if not the controlling element in determining the question. The true test has been stated thus: "If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of the policy was not intended and understood to be applicable to such a case."⁴⁵⁶ Many illustrative cases are found in which it was held that the evidence clearly, and in some of them conclusively showed that the exposure was voluntary and unnecessary.⁴⁵⁷

§ 2409. Voluntary exposure—Proof insufficient.—It is equally difficult to state the rule as to what proof shall be insufficient to defeat a recovery on a policy on account of the voluntary exposure to danger by the assured. It is not a question for the insurer to determine, but as in life insurance, it may be a sufficient ground for refusing payment. In such case, or in any action on this kind of a policy where the voluntary exposure is interposed as a defense it is a question of fact to be determined by the jury. A controlling principle in such cases might be stated to the effect that where the evidence reveals an occurrence, which, resulting in injury or death, was to all appearances

⁴⁵⁶ *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. R. 316, note; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 12 Am. St. 270; *Smith v. Preferred &c. Asso.*, 104 Mich. 634, 62 N. W. 990; *Keene v. New England &c. Asso.*, 161 Mass. 149, 36 N. E. 891; *Duncan v. Preferred &c. Asso.*, 13 N. Y. S. 620; *Manufacturers' &c. Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620.

⁴⁵⁷ *Equitable &c. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267, note; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83; *Jones v. United States &c. Asso.*, 92 Iowa 64, 61 N. W. 485; *Follis v. United States &c. Asso.*, 94 Iowa 435, 62 N. W. 807, 58 Am. St. 408; *Badenfeld v. Massachusetts &c. Asso.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; *Smith v.*

Preferred &c. Asso., 104 Mich. 634, 62 N. W. 990; *Bean v. Employers' &c. Corp.*, 50 Mo. App. 459; *Collins v. Fidelity &c. Co.*, 63 Mo. App. 253; *Williams v. United States &c. Asso.*, 133 N. Y. 366, 31 N. E. 223; *Reynolds v. Equitable &c. Asso.*, 1 N. Y. S. 738; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. R. 205; *Fidelity &c. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432, note; *Travelers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531; *Manufacturers' &c. Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620; *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453; *Lovell v. Accident Ins. Co.*, 3 Ins. L. J. 877; *Commercial &c. Asso. v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973.

deliberately contributed to, if not voluntarily prompted, the theory of accident under such circumstances is necessarily excluded. Under such circumstances the proof would be inconsistent with the theory of accident.⁴⁵⁸ It was substantially held in another case that it is sufficient when it appears from proof that the act was one which reasonable and ordinary prudence would pronounce dangerous, and when it further appears that the accident was the result of such act.⁴⁵⁹ It has been held that there is a distinction between a voluntary act and a voluntary exposure to danger. "Hidden danger may exist; yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary; yet the exposure involuntary. The danger being unknown the injury is accidental."⁴⁶⁰ Many adjudicated cases illustrate the principles of the text.⁴⁶¹

§ 2410. **External violence—Burden of proof.**—Another usual provision found in accident policies is that the insurance does not cover death or personal injury unless the claimant shall establish by direct and positive proof that the death or injury was caused by external violence and accidental means. This condition is valid and binding on the beneficiary and in an action on such a policy the burden of proof is upon him to show that the death was caused by external, violent and accidental means. Just what degree or force of evidence is necessary to prove this fact cannot be stated as a rule of evidence; but in such an action it is held that the plaintiff has the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts. It is sufficient if he shows

⁴⁵⁸ *Williams v. United States &c. Asso.*, 133 N. Y. 366, 31 N. E. 222. note; *Follis v. United States &c. Asso.*, 94 Iowa 435, 62 N. W. 807, 58

⁴⁵⁹ *Fidelity &c. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432, note. Am. St. 408; *Knickerbocker &c. Ins. Co. v. Jordan*, 7 Cin. Law Bul. 71; *Jones v. United States &c. Asso.*, 92

⁴⁶⁰ *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. R. 205. Iowa 652, 61 N. W. 485; *Schneiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 16

⁴⁶¹ *Keene v. New England &c. Asso.*, 161 Mass. 149, 36 N. E. 891; *Equitable &c. Ins. Co. v. Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267, N. E. 47, 46 Am. R. 618; *Wright v. Sun &c. Ins. Co.*, 29 U. C. C. P. 221; *Mair v. Railway &c. Co.*, 37 L. T. N. S. 356.

from all the evidence and circumstances that the death of the assured was caused by external violence and accidental means.⁴⁴²

§ 2411. **External signs of violence—Meaning.**—The courts will not permit this requirement to operate as a bar to circumstantial evidence. It may often happen that no positive and direct proof can be furnished, but at the same time circumstances may plainly and almost certainly indicate that the assured was killed by accident. "Circumstantial evidence is regarded by the law as competent to prove any given fact; and sometimes it is as cogent and irresistible as direct and positive testimony." The courts will not permit such a clause to preclude them from jurisdiction and thereby prevent a recovery.⁴⁴³ So it has been held that the external and visible sign upon the body is only required to exist in case of bodily injuries which do not produce death.⁴⁴⁴ But where the accident produces death the plaintiff is not required to make proof of a visible external sign of the injury. It has been held that the dead body itself fulfils the requirement of external and visible signs that an injury was received.⁴⁴⁵

§ 2412. **External signs of violence—Proof sufficient.**—While the courts admit that there must be an external and visible sign of the injury, yet this does not necessarily mean that the injury itself must be either external or visible. As stated by one court: "Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs, or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because

⁴⁴² *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Merritt v. Preferred &c. Asso.*, 98 Mich. 338; *Southard v. Railway &c. Co.*, 34 Conn. 574; *Whitlatch v. Fidelity &c. Co.*, 149 N. Y. 45, 43 N. E. 405.

⁴⁴³ *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913, note; *Insurance Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. 685; *Travelers' Ins. Co. v. Murray*, 16 Colo. 290, 306, 25 Am. St. 267; *Union &c. Co. v. Mondy*, (Colo.) 71 Pac. 677; *United States &c. Asso. v. Newman*,

84 Va. 52, 3 S. E. 805; *Mutual &c. Asso. v. Barry*, 131 U. S. 100.

⁴⁴⁴ *Paul v. Travelers' Ins. Co.*, 45 Hun (N. Y.) 313; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. R. 410, note; *Pickett v. Pacific &c. Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. 618.

⁴⁴⁵ *McGlinchey v. Fidelity &c. Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. 190; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 8 Am. St. 758, note; *United States &c. Asso. v. Newman*, 84 Va. 52, 3 S. E. 805.

pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching or bloody or unnatural discharges from the bowels, if, in short, it sends forth, to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury."⁴⁶⁶ As stated by another court: "The contract does not contemplate that there must be bruises, contusions or lacerations on the body, or broken limbs." It was held in this case that a disabled condition resulting from the effect of a strain was a visible external mark of injury upon the body of the assured.⁴⁶⁷ In another case it was held that if symptoms or signs become visible upon examination of the interior of the body, it was sufficient, whether such examination was made before or after death.⁴⁶⁸ Many cases are found in the various courts where the evidence was held sufficient to show that death was caused by external violence within the meaning of the policies.⁴⁶⁹

⁴⁶⁶ *United States &c. Asso. v. Travelers' Ins. Co. v. Murray*, 16 Barry, 131 U. S. 100, 9 Sup. Ct. 755; *Whitehouse v. Travelers' Ins. Co.*, 29 Fed. Cas. 17, 566; *Union &c. Co. v. Mondy*, (Colo.) 71 Pac. 677; *Gale v. Mutual Aid Asso.*, 66 Hun (N. Y.) 600; *Menneiley v. Employers' &c. Corp.*, 148 N. Y. 596, 43 N. E. 54, 51 Am. St. 716; *Horsfall v. Pacific &c. Ins. Co.*, 32 Wash. 132, 98 Am. St. 846.

⁴⁶⁷ *Pennington v. Pacific &c. Ins. Co.*, 85 Iowa 468, 52 N. W. 482, 39 Am. St. 306; *Freeman v. Mercantile &c. Asso.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, note; *Thayer v. Standard &c. Ins. Co.*, 68 N. H. 577, 41 Atl. 182; *North American &c. Ins. Co. v. Burroughs*, 69 Pa. St. 43.

⁴⁶⁸ *Freeman v. Mercantile &c. Asso.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, note.

⁴⁶⁹ *Cluff v. Mutual &c. Ins. Co.*, 13 Allen (Mass.) 308; *Standard Life &c. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. 601; *Travelers' Ins. Co. v. Murray*, 16 Barry, 131 U. S. 100, 9 Sup. Ct. 755; *Whitehouse v. Travelers' Ins. Co.*, 29 Fed. Cas. 17, 566; *Union &c. Co. v. Mondy*, (Colo.) 71 Pac. 677; *Gale v. Mutual Aid Asso.*, 66 Hun (N. Y.) 600; *Menneiley v. Employers' &c. Corp.*, 148 N. Y. 596, 43 N. E. 54, 51 Am. St. 716; *Horsfall v. Pacific &c. Ins. Co.*, 32 Wash. 132, 98 Am. St. 846; *Indianapolis &c. Asso. v. Grauman*, 107 Ind. 283, 7 N. E. 233; *Miller v. Mutual &c. Ins. Co.*, 34 Iowa 222; *Standard &c. Ins. Co. v. Thomas*, 12 Ky. L. R. 715; *McGlinchey v. Fidelity &c. Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. 190; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913, note; *Burnham v. Interstate &c. Co.*, 117 Mich. 142, 75 N. W. 445; *Summers v. Fidelity &c. Co.*, 84 Mo. App. 605; *Modern Woodmen &c. v. Shryock*, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826; *Railway Officials' &c. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 8 Am. St. 758, note; *Bacon v. United States &c. Asso.*, 44 Hun (N. Y.) 599; *Paul v. Travelers' Ins. Co.*, 45 Hun (N. Y.) 313;

§ 2413. **External violence—Meaning.**—It is difficult to state as a rule of evidence just what proof is necessary to establish death or injury by external violence, within the meaning of policies containing such a clause. The question of the external violence must not be divorced from the idea of accidental injury, or death. But the external, violent and accidental means must be separated from disease, as a death from disease cannot be from external violent and accidental means. A striking illustration of this principle is found in the case where the evidence showed that the assured choked to death while attempting to swallow a piece of beefsteak, and it was held that death resulted from accidental, violent and external means, within the meaning of the policy. The court illustrates the difference between this and disease by saying: "If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion or to completely stay the operation of nature in such manner as to produce disease, no one would contend that the pain or disease was the result of accident or that the terms of this policy embraced such a cause; but when the substance causing death is visible and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine."⁴⁷⁰

§ 2414. **External violence—Proof sufficient.**—Perhaps the nearest approach to a general rule of evidence on this subject was stated by the United States Supreme Court, as follows: "That if a result is such as follows from ordinary means, voluntarily employed, in a not

Tucker v. Mutual &c. Co., 50 Hun (N. Y.) 50; Martin v. Equitable &c. Asso., 61 Hun (N. Y.) 467; Wehle v. United States &c. Asso., 11 Misc. (N. Y.) 36; Insurance Co. v. Burroughs, 69 Pa. St. 43, 8 Am. R. 212; Insurance Co. v. Bennett, 90 Tenn. 256, 258, 16 S. W. 723, 25 Am. St. 685; Hall v. American &c. Asso., 86 Wis. 518, 57 N. W. 366; Accident Ins. Co. v. Crandall, 120 U. S. 527, 7 Sup. Ct. 685; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360; United States &c. Asso. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755;

Miller v. Fidelity &c. Co., 97 Fed. 836; Whitehouse v. Travelers' Ins. Co., Fed. Cas. No. 17566.

⁴⁷⁰ American &c. Co. v. Reigart, 92 Ky. 142, 17 S. W. 280; Maryland &c. Co. v. Hudgins, (Tex.) 76 S. W. 745; Miller v. Fidelity &c. Co., 97 Fed. 736; Healey v. Mutual &c. Asso., 133 Ill. 556, 25 N. E. 52, 23 Am. St. 637; Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. 355; Metropolitan &c. Asso. v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. 359.

unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means.⁴⁷¹ It has been held that proof of death by drowning is sufficient proof of death by external, violent or accidental means within a policy of accidental insurance.⁴⁷² It has been held that proof of the nature and character of the injury is sufficient evidence that it was caused by external violence.⁴⁷³ The principle is illustrated by the cases where proof has been held sufficient to show that the death was caused by external violence and accidental means.⁴⁷⁴

⁴⁷¹ United States &c. Asso. v. W. 328, 59 Am. St. 374; Delaney v. Barry, 131 U. S. 100, 9 Sup. Ct. 755. Modern &c. Club, 121 Iowa 528, 97

⁴⁷² Peele v. Provident &c. Soc., 147 N. W. 91; Smouse v. Iowa State &c. Ind. 543, 44 N. E. 661; Couadeau v. Asso., 118 Iowa 436, 92 N. W. 53; American &c. Co., 95 Ky. 280, 25 S. Payne v. Fraternal &c. Asso., 119 W. 6; Konrad v. Union &c. Co., 49 Iowa 342, 93 N. W. 361; American La. Ann. 636, 21 So. 721; De Van v. &c. Co. v. Reigart, 94 Ky. 547, 23 S. Commercial Travelers' &c. Asso., 92 W. 191, 42 Am. St. 374; Travelers' Hun (N. Y.) 256; Landon v. Preferred Ins. Co. v. Duvall, (Ky.) 74 S. W. 740; Omberg v. United States &c. Preferred &c. Ins. Co., 43 App. Div. (N. Asso., 101 Ky. 303, 40 S. W. 909, 72 Y.) 487; Manufacturers' &c. Co. v. Am. St. 413; McGlinchy v. Fidelity Dorgan, 58 Fed. 945, 22 L. R. A. &c. Co., 80 Me. 251, 14 Atl. 13, 6 Am. 620; Winspear v. Accident Ins. Co., St. 190; Freeman v. Mercantile &c. L. R. 6 Q. B. 42; Trew v. Railway Asso., 156 Mass. 351, 30 N. E. 1013; &c. Assur. Co., 6 H. & N. 839; Reynolds v. Accidental Ins. Co., 22 L. Early v. Standard &c. Ins. Co., 113 T. (N. S.) 820. Mich. 58, 71 N. W. 500, 67 Am. St.

⁴⁷³ Peck v. Equitable &c. Asso., 52 445; Fidelity &c. Co. v. Johnson, 72 Hun (N. Y.) 255. Miss. 333, 17 So. 2; Keene v. New

⁴⁷⁴ Equitable &c. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. England &c. Asso., 164 Mass. 170, 41 R. A. 267, note; Standard &c. Ins. N. E. 203; Lovelace v. Travelers' &c. Co. v. Schmaltz, 66 Ark. 588, 53 S. Asso., 126 Mo. 104, 28 S. W. 877, 47 W. 49, 74 Am. St. 112; Richards v. Am. St. 638; Collins v. Fidelity &c. Travelers' Ins. Co., 89 Cal. 170, 26 Co., 63 Mo. App. 253; Hester v. Fidelity &c. Co., 69 Mo. App. 186; Pac. 762, 23 Am. St. 455; Union Summers v. Fidelity &c. Co., 84 Mo. Casualty Co. v. Mondy, (Colo.) 71 App. 605; Carr v. Pacific &c. Ins. Co., 100 Mo. App. 602, 75 S. W. 180; Rail- Pac. 677; Travelers' Ins. Co. v. Mur- way Officials' &c. Co. v. Drummond, ray, 16 Colo. 296, 26 Pac. 774, 25 Am. 56 Neb. 235, 76 N. W. 562; Reynolds St. 267; Cobb v. Preferred &c. Asso., v. Equitable &c. Asso., 49 Hun (N. 96 Ga. 818, 22 S. E. 976; Atlanta &c. Y.) 605; Tucker v. Mutual &c. Co., 50 Asso. v. Alexander, 104 Ga. 709, 30 Hun (N. Y.) 50; De Van v. Commer- S. E. 939, 42 L. R. A. 188; Meyer v. cial Travelers' &c., 157 N. Y. 690, 51 Fidelity &c. Co., 96 Iowa 378, 65 N.

§ 2415. **External violence—Proof insufficient.**—It follows as a natural sequence from the principles in the preceding section that the proof is insufficient where it establishes the converse of the proposition there stated. If the proof failed to show that the injury or the death resulting from such injury was unusual or unexpected or that it was an unnatural or improbable result of the act it is insufficient to warrant a recovery under such a policy. As stated by the Iowa court: "Although a result may not be designed, foreseen, or expected, yet if it be the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, it cannot be said to be an accident." Thus where death resulted from hemorrhage from a ruptured artery, caused by the assured reaching out to close window-shutters, it was held that such death was not accidental.⁴⁷⁵ So where the assured was injured internally by jumping in haste from a railroad car and running a considerable distance, where there was no necessity for his safety but was voluntarily done on his part, it was held insufficient of proof of any external violence or accidental means.⁴⁷⁶ And if the injury is the result of some weakness or disease from which the as-

N. E. 1090; *Bailey v. Interstate Casualty Co.*, 8 App. Div. (N. Y.) 127; *Peck v. Equitable Assn.*, 52 Hun (N. Y.) 255; *De Van v. Commercial Travelers' &c.*, 92 Hun (N. Y.) 256; *Larkin v. Interstate &c. Co.*, 60 N. Y. S. 205; *Wehle v. United States &c. Assn.*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. 598; *Bailey v. Interstate Co.*, 158 N. Y. 723, 53 N. E. 1123; *United States &c. Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. R. 212 *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Horsfall v. Pacific &c. Ins. Co.*, 32 Wash. 132, 98 Am. St. 846; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731, 17 Am. St. 184; *Button v. American &c. Assn.*, 92 Wis. 83, 65 N. W. 861, 53 Am. St. 900; *Kasten v. Interstate &c. Co.*,

99 Wis. 73, 74 N. W. 534; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685; *McCarthy v. Travelers' Ins. Co.*, 8 Biss. (U. S.) 362; *Manufacturers' &c. Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620; *Preferred &c. Co. v. Muir*, 126 Fed. 926; *Nax v. Travelers' Ins. Co.*, 130 Fed. 985; *Dozier v. Fidelity Co.*, 46 Fed. 446, 13 L. R. A. 114; *Burkheiser v. Mutual &c. Assn.*, 61 Fed. 816, 26 L. R. A. 112, note; *Robinson v. United States &c. Assn.*, 68 Fed. 825; *Western &c. Assn. v. Smith*, 85 Fed. 401, 40 L. R. A. 653; *McGlothter v. Provident &c. Co.*, 89 Fed. 685; *Fidelity &c. Co. v. Lowenstein*, 97 Fed. 17, 46 L. R. A. 450.

⁴⁷⁵ *Feder v. Iowa &c. Assn.*, 107 Iowa 538, 78 N. W. 252, 70 Am. St. 212; *Niskern v. United Brotherhood &c.*, 87 N. Y. S. 640.

⁴⁷⁶ *Southard v. Railway Pass. &c. Co.*, 34 Conn. 574.

sured was suffering and which would not have happened but for the weakness or disease, such an injury cannot be said to be accidental or due to external violence.⁴⁷⁷ And it is held that the proof is insufficient where the injury comes clearly within one of the exceptions of the policy.⁴⁷⁸

§ 2416. **Injury—Immediate disability.**—Most accident policies provide that the injury shall, independently of all other causes, “immediately, wholly and continuously disable” the assured from transacting his business or performing his usual vocation. Under this provision to entitle the assured to recover proof of two things is essential: (1) The disability must follow the injury immediately; (2) the disability must be continuous. In a former section, where immediate notice of loss was required, the rule established was that immediate notice meant notice within a reasonable time.⁴⁷⁹ But this rule does not apply in cases of accident insurance where the policy stipulates that the disability must follow the injury immediately. In this class of cases it is held that the word “immediate” is a word of time and not of cause and effect. While it is not construed to mean instantly or momentarily, it does imply that “the injury must be such that the insured cannot proceed regularly and in due course with his occupation; that he cannot go on with his work or business as if he had received no injury, and then, upon becoming worse, cease the transaction of his business or labor and hold the company responsible for the loss of time.” Under this rule where an injury was received and

⁴⁷⁷ *Sharpe v. Commercial &c. Asso.*, 139 Ind. 92, 37 N. E. 353; *Freeman v. Mercantile &c. Asso.*, 156 Mass. 351, 30 N. E. 1013; *Bacon v. United States &c. Asso.*, 123 N. Y. 304, 25 N. E. 399, 20 Am. St. 748; *National &c. Asso. v. Shryock*, 73 Fed. 775; *Commercial &c. Asso. v. Fulton*, 79 Fed. 423; *Sinclair v. Maritime &c. Co.*, 3 E. & E. 478; for evidence insufficient to justify a recovery, see *Cobb v. Preferred &c. Asso.*, 96 Ga. 818, 22 N. E. 976; *Carr v. Pacific &c. Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180; *Appel v. Aetna Ins. Co.*, 86 App. Div. (N. Y.) 83, 83 N. Y. S. 238; *Tennant v. Travelers' Ins. Co.*, 31

Fed. 322; *Hendrick v. Employers' &c. Corp.*, 62 Fed. (U. S.) 893.

⁴⁷⁸ *Carnes v. Iowa &c. Asso.*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. 306; *Early v. Standard &c. Ins. Co.*, 113 Mich. 58, 71 N. W. 500, 67 Am. St. 445; *Pollock v. United States &c. Asso.*, 102 Pa. 234; *Maryland &c. Co. v. Hudgins*, (Tex.) 76 S. W. 745; *Kasten v. Interstate &c. Co.*, 99 Wis. 73, 74 N. W. 543; *Westmoreland v. Preferred &c. Ins. Co.*, 75 Fed. 244; *McGlother v. Provident Mut. &c. Co.*, 89 Fed. 685; *Bayless v. Travelers' Ins. Co.*, 2 Fed. Cas. 1077; *Cole v. Accident Ins. Co.*, 61 L. T. (N. S.) 227.

⁴⁷⁹ See §§ 2325, 2326.

the assured continued the oversight of his business for thirty days and then became unable to attend to any business, it was held that he was not entitled to recover.⁴⁸⁰

§ 2417. Total disability—Proof.—Accident insurance policies usually provide a specified amount for a stated time in the way of weekly indemnity in case of injury. This indemnity is usually on a graded scale with reference to the disability being total or partial. The undertaking on the part of the insurer is that in case the assured shall sustain bodily injuries by external, violent and accidental means which should, independently of all other causes, wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, on satisfactory proof of such fact he should be paid a sum not exceeding a certain amount for the period of such total disability for a stated time. In case of an injury under such a policy it is not necessary for the assured to prove, in order to entitle him to recover, that he was wholly disabled from the doing of any and every kind of act necessary to be done in the prosecution of his business; the law does not require the assured to prove that he was so disabled as to prevent him from doing anything whatsoever pertaining to his occupation or any part of his business under which he was insured. He is only required to prove that he was so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. When the evidence shows that the assured was not able to do all the substantial acts necessary to be done in the prosecution of his business, it is sufficient proof of total disability. A simple illustration of this subject is stated by one court as follows: "Suppose a barber, who can use his razor and shears in his right hand only, but can use his left to wipe his customer's face, comb and dress his hair and receive pay and make change, by an accident is wholly deprived of the use of his right hand, so that he can neither shave his customer nor cut his hair; can it be said that he is not wholly disabled from the prosecution of his business as a barber? An accident policy which would not afford indemnity in such a case would be a delusion and a snare."⁴⁸¹ It is

⁴⁸⁰ *Williams v. Preferred &c. Asso.*, 91 Ga. 698, 17 S. E. 982; *Merrill v. Travelers' Ins. Co.*, 91 Wis. 329, 64 N. W. 1039.

⁴⁸¹ *Young v. Travelers' Ins. Co.*, 80 Me. 244, 13 Atl. 896; *Rhodes v. Railway &c. Ins. Co.*, 5 Lans. (N. Y.) 71; *Walcott v. United Life &c. Co.*, 28 N. Y. St. 480; *Hutchinson v. Supreme Tent &c.*, 22 N. Y. S. 801; *Gordon v. United States &c. Co.*, (Tenn.) 54 S. W. 98; *Saveland v. Fidelity &c. Co.*,

held in another class of cases that in the meaning of such contracts total disability is a relative question depending upon the attainments of the person disabled. Thus, as stated by a Missouri court: "A physical ailment which would render an illiterate laboring man totally unfit to earn a livelihood might not prevent a lawyer from practising his profession, or take away from him all other chances of earning a living in some other avocation. Therefore in determining the liability in such a case, the courts must consider both the mental and the physical capabilities of the assured."⁴⁸² On the question of whether the assured was prevented from pursuing some other avocation, the same court said: "In determining whether the plaintiff was disabled to such an extent as to prevent him from pursuing some other avocation in which he could earn a livelihood, his former occupation, his education and business experience, his natural abilities and his age must be considered."⁴⁸³ In such actions it is proper for the assured to testify in his own behalf, and it was held competent for him to state that the injury was such that he was not able to do anything; such evidence not being subject to the objection that it was a conclusion.⁴⁸⁴

§ 2418. Time of filing proofs.—Accident policies, like other insurance policies, require proof of the injury, and no recovery can be had if the assured fails to prove that he has complied with this requirement. But accident policies do not always require immediate proof; they limit the payment of indemnity to a certain number of weeks and usually give that full time and more in which to make the proofs. The reason of this is apparent. In such cases the assured may wait until the expiration of the time for which the insurer agrees to pay indemnity before filing any proofs. But he must show that the

67 Wis. 174, 30 N. W. 237, 58 Am. R. 863; Neill v. Order of United Friends, 28 N. Y. S. 928; Knapp v. Accident Asso., 53 Hun (N. Y.) 84; Turner v. Fidelity & Co., 112 Mich. 425, 70 N. W. 898, 67 Am. St. 428; Hohn v. Inter-State & Co., 115 Mich. 79, 72 N. W. 1105; Lobdill v. Laboring Men's & Co., 69 Minn. 14, 71 N. W. 696, 65 Am. St. 542; Commercial & Co. v. Springsteen, 23 Ind. App. 657, 55 N. W. 973; Bean v. Travelers' Ins. Co., 94

Cal. 581, 29 Pac. 1113; United States & Co. v. Millard, 43 Ill. App. 148; Neafie v. Manufacturers' & Co., 55 Hun (N. Y.) 111; Hooper v. Accident & Co., 5 H. & N. 546.

⁴⁸² McMahon v. Supreme Council & Co., 54 Mo. App. 468; Sawyer v. United States & Co., (Mass.) 8 L. Reg. N. S. 233.

⁴⁸³ McMahon v. Supreme Council & Co., 54 Mo. App. 468.

⁴⁸⁴ Lyon v. Railway & Co., 46 Iowa 631.

proofs were filed within the time required by the policy. However, he need not wait until the expiration of such time, but may file proofs at the expiration of one week or at any other stated time; but the proof so filed will not cover any subsequent disability. Thus it has been expressly held that where the assured filed his proof of injury at the end of ten weeks, and failed to make his proof for disability thereafter, he could only recover the indemnity for the ten weeks although the disability extended for the full period of twenty-six weeks.⁴⁸⁵

Mutual and Benefit Societies.

§ 2419. **Mutual insurance.**—Mutual insurance companies are generally the creatures of and are governed by statutes. They are essentially different from stock companies. Their original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Hence, it is necessary and equitable that the person thus mutually insured should become subject to the same obligations toward his associates that he requires from them toward himself; the contract must be mutual and complete.⁴⁸⁶ As otherwise defined: "A mutual insurance company is simply a company whose fund for the payment of losses and expenses consists not of capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured."⁴⁸⁷ "A mutual insurance in its origin, was a body of persons, each of whom was desirous of effecting an insurance; and agreed with the rest of the members to contribute the premiums to a common fund, on the terms that he should be entitled to receive out of that fund."⁴⁸⁸ The principle of mutuality exists when the persons who constitute the company contribute either cash or premium notes, or both, as the by-laws of the company may provide, to a common fund out of which losses and indemnity are paid.⁴⁸⁹ Whether the premium is paid in cash or by

⁴⁸⁵ *Bickford v. Travelers' Ins. Co.*, 67 Vt. 418, 32 Atl. 230; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 37 Am. St. 529; *McFarland v. United States &c. Asso.*, 124 Mo. 204, 27 S. W. 436; *Wilson v. Northwestern &c. Asso.*, 53 Minn. 470, 55 N. W. 626; *Kendall v. Holland &c. Co.*, 2 N. Y. Super. Ct. 375.

⁴⁸⁶ *Baxter v. Chelsea &c. Ins. Co.*, 1 Allen (Mass.) 294, 79 Am. Dec. 730.

⁴⁸⁷ *Mygatt v. New York &c. Ins. Co.*, 21 N. Y. 52.

⁴⁸⁸ *Angell Insurance*, § 413; *State v. Standard &c. Asso.*, 38 Ohio St. 281; *State v. People's &c. Asso.*, 42 Ohio St. 579; *National &c. Asso. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11.

⁴⁸⁹ *Spruance v. Farmers' &c. Ins. Co.*, 9 Colo. 73, 10 Pac. 285; *State v. Manufacturers' &c. Ins. Co.*, 91 Mo. 311, 3 S. W. 383; *Mygatt v. New*

note is wholly immaterial. The policy is a mutual policy, and the holder a member of the association if he has paid the premium in cash. In either instance those who are insured are also insurers.⁴⁹⁰

§ 2420. **Parol evidence—Admissibility.**—In such companies the policy or certificate usually provides that the assured or his legal representatives, or the beneficiary may be paid a certain amount for every person a member of the society and of the same division or class; and they further stipulate as to what constitutes the class or when it is full. In an action on such a policy proof of the number of members, either of the association or of the class, at the date of the death of the assured, becomes essential as a basis for the amount of recovery, and it is held that parol evidence is admissible to show the number of members at the time such payment should be made, in order to arrive at the measure of damages.⁴⁹¹ But where no parol evidence is offered, the number of members may be proved from the notice of assessment.⁴⁹² And under a defense that the assured was not a member in good standing at the time of his death, and where the records of the association showed a motion to suspend, but did not show the action taken on such motion, parol evidence was held competent to complete the record and show the fact of the suspension.⁴⁹³ In the absence of a requirement in the constitution that a record shall be made of an assessment, such assessment may be proved by parol.⁴⁹⁴ It is held by some courts that parol evidence is admissible to show that the answers to questions in his application were not written by the assured, and that he did not in fact know the contents of such application when he signed it, when it appears that he was without

York &c. Ins. Co., 21 N. Y. 52; White v. Haight, 16 N. Y. 310; Ohio &c. Co. v. Marietta &c. Factory, 3 Ohio St. 348; Schimpf v. Lehigh Valley &c. Ins. Co., 86 Pa. St. 373; Union Ins. Co. v. Hoge, 21 How. (U. S.) 35.

⁴⁹⁰ Spruance v. Farmers' &c. Ins. Co., 9 Colo. 73, 10 Pac. 285; Carlton v. Southern &c. Ins. Co., 72 Ga. 371; Muller v. State Life Ins. Co., 27 Ind. App. 45, 60 N. E. 958; State v. Manufacturers' &c. Ins. Co., 91 Mo. 311, 3 S. W. 383; Mygatt v. New York &c. Ins. Co., 21 N. Y. 52; Mutual &c. Ins.

Co., Matter of, 164 N. Y. 10, 58 N. E. 29; Ohio &c. Co. v. Marietta &c. Factory, 3 Ohio St. 348; Schimpf v. Lehigh Valley &c. Ins. Co., 86 Pa. St. 373; Union Ins. Co. v. Hoge, 21 How. (U. S.) 35.

⁴⁹¹ St. Clair &c. Soc. v. Fietsam, 97 Ill. 474.

⁴⁹² Fairchild v. North Eastern &c. Asso., 51 Vt. 613.

⁴⁹³ Hamill v. Supreme Council, 152 Pa. 537, 25 Atl. 645.

⁴⁹⁴ Backdahl v. Grand Lodge &c., 46 Minn. 61, 48 N. W. 454.

fault.⁴⁹⁵ But some courts hold that such evidence is not admissible.⁴⁹⁶ Where the certificate of membership in such society provided for the stipulated sum upon the death of the assured, when the class of which he was a member was full, and in an action on such policy it was admitted in the answer that the class was full when the certificate was issued, it was held that a prima facie case was made in favor of the plaintiff and that proof of death of the assured was all the evidence necessary on the part of the plaintiff. It was further held where it was alleged in the answer that the class was not full, together with other matters of defense, that as to all such matters the burden of proof was upon the defendant to establish the breach of all such conditions.⁴⁹⁷

§ 2421. **Presumptions.**—In actions on such policies certain presumptions will be indulged in the absence of proof; or when a certain or given state of facts is proved certain presumptions arise from those which dispense with further proof. Thus, where the intemperance of the assured was proved, it was held that it would be presumed that he became so after the insurance was effected.⁴⁹⁸ So where a benefit society expels a member, every presumption is in favor of the fairness and legality of the proceedings.⁴⁹⁹ And where a member of such society is shown to be in good standing the presumption is that he continues so until the contrary appears.⁵⁰⁰ The presumption is that the

⁴⁹⁵ *Continental Ins. Co. v. Pearce*, 39 Kans. 396, 18 Pac. 291, 7 Am. St. 537; *Grattan v. Metropolitan &c. Ins. Co.*, 92 N. Y. 274, 44 Am. R. 372; *Ring v. Windsor Co. &c. Ins. Co.*, 51 Vt. 563; *Manhattan &c. Ins. Co. v. Weill*, 28 Gratt. (Va.) 389; *Dietz v. Provident &c. Ins. Co.*, 31 W. Va. 851, 13 Am. St. 909; *Hanson v. Milwaukee &c. Ins. Co.*, 45 Wis. 321; *New Jersey &c. Ins. Co. v. Baker*, 94 U. S. 610; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *McArthur v. Home &c. Ins. Co.*, 73 Iowa 336, 35 N. W. 430, 5 Am. St. 684; *Hartford &c. Ins. Co. v. Gray*, 80 Ill. 28; *Brown v. Metropolitan &c. Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. 894; *Kausal v. Minnesota &c. Asso.*, 31 Minn. 17, 16 N. W. 430, 47 Am. R.

776; *Grattan v. Metropolitan &c. Ins. Co.*, 80 N. Y. 281, 36 Am. R. 617; *O'Brien v. Home &c. Soc.*, 117 N. Y. 310, 22 N. E. 945; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352; *Texas &c. Ins. Co. v. Stone*, 49 Tex. 4.

⁴⁹⁶ *Franklin &c. Ins. Co. v. Martin*, 40 N. J. L. 568.

⁴⁹⁷ *Hall v. Scottish Rite &c. Asso.*, 6 Ohio C. C. 137.

⁴⁹⁸ *Gartside v. Connecticut &c. Ins. Co.*, 8 Mo. App. 592.

⁴⁹⁹ *Bachmann v. New Yorker &c. Bund*, 64 How. Pr. (N. Y.) 442.

⁵⁰⁰ *Kumle v. Grand Lodge &c.*, 110 Cal. 204, 42 Pac. 634; *Supreme Lodge &c. v. Johnson*, 78 Ind. 110; *Nye v. Grand Lodge &c.*, 9 Ind. App. 131, 36 N. E. 429; *Zeigler v. Mutual Aid*

person who signed an application for insurance made the representations therein contained, and that he was familiar with its contents.⁵⁰¹ So where the policy provides for the making of assessments on proof of death, it was held to be presumed that one was made.⁵⁰² And the presumption of law is in favor both of the regularity of the proceedings to assess and the legality of the assessment; and such presumption must be met and overcome.⁵⁰³ But where there is no answer to a question in the application for insurance, there is no presumption that it was answered in the negative.⁵⁰⁴

§ 2422. **Losses—Liability of members.**—A member of a mutual company cannot defeat an action against him either on his premium note or for an assessment by showing that he is not a member, or by proof that his policy has been canceled. The company or its representative is only required to prove, in addition to the loss, the assessment and notice, the further fact that the defendant was a member at the time the loss occurred; or rather that the losses occurred during the continuance of the defendant's membership. The rule as to liability in such cases is thus stated: "The liability to assessments at any time, within the limit fixed by the statute, is measured only by the amount of the losses for which the company is then responsible. It is not apportionable according to the ratio of time of the expired and the unexpired term of the policy. The assessment cannot be reduced or a part of it withheld, to provide future indemnity for members who have not already suffered loss. The whole proceeds of the conditional fund thus provided, as well as the absolute funds, are pledged to satisfy and make good the losses that have occurred. Each one in turn who suffers loss is entitled to the full benefit of this pledge, according to the state of those funds when his loss occurs; this forbids any reduction of the fund, when the whole is required to

Soc., 1 McGloin (La.) 284; Cornfield v. Order &c., 64 Minn. 251, 66 N. W. 970; Monahan v. Supreme Lodge, 88 Minn. 224; Mulroy v. Knights &c., 28 Mo. App. 463; Stewart v. Supreme Council, 36 Mo. App. 319; Forse v. Supreme Lodge &c., 41 Mo. App. 106.

⁵⁰¹ Hartford &c. Ins. Co. v. Gray, 80 Ill. 28; Hartford &c. Ins. Co. v. Gray, 91 Ill. 159; Supreme Council

&c. v. Conklin, 60 N. J. L. 565; New York &c. Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837; Fletcher v. New York &c. Ins. Co., 3 McCrary 603, 11 Fed. 377.

⁵⁰² Fairchild v. North Eastern &c. Asso., 51 Vt. 613.

⁵⁰³ Fidelity &c. Co. v. Vitale, 10 Pa. Super. Ct. 157.

⁵⁰⁴ Queen's Ins. Co. v. Legare, Ramsey's App. Cas. (D. C.) 369.

cover losses, either by apportionment, set off or otherwise."⁵⁰⁵ In such an action it must be averred in the complaint and proved on the trial that the losses to be paid with the money received from the assessments occurred during the time the defendant held his policy and was a member of the company.⁵⁰⁶

§ 2423. **Proof of membership.**—A person is not liable in an action for assessment unless it is shown that he is or has been a member of the company. Membership does not necessarily depend on the existence or production of a policy, but may be proved in other ways. Thus where a defendant testified that he had never accepted one policy and that the other had lapsed and he had returned it to the company, and that he was not, in fact, a member, it was held proper to admit the applications of the defendant, the entries in the company's books and the certificates of assessments, and that these were sufficient to establish his membership and liability.⁵⁰⁷ Where the burden of proof is upon the plaintiff to show that the defendant was a member in good standing, it has been held that the certificate is sufficient proof of such good standing at the time it was issued, and that such standing will be presumed to have continued until the contrary is shown, and when the certificate is put in evidence the burden is then on the defendant to prove that at the time of the commencement of the action he was

⁵⁰⁵ *Commonwealth v. Massachusetts Ins. Co.*, 112 Mass. 116; *Alliance Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *Marblehead Ins. Co. v. Underwood*, 3 Gray (Mass.) 210; *Fayette Ins. Co. v. Fuller*, 8 Allen (Mass.) 27; *Commonwealth v. Mechanics' &c. Ins. Co.*, 112 Mass. 192; *Cummings v. Sawyer*, 117 Mass. 30; *Boot &c. Ins. Co. v. Melrose &c. Soc.*, 117 Mass. 199; *Cummings v. Hildreth*, 117 Mass. 309; *New Hampshire &c. Ins. Co. v. Hunt*, 30 N. H. 219; *Great Falls &c. Ins. Co. v. Harvey*, 45 N. H. 292; *State v. Monitor &c. Asso.*, 42 Ohio St. 555; *Vanatta v. New Jersey &c. Ins. Co.*, 31 N. J. Eq. 15; *Rhinehart v. Alleghany &c. Ins. Co.*, 1 Pa. St. 359; *Schimpf v. Lehigh Valley &c. Ins. Co.*, 86 Pa. St.

373; *Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516; *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 426; *Davis v. Parcher &c. Co.*, 82 Wis. 488, 52 N. W. 771; *Green v. Beaver &c. Co.*, 34 U. C. Q. B. 78.

⁵⁰⁶ *Embree v. Shideler*, 36 Ind. 423; *Manlove v. Naw*, 39 Ind. 289; *Whitman v. Mason*, 40 Ind. 189; *Downs v. Hammond*, 47 Ind. 131; *People's &c. Ins. Co. v. Hartshorne & Co.*, 90 Pa. St. 465; *Victoria &c. Ins. Co. v. Thomson*, 9 Ont. App. 620.

⁵⁰⁷ *New Era &c. Asso. v. Rossiter*, 132 Pa. 315, 19 Atl. 140; *Van Frank v. United States &c. Soc.*, 158 Ill. 560, 41 N. E. 1005; *Hannum v. Waddill*, 135 Mo. 153, 36 S. W. 616; *New Era &c. Asso. v. Rossiter*, 132 Pa. St. 314, 19 Atl. 140.

not a member.⁵⁰⁸ It is also held that the introduction in evidence of the certificate of membership by the plaintiff at the trial makes a sufficient *prima facie* case on the question of membership.⁵⁰⁹ And it has been held that the number of membership certificates issued by the company was *prima facie* evidence of the number of members.⁵¹⁰

§ 2424. Recovery of assessments—Proof.—The premium note given by a member of a mutual company is usually upon the condition, either expressed or implied, that it is payable in such portions or times as the directors of the company may require according to the charter or by-laws. The sum total of the premium notes and cash is a fund or the capital for the payment of losses. Hence no action ordinarily can be maintained on such a note except for the payment of losses, and then upon the order of the board of directors by way of assessments. In an action on such a note it is not sufficient, however, to show an order or resolution by the board for the collection of the note. In such an action the plaintiff must show four things: (1) That the contingency has occurred upon which the defendant's liability has become absolute by proof of actual losses; (2) that the assessment has been made by an order or resolution of the board; (3) that the losses to be paid with the money collected from the assessments occurred during the time of the defendant's membership; (4) that the amount demanded is the defendant's due proportion of such losses and expenses.⁵¹¹ In such an action it would perhaps not be necessary to

⁵⁰⁸ *Supreme Lodge &c. v. Johnson*, 78 Ind. 110; *Seibert v. Chosen Friends*, 23 Mo. App. 268; *Mulroy v. Knights of Honor*, 28 Mo. App. 463.

⁵⁰⁹ *Stewart v. Supreme Council*, 36 Mo. App. 319; *Forse v. Supreme Lodge &c.*, 41 Mo. App. 106.

⁵¹⁰ *Neskern v. Northwestern &c. Asso.*, 30 Minn. 406, 15 N. W. 683.

⁵¹¹ *Embree v. Shideler*, 36 Ind. 423; *American Ins. Co. v. Schmidt*, 19 Iowa 502; *Manlove v. Naw*, 39 Ind. 289; *Warner v. Beem*, 36 Iowa 385; *Chandler v. Keith*, 42 Iowa 99; *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.) 279; *Long Point Ins. Co. v. Houghton*, 6 Gray (Mass.) 77; *Pacific &c. Ins. Co. v. Guse*, 49 Mo. 329,

8 Am. R. 132; *White v. Haight*, 16 N. Y. 310; *Bangs v. Buckinfield*, 18 N. Y. 592; *Savage v. Medbury*, 19 N. Y. 32; *Howland v. Edmonds*, 24 N. Y. 307; *Sands v. Kimbark*, 27 N. Y. 147; *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605; *Deven-dorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Hyatt v. Esmond*, 37 Barb. (N. Y.) 601; *Howland v. Cuy-kendall*, 40 Barb. (N. Y.) 320; *Hagan v. Merchants' &c. Ins. Co.*, 81 Iowa 321, 46 N. W. 1114, 25 Am. St. 493; *Doane v. Millville &c. Ins. Co.*, 45 N. J. Eq. 274, 17 Atl. 625; *St. Lawrence &c. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430.

prove that there had been fires by which insured persons had sustained losses. It would doubtless be sufficient to prove notice of loss received by the company and the settlement and allowance; or proof of a judgment recovered against such company would be sufficient.⁵¹² So, it was held to be unnecessary to show the particular loss for the payment of which the assessment was made; but it is sufficient if it be proved that losses accrued during the life of the defendant's policy.⁵¹³ And it has been held in such an action that the record of losses kept by such company was sufficient prima facie evidence that the loss had occurred.⁵¹⁴ It is settled by the authorities that the directors or managers of such a company have the power to make such assessments, and may exercise a reasonable discretion in determining the amount necessary to be raised for the payment of losses and expenses.⁵¹⁵

§ 2425. **Recovery of assessments—Burden of proof.**—In an action by a mutual insurance company to enforce the collection of an assessment, the burden of proof is upon the plaintiff to show that the assessment was in accordance with the charter and by-laws of the company; and for this purpose the charter and by-laws are admissible in evidence.⁵¹⁶ And in an action by such company to recover an assessment, the burden is upon the plaintiff to prove that the assessment was legally made and that notice thereof was given.⁵¹⁷ In an action on such a premium note the proof must show that all statutory requirements have been complied with. Thus if the statute requires notice or demand or that no action can be brought until after the expiration of a certain stated time from the giving of the notice, the evidence must show that all such things have been done before the maker of such note can be compelled to pay assessments.⁵¹⁸

⁵¹² Embree v. Shideler, 36 Ind. 423; Sands v. Kimbark, 27 N. Y. 147; Sands v. Hill, 42 Barb. (N. Y.) 651.

⁵¹³ Jackson v. Roberts, 31 N. Y. 304; Embree v. Shideler, 36 Ind. 423. See, § 2426.

⁵¹⁴ People's &c. Ins. Co. v. Allen, 10 Gray (Mass.) 297; Jackson v. Roberts, 31 N. Y. 304.

⁵¹⁵ Farmers' &c. Ins. Co. v. Knight, 162 Ill. 470, 44 N. E. 834; Vandalia &c. Ins. Co. v. Peasley, 84 Ill. App. 138; Western &c. Ins. Co. v. Hutchinson &c. Co., 92 Ill. App. 1; Swing

v. Bentley &c. Co., 45 W. Va. 233, 31 S. E. 925; Swing v. Parkersburg &c. Co., 45 W. Va. 288, 31 S. E. 926.

⁵¹⁶ Rand &c. Co. v. Continental &c. Ins. Co., 58 Ill. App. 665; Susquehanna &c. Ins. Co. v. Gackenbach, 115 Pa. 492, 9 Atl. 90.

⁵¹⁷ Augusta &c. Ins. Co. v. French, 39 Me. 522; York Co. &c. Ins. Co. v. Knight, 48 Me. 75; Buckley v. Columbia Ins. Co., 83 Pa. St. 293, 298, 24 Am. R. 172.

⁵¹⁸ Sands v. Sanders, 26 N. Y. 239; Devendorf v. Beardsley, 23 Barb.

§ 2426. **Recovery of assessments—Prima facie evidence.**—Not infrequently the charter of a mutual company provides that in an action for the recovery of an assessment the certificate of the secretary stating the amount of the assessment shall be taken and received as prima facie evidence of the validity and the amount of the assessment. The purpose of such certificate is to relieve the company in such action from making the preliminary proof as to the risks, losses and assets in order to show the right to levy and recover the assessment. It has been held that such proof is sufficient to establish the facts stated in such certificate.⁵¹⁹ It has been held in an action to recover an assessment that the record of losses kept by the company was sufficient prima facie evidence that such losses had occurred.⁵²⁰ The rule as to the pleading and proof necessary to entitle the plaintiff to recover is thus stated: "All that is necessary in the complaint to make out a cause of action upon a policy of life insurance is a statement of the contract, the death of the assured and the failure to pay as agreed; an allegation that the death of the assured was not caused by the breaking of any of the conditions of the policy is unnecessary, and does not require proof. The plaintiff is not bound to anticipate in the complaint the defense which the defendant may set up, and has a right to rely, in complaining, upon such averments as state a cause of action, leaving matter which would meet a defense for proof, or argument from proof, at the trial. When the answer admits the issuing of the policy and the allegations in complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant and the plaintiff is entitled to recover, unless the defendant satisfies the court or jury, by a fair preponderance of the evidence, that the conditions had been broken."⁵²¹

§ 2427. **Action on policy—Pleading and proof.**—In mutual and benefit insurance the certificate or policy usually provides for the

(N. Y.) 656; *Sands v. St. John*, 36 Ins. Co. v. Vitale, 10 Pa. Super. Ct. Barb. (N. Y.) 628; *Howland v. Cuykendall*, 40 Barb. (N. Y.) 320; *Sands* 157.

v. Annesley, 56 Barb. (N. Y.) 598. ⁵¹⁹ *People's &c. Ins. Co. v. Allen*, 10 Gray (Mass.) 297; *Connecticut River &c. Ins. Co. v. Way*, 62 N. H. 622.

⁵²⁰ *Williams v. German &c. Ins. Co.*, 68 Ill. 387; *West Branch Ins. Co. v. Macklin*, 66 Pa. St. 34; *Buckley v. Columbia Ins. Co.*, 83 Pa. St. ⁵²¹ *Boone Code Pleading*, § 156; *Hall v. Scottish Rite &c. Asso.*, 6 Ohio C. C. 137.

293, 298, 24 Am. R. 172; *Fidelity &c.*

payment of a sum not to exceed a stated amount on certain conditions. The existence of such conditions can only be determined by the books and papers of the company or society. It has, therefore, been held that in an action on such a certificate or policy the plaintiff is *prima facie* entitled to recover the full amount stated. But if the plaintiff is not entitled to recover the full amount by reason of the conditions the burden is upon the company or society to plead and prove as a defense that the plaintiff is entitled to recover less than the amount stated.⁵²² And in an action on such a policy providing for the payment of a certain sum, not to exceed a certain per cent. of the amount of the assessments, it was held that the plaintiff was entitled to recover without proving either a demand to make the assessments, or that the assessments had been made; or if made, the amount collected; but the burden of proof was upon the defendant to show that the assessment had been made or the amount realized therefrom.⁵²³

§ 2428. Action on policy—Burden of proof.—Generally the same rules apply both as to pleading and proof in actions on mutual insurance policies as on other insurance policies and the same burden rests upon the plaintiff to make his case. But in an action on such a policy where the insurance company seeks to avoid liability by showing that the plaintiff had failed to pay assessments regularly made and the policy had thereby become void, it was held that the plaintiff was not required to disprove such allegations, notwithstanding he had averred a performance of all the conditions of the policy, but that the burden was upon the defendant to prove both the fact of the assessment and its non-payment.⁵²⁴ In an action for loss on a policy in a mutual company the defendant may defeat the action by showing that the plaintiff had failed to pay prior assessments. The burden in such cases is upon the defendant to show the suspension of the policy by

⁵²² *Supreme Council v. Anderson*, 61 Tex. 296; *Metropolitan &c. Asso. v. Windover*, 137 Ill. 417, 27 N. E. 538.

⁵²³ *Kansas &c. Union v. Whitt*, 36 Kans. 760, 14 Pac. 275, 59 Am. R. 607; *Kansas &c. Union v. Gardner*, 41 Kans. 397, 21 Pac. 233.

⁵²⁴ *Phoenix Ins. Co. v. Bowersox*, 6 Ohio C. C. 1; *Hall v. Scottish Rite &c. Asso.*, 6 Ohio C. C. 137; *Ziegler*

v. Mutual &c. Asso., 1 McGloin (La.) 284; *Elkhart &c. Asso. v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. R. 514; *Tobin v. Western &c. Soc.*, 72 Iowa 261, 33 N. W. 663; *Hodsdon v. Guardian &c. Ins. Co.*, 97 Mass. 144, 93 Am. Dec. 73; *Campbell v. Northeastern &c. Ins. Co.*, 98 Mass. 381; *Shea v. Massachusetts &c. Asso.*, 160 Mass. 289, 35 N. E. 855, 39 Am. St. 475.

reason of the failure to pay assessments; but where the charter or the statute requires notice of an assessment to be given, the defendant as a part of such defense must prove that notice of the assessment had been duly given the plaintiff.⁵²⁵

Marine.

§ 2429. **Ownership and insurable interest—Proof.**—As in other insurance the claimant in order to entitle him to recover on a marine policy must show either ownership or an insurable interest. The principles of proof which govern in this class of insurance are not essentially different from those in fire insurance. Since the earliest cases in this country, it has been held that under the forms of marine policies none but the parties to the contract, or their legal representatives, could maintain an action on the policy; although other persons might in fact have an equitable or even a legal interest in the insured property.⁵²⁶ A purchaser of a vessel by parol has a sufficient ownership to support a contract of insurance, and a register or bill of sale is not necessary to complete the title.⁵²⁷ But a person cannot set up a parol title to the whole ship when the ship's papers prove a joint ownership in himself and another; but such joint owner can recover for his moiety of insurance in case of loss.⁵²⁸ So a commission merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions.⁵²⁹ Proof that the plaintiff himself purchased and paid for the insured goods is sufficient *prima facie* evidence of an insurable interest.⁵³⁰ So, a mere equitable interest is sufficient to support a contract of insurance.⁵³¹ In an action on a policy upon a cargo, it has been held that it is not necessary to prove an insurable interest at the time of effecting the insurance. Proof that such interest subsisted during the risk and when the loss occurred was held sufficient.⁵³² So where the owner of a vessel or of a cargo

⁵²⁵ *Vandalia &c. Ins. Co. v. Peasley*, 84 Ill. App. 138.

⁵²⁶ *Carroll v. Boston &c. Ins. Co.*, 8 Mass. 515.

⁵²⁷ *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Wendover v. Hogeboom*, 7 Johns. (N. Y.) 308.

⁵²⁸ *Ohl v. Eagle Ins. Co.*, 4 Mason (U. S.) 172.

⁵²⁹ *Putnam v. Mercantile &c. Ins. Co.*, 5 Metc. (Mass.) 386; *Sturm v.*

Atlantic &c. Ins. Co., 6 Jones & Spen. (N. Y.) 281; *Wells v. Philadelphia Ins. Co.*, 9 S. & R. (Pa.) 103.

⁵³⁰ *Sturm v. Atlantic &c. Ins. Co.*, 6 Jones & Spen. (N. Y.) 281.

⁵³¹ *Hume v. Providence &c. Ins. Co.*, 23 S. Car. 190.

⁵³² *Worthington v. Bearse*, 12 Allen (Mass.) 388, 90 Am. Dec. 152; *Hooper v. Robinson*, 98 U. S. 528.

age done to each vessel occasioned by the collision, the insurer has been held liable not only for the damages occasioned to the injured vessel, but also for the amount it was compelled to pay on account of the injury to the other vessel.⁵⁴⁴ It has been held that the perils of sea and perils of river, as used in marine policies, include canal navigation.⁵⁴⁵ Where it appeared from the evidence that no other cause could be assigned for the sinking of a vessel than by damage caused by fire, the insurers were held liable.⁵⁴⁶ And the ordinary marine policy was held to cover damages done to zinc in shipment by corrosion and rust, and that proof of such injury was sufficient to raise the presumption that it was done by salt water.⁵⁴⁷ Insurers of goods stowed in the hold of a vessel are held liable for damages caused by sea-water, shipped during extraordinary stress of weather. But they are not liable from the ordinary dampness though aggravated by length of the voyage and variety of climate.⁵⁴⁸

§ 2432. **Seaworthiness—Presumptions.**—One of the essential things in marine insurance is that the vessel at the time the insurance is effected should be seaworthy. For obvious reasons the insurer is not required to make a survey or inspection of a vessel in order to determine whether or not it is seaworthy. The law raises this presumption in his favor, and unless such is the fact the insurance does not attach. This presumption of seaworthiness amounts to an implied warranty on the part of the owner that the vessel, at the time the insurance is placed, or the voyage begun, is tight, stanch, strong, properly manned and provisioned, and suitably equipped for the voyage; that the vessel has or should have a competent master and mate and a sufficient crew for the particular voyage.⁵⁴⁹ This rule of implied warranty is extended

⁵⁴⁴ *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 98; *De Vaux v. Salvador*, 4 Ad. & El. 420.

⁵⁴⁵ *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553.

⁵⁴⁶ *Pointer v. Merchants' Mut. Ins. Co.*, 20 La. Ann. 100.

⁵⁴⁷ *Cogswell v. Ocean Ins. Co.*, 18 La. 84.

⁵⁴⁸ *Montgomery v. Abby Pratt Shipp*, 6 La. Ann. 410, 54 Am. Dec. 562; *Baker v. Manufacturers' Ins. Co.*, 12 Gray (Mass.) 603; *Cory v. Boylston Ins. Co.*, 107 Mass. 140, 9 Am. R. 14.

⁵⁴⁹ *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474, 48 Am. Dec. 462; *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832; *Dodge v. Boston & C. Ins. Co.*, 85 Me. 215, 27 Atl. 105; *Field v. Insurance Co. & C.*, 3 Md. 244; *Perry v. Cobb*, 88 Me. 435, 34 Atl. 278; *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Copeland v. New England & C. Ins. Co.*, 2 Metc. (Mass.) 432; *Hoxie v. Pacific & C. Ins. Co.*, 7 Allen (Mass.) 211; *Swift v. Union & C. Ins. Co.*, 122 Mass. 573; *Van Wickles v. Mechanics' & C. Ins.*

to latent defects, and to defects of which the owner had no knowledge.⁵⁶⁰ But where it is shown that the inability to perform a voyage arises soon after leaving port, and the vessel sprung a leak and foundered without stress of weather or other adequate cause of injury, the presumption then is that this inability existed at the time the insurance was effected and arose from some latent defect which in fact rendered the vessel unseaworthy.⁵⁶¹ The rule as stated is "if a ship is lost without any apparent sea damage or accident sufficient to destroy a sound vessel, there is a presumption that it proceeds from inherent weakness or decay."⁵⁶² And if a vessel is seaworthy at the time the risk begins the presumption is that it continued so during the time of the risk in the absence of any evidence rebutting such presumption.⁵⁶³ But where a vessel which was built to navigate inland waters is insured for a consideration more than the usual premium for an ocean voyage, with knowledge of her character and construction, in case of loss the insurer cannot rely on either the implied warranty or the legal presumption of seaworthiness.⁵⁶⁴

§ 2433. Seaworthiness—Presumptions rebutted.—The presumption of seaworthiness of vessels is held by some courts to be of such probative force that the insured is entitled to recover on proof of loss. But this presumption of seaworthiness at the inception of the risk may be rebutted; and when fairly or successfully done the insurance

Co., 97 N. Y. 350; *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Reeside, The*, 2 Sumn. (U. S.) 567; *Caledonia, The*, 157 U. S. 124, 15 Sup. Ct. 537.

⁵⁶⁰ *Work v. Leathers*, 97 U. S. 379; *Edwin v. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823; *Caledonia, The*, 157 U. S. 124, 15 Sup. Ct. 537; *Richellieu & Co. v. Boston & C. Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. 934; *Northern Belle, The*, 9 Wall. (U. S.) 526; *Rover, The*, 33 Fed. 515; *Carib Prince, The*, 63 Fed. 266; *Lizzie V. Virden, The*, 19 Blatch. (U. S.) 340; *Whitall v. Brig William Henry*, 4 La. 223, 23 Am. Dec. 483; *Putnam v. Wood*, 3 Mass. 481, 3 Am. Dec. 179; *Eureka*

& C. Ins. Co. v. Purcell, 19 Ohio C. C. 135.

⁵⁶¹ *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474, 48 Am. Dec. 462; *Field v. Insurance Co. & C.*, 3 Md. 244; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Walsh v. Washington & C. Ins. Co.*, 32 N. Y. 427; *Patrick v. Hallett*, 1 Johns. (N. Y.) 246; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124, 3 Am. Dec. 406.

⁵⁶² *Swift v. Union & C. Ins. Co.*, 122 Mass. 573.

⁵⁶³ *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220.

⁵⁶⁴ *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284; *Thebaud v. Phoenix Ins. Co.*, 5 N. Y. 619.

is fully and effectually avoided. Or, otherwise stated, when the presumption of seaworthiness or the implied warranty on the part of the owner is overcome by proof showing the contrary, then in such case the insurance never attached and there never was any liability. This presumption may be rebutted either by direct evidence of the vessel's actual condition showing her unfitness in that she was not either tight, staunch, strong or properly manned and provisioned, and suitably equipped for the voyage. The presumption may also be overcome by proof of facts from which unseaworthiness may fairly be inferred.⁵⁵⁵ Thus where it is shown by the evidence that the loss was occasioned by springing a leak without any accident or stress of weather but by the ordinary pressure of the cargo and the usual action of the wind and sea, this was held sufficient to rebut or overcome the presumption of seaworthiness.⁵⁵⁶ But the presumption of seaworthiness is not rebutted by showing that the master of the ship became incompetent, at a foreign port, to command the vessel, even where it is shown that the loss may have been caused by such incapacity of the master.⁵⁵⁷ So, proof of the fact that a well built vessel, unprotected from worms, lay for six months in the Gulf of Mexico was held insufficient to rebut the presumption of all seaworthiness.⁵⁵⁸

§ 2434. Continuation of seaworthiness—Burden may shift.—The rule that when a status or condition is once proved it is presumed to continue, applies to seaworthiness of vessels. And the rule is that if a vessel is shown to be seaworthy at the time it is insured, the presumption is that such seaworthiness continues up to the time of her loss, unless the proof shows that some known intervening cause rendered her unseaworthy after she was insured. And if a vessel is proved to be unseaworthy when she leaves the last port before loss, such loss would be attributed to that fact. But if she was shown to be seaworthy when she left the last port she will be presumed to remain seaworthy during the voyage. But if on the voyage she suddenly

⁵⁵⁵ *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832; *Dodge v. Boston &c. Ins. Co.*, 85 Me. 215, 27 Atl. 105.

⁵⁵⁶ *Swift v. Union &c. Ins. Co.*, 122 Mass. 573; *Walsh v. Washington &c. Ins. Co.*, 32 N. Y. 427; *Van Wickle v. Mechanics' &c. Ins. Co.*, 97 N. Y. 350; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Talcot v.*

Commercial Ins. Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; *Wright v. Orient &c. Ins. Co.*, 6 Bosw. (N. Y.) 269.

⁵⁵⁷ *Copeland v. New England &c. Ins. Co.*, 2 Metc. (Mass.) 432.

⁵⁵⁸ *Voisin v. Commercial Ins. Co.*, 67 Hun (N. Y.) 365.

springs a leak, without any apparent or known cause originating in some peril covered by the policy, a new presumption then arises, that of unseaworthiness. This new presumption is not conclusive, but its effect is said to be to shift the burden of proof on the insured, and require him to show that the vessel was lost by some one of the perils insured against.⁵⁵⁹ And it has been held that this presumption may be shifted by showing the inability of the vessel to perform the voyage without accident or adequate cause to account for such failure.⁵⁶⁰ And it has been held that when this presumption has been shifted, it is much strengthened by the length of time that the vessel had been at sea, and former manifestations of weakness and decay by leaking or otherwise.⁵⁶¹

§ 2435. Seaworthiness—Burden of proof.—In marine insurance, as in kindred insurance subjects, a breach of warranty is a defense which must be pleaded and proved. So a breach of the implied warranty of seaworthiness is a defense which must be pleaded and proved in the action, and the burden of proof on this subject is upon the insurer and he must show by a preponderance of the evidence, either direct or circumstantial, that the vessel was not seaworthy at the inception of the risk.⁵⁶² But the insurer is not liable for common and ordinary perils to which vessels are exposed. Therefore, where it is shown that the insured vessel was lost by springing a leak and foundering in moderate weather the presumption as seen is that this arose from weakness and internal defect, and in such case the burden of proof is then upon the plaintiff, to show that the loss arose from stress of weather or under some of the denomination of perils of the sea insured against.⁵⁶³

⁵⁵⁹ *Western Ins. Co. v. Tobin*, 32 Ohio St. 77.

⁵⁶⁰ *Myers v. Girard Ins. Co.*, 26 Pa. St. 192.

⁵⁶¹ *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

⁵⁶² *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Treat v. Union Ins. Co.*, 56 Me. 231, 96 Am. Dec. 447; *Watson v. Clark*, 1 Dow. 336; *Parker v. Potts*, 3 Dow. 23; *Pickup v. Thames Ins. Co.*, L. R. 3 Q. B. 594.

⁵⁶³ *Schultz v. Pacific Ins. Co.*, 14 Fla. 73; *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474, 48 Am. Dec. 462; *Treat v. Union Ins. Co.*, 56 Me. 231, 96 Am. Dec. 447; *Field v. Insurance Co. &c.*, 3 Md. 244; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Coffin v. Phenix Ins. Co.*, 15 Pick. (Mass.) 291; *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 151; *Patrick v. Hallett*, 1 Johns. (N. Y.) 246; *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Miller v. South Carolina Ins. Co.*, 2 McCord

§ 2436. **Seaworthiness a warranty—Effect on burden.**—The seaworthiness of a vessel at the time the insurance is effected is regarded by all cases as an implied warranty. But a class of cases holds that the seaworthiness of a vessel at the time of the commencement of the risk is a condition precedent to the attaching of the policy, and the fulfilment of this condition is the implied warranty of the assured. This class of cases holds also that the burden of proving the fulfilment of a condition precedent is upon the party whose right to maintain his action depends upon its performance. Hence these cases hold that in an action on the policy of marine insurance the burden of proof rests upon the plaintiff to show the existence of seaworthiness at the commencement of the voyage, as a condition precedent to the attaching of the policy. The rule was thus stated: "The assured is bound to aver and prove that the ship was seaworthy when the risk commenced, but the proof to be given by him at the first instance need not be particular and full. Although slight and general, if not contradicted, it is deemed sufficient, and when given it shifts the burden upon the underwriter."⁵⁶⁴ It is, for apparent reasons, the rule that very slight evidence on the question of seaworthiness is sufficient to make out a *prima facie* case. The reason for this is founded on the fact of the difficulty of making such proof after a vessel has been injured or lost.⁵⁶⁵ Thus it has been held that the report of the surveyors of a port is sufficient evidence of seaworthiness until overcome by competent proof.⁵⁶⁶ And this rule is carried to the extent of holding that the burden is upon the plaintiff to prove seaworthiness whether the loss or injury proceeded from the want of it in any particular or not.⁵⁶⁷

L. (S. Car.) 336, 13 Am. Dec. 734, 148; Ward v. China &c. Ins. Co., 44 note; Batchelder v. Insurance Co. Fed. 43; 2 Arnould Mar. Ins., § 447, &c., 30 Fed. 459; Guy v. Citizens' &c. Ins. Co., 30 Fed. 695. p. 1345.

⁵⁶⁴ Van Wickle v. Mechanics' &c. Ins. Co., 97 N. Y. 350; Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151; Moses v. Sun &c. Ins. Co., 1 Duer (N. Y.) 159; Borland v. Mercantile &c. Ins. Co., 14 Jones & Spen. (N. Y.) 433; Tidmarsh v. Washington &c. Ins. Co., 4 Mason (U. S.) 439; Hazard v. Wing &c. Ins. Co., 8 Pet. (U. S.) 557; Bullard v. Roger Williams Ins. Co., 1 Curtis (U. S.)

⁵⁶⁵ Voisin v. Commercial &c. Ins. Co., 67 Hun (N. Y.) 365; Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151; Van Vliet v. Greenwich Ins. Co., 14 Daly (N. Y.) 496; Rogers v. Sun &c. Ins. Co., 14 Jones & Spen. (N. Y.) 65; Borland v. Mercantile &c. Ins. Co., 14 Jones & Spen. (N. Y.) 433.

⁵⁶⁶ Batchelder v. Insurance Co. &c., 30 Fed. 459.

⁵⁶⁷ Van Vliet v. Greenwich Ins. Co.,

§ 2437. **Repairs during voyage.**—When a ship is on its voyage it is the duty of the owner or the officer in charge to keep her in suitable repair so that she may continue to be seaworthy. Failing to do this while it was in his power to do so, and the vessel is lost from causes traceable to such failure, the insurers are discharged. This rule is carried to the extent of holding that it is the duty of the owner, even after damage done to the vessel by a peril insured against, to put the vessel in a seaworthy condition; in a condition fit to continue the voyage; or failure to do so, and the vessel is afterwards lost, if such loss might be reasonably attributed, in whole or in part, to such want of repair, then the actual cause of loss is the want of such repair and the insurer is discharged.⁵⁶⁸ But this principle was held not to apply to a case where the master of a vessel became incapacitated during the voyage at a foreign port to command the vessel. The reason of this is that, under marine law, in case of death or incompetency of the master, it is the duty of the mate to take command of the vessel.⁵⁶⁹

§ 2438. **Repairs during the voyage—Burden and liability.**—This rule of duty to make needed repairs is carried to the extent of holding that the burden of proof is upon the owner, the insured, to show that it was not within his power to make the repairs required, or that notwithstanding the needed repairs the loss was occasioned by one of the perils insured against to which the failure to repair did not contribute.⁵⁷⁰ And where the owner of a vessel, the insured, seeks to recover against the insurer for repairs made during the voyage, the proof must establish two propositions: (1) That such repairs were proper and necessary; (2) that the necessity for such repairs was occasioned from the extraordinary perils of the voyage within the policy. The burden is on the plaintiff to establish these propositions.⁵⁷¹

14 Daly (N. Y.) 496; Rogers v. Sun Ins. Co., 1 Sumn. (U. S.) 218; Union &c. Ins. Co., 14 Jones & Spen. (N. Y.) Ins. Co. v. Smith, 124 U. S. 405, 8 65; Hazard v. Wing &c. Ins. Co., 8 Sup. Ct. 534.
Pet. (U. S.) 557.

⁵⁶⁸ Copeland v. New England &c.

⁵⁶⁹ Paddock v. Franklin &c. Ins. Ins. Co., 2 Metc. (Mass.) 432.
Co., 11 Pick. (Mass.) 227; Starbuck
⁵⁷⁰ Paddock v. Franklin &c. Ins. Co., 11 Pick. (Mass.) 227; Starbuck
v. New England &c. Ins. Co., 19
Pick. (Mass.) 198; Copeland v. New
England &c. Ins. Co., 2 Metc.
(Mass.) 432; Capen v. Washington
v. New England &c. Ins. Co., 19
Ins. Co., 12 Cush. (Mass.) 517;
Pick. (Mass.) 198; Union Ins. Co.
Swift v. Union &c. Ins. Co., 122
v. Smith, 124 U. S. 405, 8 Sup. Ct.
Mass. 573; Hazard v. New England
534.

⁵⁷¹ Donnell v. Columbian Ins. Co.,
2 Sumn. (U. S.) 366.

§ 2439. **Loss—Burden of proof.**—A marine policy insures against certain stated perils under certain stipulated conditions. In an action on such a policy the burden of proof is on the plaintiff, as in other cases, to show that the loss arose from one of the perils insured against.⁵⁷² And it has been held that the burden is upon the plaintiff to offer evidence by which injury by perils of the sea may be distinguished from defective conditions arising from wear and tear and other ordinary causes.⁵⁷³ When goods are shown to be in good order when received for shipment and are damaged when delivered, the burden of proof is on the owner and officers of the vessel, the plaintiff, to show that the damage was occasioned by some peril or accident which was inevitable.⁵⁷⁴ The burden of proving the amount of the loss, and that it was from a cause for which the insurer is liable, is upon the plaintiff.⁵⁷⁵ Where the injury to a vessel may have been caused by two perils, one which was insured against and the other not, the burden of proof is on the plaintiff to show definitely the amount of the loss sustained by the peril insured against.⁵⁷⁶ Where the defense relied upon was that the insured vessel was lost through the agency or instrumentality of the insured, the burden of proof upon such proposition was upon the defendant.⁵⁷⁷

§ 2440. **Loss—Proof of cause.**—While the burden is on the plaintiff to show the loss and that such loss comes within the terms of the policy, yet he is not bound to show this fact by direct evidence. Courts recognize the difficulty of proving loss by unseen and hidden perils,

⁵⁷² *Field v. Insurance Co. &c.*, 3 Md. 244; *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Cory v. Boylston &c. Ins. Co.*, 107 Mass. 140, 9 Am. R. 14; *Louisville &c. Ins. Co. v. Bland*, 9 Dana (Ky.) 143; *Fleming v. Insurance Co.*, 12 Pa. St. 391; *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 99.

⁵⁷³ *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Coles v. Marine Ins. Co.*, 3 Wash. (U. S.) 159.

⁵⁷⁴ *Montgomery v. Chlp Abby Pratt*, 6 La. 410, 54 Am. Dec. 562; *Baker v. Manufacturers' Ins. Co.*, 12

Gray (Mass.) 603; *King v. Shepherd*, 3 Story (U. S.) 349.

⁵⁷⁵ *Cory v. Boylston Ins. Co.*, 107 Mass. 140, 9 Am. R. 14; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Richellieu &c. Co. v. Boston &c. Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. 934; *Louisville &c. Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308.

⁵⁷⁶ *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Flint &c. R. Co. v. Marine Ins. Co.*, 71 Fed. 210.

⁵⁷⁷ *Slocovich v. Orient &c. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802.

whose existence can often be shown only by proof of the injury inflicted. For these reasons very slight evidence of the cause of the loss is sufficient. In an action on a policy where the insurance was against river risks and where the proof showed that the vessel was seaworthy and that the loss was from a peril of the river and a possible cause is shown, it was held sufficient to entitle the plaintiff to recover as he was not bound to prove the identical cause of the loss.⁵⁷⁸ And it has been held that in making proof of the cause of loss it is competent to receive the opinion of a skilled river navigator as to the effect upon a smaller vessel of wave-swells made by a large steamboat while passing, for the purpose of showing the cause of the loss, in the absence of evidence of other apparent causes.⁵⁷⁹ So, on this theory the statements of the captain of a vessel as to the cause of the ship sinking, made at the time and while soliciting aid to save the ship, are competent evidence as to the cause of the loss, as a part of the *res gestae*.⁵⁸⁰

§ 2441. **Total loss.**—Proof of loss in marine insurance is not essentially different from that in fire insurance, and in general way the same rules apply.⁵⁸¹ In an action on a marine policy as for a total loss the general rule is that the insured must establish the physical extinction of the insured property. But where the evidence fails to show the actual or absolute extinction of the property if it is shown that the property remaining and delivered at the destination is of no mercantile value, it is equivalent to proof of actual extinction.⁵⁸² This rule is stated to the effect that proof of a constructive total loss may be equivalent to proof of an actual total physical loss; by this is meant that when the proof shows a destruction of all value to the owner and hence a total loss to him, it is equivalent to proof of actual demolition and actual annihilation.⁵⁸³ According to the English doctrine a ship

⁵⁷⁸ *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474, 48 Am. Dec. 462; 97 N. Y. 333; *Devitt v. Providence Marcy v. Sun Ins. Co.*, 14 La. Ann. 264; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *Insurance Co. v. Fogarty*, 19 Wall. (U. S.) 640; *Washburn & Mfg. Co. v. Reliance & Co. Ins. Co.*, 179 U. S. 1, 21 Sup. Ct. 1.

⁵⁷⁹ *Western Ins. Co. v. Tobin*, 32 Ohio St. 77.

⁵⁸⁰ *Western Ins. Co. v. Tobin*, 32 Ohio St. 77.

⁵⁸¹ See § 2362, et seq.

⁵⁸² *Young v. Pacific & Co. Ins. Co.*, 2 Jones & Spen. (N. Y.) 321; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y.

⁵⁸³ *Poole v. Protective Ins. Co.*, 14 Conn. 47; *Lemont v. Lord*, 52 Me. 365; *Snow v. Union & Co. Ins. Co.*, Co., 119 Mass. 592, 20 Am. R. 349; *Macy v. China & Co. Ins. Co.*, 135 Mass. 323; *De Peyster v. Sun & Co.*

is a total loss "when she has sustained such extensive damage that it would not be reasonably practicable to repair her." The ordinary measure of proofs which the courts have adopted is this: "If the ship when repaired will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss."⁵⁸⁴ The American cases follow the same principle stated by the English cases, but they fix a different amount of expense in giving the right of abandonment. The rule adopted by the American courts is that "if the expense of repairs will exceed half the value of the ship or property when repaired, she is considered a total loss, and may be abandoned."⁵⁸⁵ Where a vessel is insured against actual total loss only the insurers as a rule are not liable where after a disaster she remained a vessel and as such reached her place of destination afloat.⁵⁸⁶

§ 2442. **Deviation.**—An insurer may defeat an action on the policy by showing that there was a deviation from the usual course of

Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. R. 664; *Bryan v. New York Ins. Co.*, 25 Wend. (N. Y.) 618; *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *Pennsylvania & C. Ins. Co. v. Drackett*, 63 Ohio St. 41, 81 Am. St. 698, note; *Grainger v. Martin*, 2 Best & S. 467; *Burnett v. Kensington*, 7 T. R. 210; *Dyson v. Rowcroft*, 3 B. & P. 474; *Cologan v. London & C. Co.*, 5 M. & S. 447; *Roux v. Salvador*, 3 Bing. N. Cas. 266; *Adams v. McKenzie*, 13 C. B. N. S. 442; *Moss v. Smith*, 9 Man. & G. & S. 94, 103; *Rosetto v. Gurney*, 11 C. B. 186.

⁵⁸⁴ *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. R. 664; *Moss v. Smith*, 9 M. G. & S. 94, 103; *Irving v. Manning*, 1 M. G. & S. 176; *Rosetto v. Gurney*, 11 C. B. 186; *Adams v. McKenzie*, 13 C. B. N. S. 442; *Grainger v. Martin*, 2 Best & S. 467.

⁵⁸⁵ *Wallerstein v. Columbian Ins.*

Co., 44 N. Y. 204, 4 Am. R. 664; *De Peyster v. Sun & C. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331; *Chadsey v. Guion*, 97 N. Y. 333; *Carr v. Security Ins. Co.*, 109 N. Y. 504, 17 N. E. 369; *Devitt v. Providence & C. Ins. Co.*, 173 N. Y. 17, 65 N. E. 777; *Kettell v. Alliance Ins. Co.*, 10 Gray (Mass.) 144; *Mayo v. India & C. Ins. Co.*, 152 Mass. 172, 25 N. E. 80, 23 Am. St. 814; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303, 314, 28 Am. Dec. 245; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; 2 *Parsons Marine Insurance*, (Ed. 1868) 125, 126.

⁵⁸⁶ *Murray v. Hatch*, 6 Mass. 465; *De Peyster v. Sun & C. Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331; *Burt v. Brewers' & C. Ins. Co.*, 78 N. Y. 400; *Carr v. Security Ins. Co.*, 109 N. Y. 504, 17 N. E. 369; *Magrath v. Church*, 1 Caines (N. Y.) 196; *Le Roy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

the voyage. The reason of this is that where a vessel is insured for a particular voyage, or where the insurance is for a stated time for the navigation of particular waters, these are regarded as warranties to the effect that for that particular voyage, the vessel will travel the usual and ordinary route; or that for the stated time she will navigate the particular waters named. Any material deviation is at the risk of the insured; and if a loss ensues thereby, there can be no recovery.⁵⁸⁷ Thus where a boat in ascending the Mississippi River was shown to have left the main channel and attempted to shorten the voyage by running through a cut-off where boats ran at high water, was grounded and the cargo injured, it was held that the insurer was discharged.⁵⁸⁸ But it has been held that in case of time policies for the navigation of particular waters, that the insurer is not relieved where the proof shows that the vessel did leave the prohibited waters, but within the life of the policy returned to such waters and was there lost. But it was conceded that such a rule did not apply to insurance for a particular voyage, as the insurance was forfeited the instant the deviation occurred.⁵⁸⁹ Yet this rule is held not to apply where the policy expressly prohibits the navigation of other waters.⁵⁹⁰ But it has been held that a mere intention to deviate is not sufficient; the vessel must have entered upon the forbidden or unusual course of voyage to constitute a deviation.⁵⁹¹ And where an intention to deviate is proved it is not sufficient to defeat the action, if the evidence shows that the

⁵⁸⁷ *Dodge v. Essex Ins. Co.*, 12 Gray (Mass.) 65; *Burgess v. Equitable &c. Ins. Co.*, 126 Mass. 70, 30 Am. R. 654; *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571; *Merchants' Ins. Co. v. Algeo*, 32 Pa. St. 330; *Hume v. Providence &c. Ins. Co.*, 23 S. Car. 190; *Hearn v. New England &c. Ins. Co.*, 3 Cliff. (U. S.) 318; *Middlewood v. Blakes*, 7 Term R. 162; *Brown v. Tayleur*, 4 A. & E. 241; *African Merchants v. British Ins. Co.*, L. R. 8 Exch. 154.

⁵⁸⁸ *Jolly v. Ohio Ins. Co.*, Wright (Ohio) 539.

⁵⁸⁹ *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. R. 445; *Coffin v. Newburyport &c. Ins. Co.*, 9 Mass. 436; *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 537; *Greenleaf v.*

St. Louis Ins. Co., 37 Mo. 25; *Union Ins. Co. v. Tysen*, 3 Hill (N. Y.) 118; *Keeler v. Fireman's Ins. Co.*, 3 Hill (N. Y.) 250; *Palmer v. Warren Ins. Co.*, 1 Story (U. S.) 364; *Yeaton v. Fry*, 5 Cranch (U. S.) 335; *Bradlee v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378.

⁵⁹⁰ *Stevens v. Connecticut &c. Ins. Co.*, 6 Duer (N. Y.) 594; *Cobb v. Lime Rock Ins. Co.*, 58 Me. 326; *Odiorne v. New England Ins. Co.*, 101 Mass. 551, 3 Am. R. 401; *Whiton v. Albany City Ins. Co.*, 109 Mass. 24; *Burgess v. Equitable Ins. Co.*, 126 Mass. 70, 30 Am. R. 654; *Parker v. China &c. Ins. Co.*, 164 Mass. 237, 41 N. E. 267; *Birrell v. Dryer*, 9 App. Cas. 345.

⁵⁹¹ *Arnold v. Pacific &c. Ins. Co.*, 78 N. Y. 7; *Thatcher v. McCulloh*, 23

result and is therefore presumed.² In other cases they are only actionable, as a rule, where special injury or damage is averred and proved in the particular case.

§ 2448. **Questions of law or fact.**—What constitutes libel or slander in the abstract is a question of law where the language used is clear and unambiguous, the question as to whether it is actionable and the question as to whether the words in themselves or as explained by the inducement or colloquium, are reasonably susceptible or the meaning attributed to them by the innuendoes, are questions of law for the court,³ but where the words in the particular case are ambiguous and fairly susceptible of two meanings, the question as to the meaning in which they were used and understood in the particular case and under the particular circumstances is usually a question for the jury.⁴ So whether or not there was a publication of the alleged libel or slander, by the defendant, as a matter of fact, is for the jury.⁵ So it is usually for the jury to determine, as a matter of fact, whether the words were spoken or written concerning the plaintiff,⁶ and whether they were spoken of him in a particular capacity.⁷ And if the evidence is con-

² For classification, see, Pollard v. Pub. Co., 91 Me. 203, 39 Atl. 556; Lyon, 91 U. S. 225, 226.

³ Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. 446; Over v. Schiffing, 102 Ind. 191, 26 N. E. 91; Carter v. Carter, 62 Ill. 439; Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724; Gibson v. Williams, 4 Wend. (N. Y.) 320; Price v. Conway, 134 Pa. St. 340, 19 Am. St. 704; Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. 636; Hunt v. Goodlake, 43 L. J. C. P. 54.

⁴ Alcorn v. Bass, 17 Ind. App. 500, 46 N. E. 1024; Donaghue v. Gaffy, 54 Conn. 257, 7 Atl. 552; Bridgman v. Armer, 57 Mo. App. 528; Twombly v. Monroe, 136 Mass. 464, 468; Chiatovich v. Hanchett, 88 Fed. 873, 876; Witcher v. Jones, 137 N. Y. 599, 33 N. E. 743, 43 N. Y. S. 151; Sloan v. Gilbert, 12 Bush (Ky.) 51, 23 Am. R. 708; Thompson v. Sun

Blagg v. Sturt, L. R. 10 Q. B. 899, 59 E. C. L. 899; Australian & Co. v. Bennett, L. R. (1894) A. C. 284, 63 L. J. C. P. 105.

⁵ McCoombs v. Tuttle, 5 Blackf. (Ind.) 431; Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919; McGeever v. Kennedy, (Ky.) 42 S. W. 114; Loranger v. Loranger, 115 Mich. 681, 74 N. W. 228. But it may be for the court to say what is necessary in law to constitute a publication.

⁶ Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. 318; People v. McDowell, 71 Cal. 194, 11 Pac. 868; Lawrence v. Newberry, 64 L. T. N. S. 797, 39 W. R. 605; Butler v. Barrett, 130 Fed. 944.

⁷ Skinner v. Grant, 12 Vt. 456, unless it is clear; Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

flicting, it is proper to instruct the jury as to what constitutes a privilege and leave it to them to say from the evidence whether or not the essential facts are proved,⁸ but when the words are actionable per se, it is the duty of the court to so instruct,⁹ and if there is no dispute as to the facts and no extrinsic evidence of malice, it is usually for the court to say, as a matter of law, whether or not the words were privileged.¹⁰ If, however, there is evidence of malice, the question must usually be left to the jury.¹¹

§ 2449. **Burden of proof.**—"The plea of the general issue," says Greenleaf, "will require the plaintiff to prove: (1) The special character and extrinsic facts, when they are essential to the action; (2) the speaking of the words, or the publication of the libel; (3) the truth of the colloquium; (4) the defendant's malicious intention, where malice in fact is material; (5) the damage, where special damages are alleged, or more than nominal damages are expected."¹² The question as to the burden of proof under special pleas, such as justification and the like, will be considered in the sections devoted to such defenses. It may be well to note in this connection, however, that if a communication alleged to be libelous is privileged the burden is generally upon the plaintiff to show that it was maliciously made.¹³ If the words are actionable per se, proof of their publication by the de-

⁸ *Norfolk &c. Co. v. Davis*, 12 App. Cas. (D. C.) 306; *Howland v. George F. Blake &c. Co.*, 156 Mass. 543, 31 N. E. 656; *Nord v. Gray*, 80 Minn. 143, 82 N. W. 1082.

⁹ *Gottbehuet v. Hubachek*, 36 Wis. 515; *Filber v. Dautermann*, 28 Wis. 134.

¹⁰ *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Howland v. George F. Blake &c. Co.*, 156 Mass. 543, 31 N. E. 656; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211, 22 N. E. 365; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Cotulla v. Kerr*, 74 Tex. 94, 11 S. W. 1058, 15 Am. St. 819; *Rude v. Nass*, 79 Wis. 321, 326, 48 N. W. 555, 24 Am. St. 717; *Somerville v. Hawkins*, 10 C. B. 583, 70 E. C. L. 583.

¹¹ *Fresh v. Cutter*, 73 Md. 87, 93,

20 Atl. 774, 25 Am. St. 575; *Hewitt v. Morley*, 111 Mich. 187, 69 N. W. 245; *Brown v. Vannaman*, 85 Wis. 456, 39 Am. St. 860; *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. 659.

¹² 2 Greenleaf Evidence, § 410.

¹³ *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. 726, and note; *Lewis v. Chapman*, 16 N. Y. 369; *Henry v. Moberly*, 23 Ind. App. 305, 51 N. E. 497; *Alabama &c. R. Co. v. Brooks*, 69 Miss. 163, 30 Am. St. 528; *Ramsey v. Cheek*, 109 N. Car. 270, 13 S. E. 775; *Wright v. Woodgate*, 2 Crompt. M. & R. 573; *Spill v. Maule*, L. R. 4 Exch. 232. In cases of absolute privilege no action lies. But the burden may be upon the defendant to show that it is within the privileged class.

fendant of the plaintiff is generally sufficient to make at least a prima facie case;¹⁴ but if they depend upon extrinsic facts to make them actionable the burden is generally upon the plaintiff to show such facts.¹⁵ The words must be proved substantially as alleged,¹⁶ but it is not necessary that every set of words alleged should be proved, nor that the identical words should be proved in all respects¹⁷

§ 2450. **Publication.**—In order to make the charge actionable, it must be published by the defendant or some one for whom he is responsible.¹⁸ But whether there was a publication by the defendant, in the particular case, is generally for the jury to determine even though the evidence to that effect is merely circumstantial.¹⁹ "The publication of a libel by the defendant," says Greenleaf, "may be proved by evidence that he distributed it with his own hand or ma-

¹⁴ *Bullock v. Koon*, 9 Cow. (N. Y.) 30; see also, *Cristle v. Cowell*, Peake N. P. 4.

¹⁵ *Nidever v. Hall*, 67 Cal. 79, 7 Pac. 136; *Carter v. Andrews*, 16 Pick. (Mass.) 1, 6; *Johnston v. Morrison*, 3 Ariz. 109, 21 Pac. 465; *Bond v. Brewster*, 16 Daly (N. Y.) 82.

¹⁶ *Gray v. Elzroth*, 10 Ind. App. 587, 37 N. E. 551; *Robbins v. Fletcher*, 101 Mass. 115; *Desmond v. Brown*, 29 Iowa 53, 4 Am. R. 194; *Zimmerman v. McMakin*, 22 S. Car. 372, 53 Am. R. 720; *Maitland v. Goldney*, 2 East 434, 438; *Broughton v. McGrew*, 39 Fed. 672; *Estes v. Estes*, 75 Me. 478; *Sanford v. Gaddis*, 15 Ill. 228.

¹⁷ *Nicholson v. Dunn*, (Ky.) 52 S. W. 925; *Brown v. Barnes*, 39 Mich. 211, 33 Am. R. 375; *King v. Sassaman*, (Tex. Civ. App.) 54 S. W. 304; *Miller v. Miller*, 8 Johns. (N. Y.) 74; *McCallister v. Mount*, 73 Ind. 559; *Tucker v. Call*, 45 Ind. 31.

¹⁸ *McGeever v. Kennedy*, (Ky.) 42 S. W. 114, burden on plaintiff to show; *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228; *Warnock v. Mitchell*, 43 Fed. 428; *Mielenz v.*

Guasdorf, 68 Iowa 726, 28 N. W. 41; *Kiene v. Ruff*, 1 Iowa 482; *Wennhak v. Morgan*, 20 Q. B. Div. 635; *Reg. v. Beere*, 12 Mod. 219; *Pullman v. Hill*, L. R. (1891) 1 Q. B. 524; *Cooley Torts* (1st ed.), 193, 194; as to what is sufficient, see, *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Spaits v. Poundstone*, 87 Ind. 522, 44 Am. R. 773; *Philadelphia &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Brunswick v. Harmer*, L. R. 14 Q. B. 185; *Croasdale v. Bright*, 6 Houst. (Del.) 52; *State v. Shaffner*, (Del.) 44 Atl. 620; *Storey v. Wallace*, 60 Ill. 51; *Bacon v. Michigan Cent. R. Co.*, 55 Mich. 224, 54 Am. R. 372; *Baldwin v. Elphinston*, 2 W. Bl. 1037; *Louisville Press Co. v. Tennyly*, (Ky.) 49 S. W. 15; *Mankins v. State*, (Tex. Cr. App.) 57 S. W. 950; *Peterson v. Western U. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022; *Miller v. Johnson*, 79 Ill. 58; *Nicholson v. Rust*, (Ky.) 52 S. W. 933.

¹⁹ *McCoombs v. Tuttle*, 5 Blackf. (Ind.) 431, 432; *Bent v. Mink*, 46 Iowa 576; *Rex v. Bear*, 2 Salk. 417; see also, *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515.

liciously exposed its contents, or read or sang it in the presence of others; or, if it were a picture, or a sign, that he painted; or if it were done by any other symbol or parade, that he took part in it, for the purpose of exposing the plaintiff to contempt and ridicule. Evidence that a libel is in the defendant's handwriting is not, of itself, proof of a publication by him; but it is admissible evidence, from which, if not explained, publication may be inferred by the jury; the question of publication, where the facts are doubtful, being exclusively within their province."²⁰ An admission of the defendant that he spoke to third persons the words complained of, is competent evidence of publication.²¹ But it has been held that admissions of a defendant, in a letter, as to publication of a libel, cannot be proved where the letter itself is not produced or its absence accounted for.²² And other libelous publications by the defendant against the same person are not admissible for the purpose of proving publication of the libel upon which the prosecution is based,²³ although they may sometimes be competent for other purposes. So, where the defendant has pleaded the general issue and justification, it has been held that the plaintiff cannot use the latter plea as evidence of publication on the issue joined under the former plea.²⁴ But evidence that the defendant had paid the printer or publisher of a newspaper for the insertion of libelous matter has been held admissible as tending to show that the defendant wrote or adopted it.²⁵

§ 2451. **Malice.**—It is said that where one publishes a libel or slander he is presumed to have intended an injury,²⁶ and malice in law is presumed from the publication of libelous or slanderous

²⁰ 2 Greenleaf Ev., § 415; see also, *v. Wischstadt*, 47 Minn. 358, 50 N. Bond v. Douglas, 7 Car. & P. 626; W. 225.

Reg. v. Lovett, 9 Car. & P. 462; ²² *Simpson v. Wiley*, 4 Port. (Ala.) Aspell v. Smith, 134 Pa. St. 59, 19 215.

Atl. 484; *McCoombs v. Tuttle*, 5 ²³ *State v. Riggs*, 39 Conn. 498.

Blackf. (Ind.) 431; *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. ²⁴ *Wheeler v. Robb*, 1 Blackf. (Ind.) 330, 12 Am. Dec. 245; *Rick- Dec. 515*, postmark as evidence; *ert v. Stanley*, 6 Blackf. (Ind.) 169; *Shipley v. Todhunter*, 7 Car. & P. *Whitaker v. Freeman*, 1 Dev. L. (N. 680, 32 E. C. L. 685; telegram: Car.) 271.

Monson v. Lathrop, 96 Wis. 386, 71 ²⁵ *Schenck v. Schenck*, 20 N. J. L. N. W. 596. 208.

²⁶ *Witcher v. Richmond*, 8 Humph. ²⁶ *Haire v. Willson*, 9 Barn. & C. (Tenn.) 473; *Carpenter v. Willey*, 643; *King v. Harvey*, 3 D. & R. 464. 65 Vt. 168, 26 Atl. 488; *Wischstadt*

words.²⁷ It need not, therefore, be proved in order to recover compensatory damages. But in cases of qualified privilege, express malice must usually be proved,²⁸ and where exemplary or primitive damages are sought evidence upon the subject of malice is usually competent and very material.

§ 2452. **Evidence as to malice.**—"Subject to the general rules of evidence as to admissibility, competency, and relevancy," it is said, "either party to an action or prosecution for libel or slander may, for the purpose of proving or disproving malice, introduce in evidence whatever tends to throw light upon the motive of the defendant in publishing or uttering the defamatory words."²⁹ Thus, evidence of the republication of other slanderous words, published by the defendant concerning the plaintiff about the same time or even at other times and places is often admissible to show malice, or in aggravation of damages,³¹ although in some jurisdictions this rule is confined

²⁷ *Furr v. Speed*, 74 Miss. 423, 21 So. 562; *Yeates v. Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *Gabe v. McGinnis*, 68 Ind. 538; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; *Boehmer v. Detroit &c. Co.*, 94 Mich. 7, 53 N. W. 822, 34 Am. St. 318; *Estes v. Antrobus*, 1 Mo. 197, 13 Am. Dec. 496; *Fitzpatrick v. Daily &c. Pub. Co.*, 48 La. Ann. 1116, 20 So. 173; *Brueshaber v. Hertling*, 78 Wis. 498, 47 N. W. 725; *State v. Mason*, 26 Ore. 273, 38 Pac. 130, 46 Am. St. 629; *Scullin v. Harper*, 78 Fed. 460; *White v. Nicholls*, 3 How. (U. S.) 266; *Tompson v. Dashwood*, L. R. 11 Q. B. 43, 52 L. J. Q. B. 425; *Darley v. Ouseley*, 1 H. & N. 1, 25 L. J. Exch. 227.

²⁸ See § 2453 on privilege.

²⁹ 18 Am. & Eng. Ency. of Law (2d ed.), 1003, 1004, citing: *Reg. v. Francis*, L. R. 2 C. C. 128; *Blake v. Albion L. Assur. Soc.*, 4 C. P. D. 94; *McCann v. Preneveau*, 10 Ont. 573; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; *Hotchkiss v. Porter*, 30 Conn. 414; *Hastings v. Stetson*, 130

Mass. 76; *Provost v. Brueck*, 110 Mich. 136, 67 N. W. 1114; *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710; *Steinnecke v. Marx*, 10 Mo. App. 580; *Weaver v. Hendrick*, 30 Mo. 502; *Cameron v. Tribune Asso.*, 7 N. Y. S. 739.

³¹ *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Casey v. Hulgán*, 118 Ind. 590, 21 N. E. 322; *De Pew v. Robinson*, 95 Ind. 109; *Markham v. Russell*, 12 Allen (Mass.) 573, 90 Am. Dec. 169; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Ward v. Dick*, 47 Conn. 300, 36 Am. R. 75; *Evening Journal Asso. v. McDermott*, 44 N. J. L. 430, 43 Am. R. 392; see also, *Chubb v. Westley*, 6 Car. & P. 436; *Barwell v. Adkins*, 2 Scott. N. R. 11, 1 M. & G. 807, 39 E. C. L. 666; *Stayton v. State*, (Tex. Civ. App.) 78 S. W. 1071; *Cushing v. Hiderman*, 117 Iowa 637, 91 N. W. 940; *Post Pub. Co. v. Hallam*, 59 Fed. 530; *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 47 N. W. 562, 21 Am. St. 629; *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W.

to the republication of the same slanderous words or at least to such as relate to the same subject.³² Other proper evidence is also admissible. Threats by the defendant against the plaintiff have been held admissible,³³ and the same has been held as to evidence of the defendant's refusal to retract or apologize.³⁴ It is also generally held, although the rule has been changed by statute or decisions in some jurisdictions, that not only the circumstances immediately attending the uttering of the words, but likewise of the relations of the parties prior to and at that time tending to show the state of feeling at that time and thus bearing upon the question of malice.³⁵ So, evidence of a plea of justification asserting the truth if unsustained by the evidence, and especially if interposed in bad faith, is itself evidence of malice on the part of the defendant.³⁶ On the other hand, the defendant may show in mitigation and as tending to rebut actual malice that he had probable cause for making the charge and believed it to be true.³⁷ It has

710; *Chamberlin v. Vance*, 51 Cal. 75; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Eldridge v. State*, 27 Fla. 162; Vol. I, § 164, n. 102.

³² See, *Commonwealth v. Damon*, 136 Mass. 441; *Farmer v. Anderson*, 33 Ala. 78; *Thompson v. Powning*, 16 Nev. 195; *Howard v. Sexton*, 4 N. Y. 157; *Cassidy v. Brooklyn Eagle*, 138 N. Y. 239, 33 N. E. 1083; *Russell v. Farrell*, 102 Tenn. 248, 52 S. W. 146; *Jacobs v. Cater*, 87 Minn. 448, 92 N. W. 397.

³³ *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Wright v. Gregory*, 9 App. Div. (N. Y.) 85; but see, *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1061.

³⁴ *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Klewin v. Bauman*, 53 Wis. 244, 10 N. W. 398; *Wallace v. Jameson*, 179 Pa. St. 98, 36 Atl. 142; see also, Vol. I, § 164.

³⁵ *Provost v. Brueck*, 110 Mich. 136, 67 N. W. 1114; *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Ransom v. McCurley*, 140 Ill. 626, 31 N. E. 119; *Atwater v. Morning News*

Co., 67 Conn. 504, 34 Atl. 865; *Hubbard v. Rutledge*, 57 Miss. 7; *Morgan v. Livingston*, 2 Rich. L. (S. Car.) 573; see also, *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; but compare, *Stowell v. Beagle*, 57 Ill. 97; *York v. Pease*, 2 Gray (Mass.) 282; *Barr v. Hack*, 46 Iowa 308; *Justice v. Kirlin*, 17 Ind. 588; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. 317.

³⁶ *Sun Pub. &c. Co. v. Scheuck*, 98 Fed. 925, 928, and authorities cited; *Jackson v. Stetson*, 15 Mass. 48; *Robbins v. Fletcher*, 101 Mass. 115; *Finch v. Finch*, 21 S. Car. 342; *Richardson v. Roberts*, 23 Ga. 215; *Shartle v. Hutchinson*, 3 Ore. 337; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Downing v. Brown*, 3 Colo. 571; *Wilson v. Robinson*, L. R. 7 Q. B. 68, 53 E. C. L. 68; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. 282, note on 302, where the authorities are reviewed; and *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732, and note.

³⁷ *Arnott v. Standard Assn.*, 57 Conn. 86, 17 Atl. 361; *Williams v.*

also been held that he may show that the words were provoked by the plaintiff and spoken in the heat of passion.³⁸ But circumstances of which the defendant had no knowledge at the time of the publication of the libel or slander are usually inadmissible either to prove or disprove malice.³⁹

§ 2453. **Privilege.**—The burden has been held to be upon the defendant to show that the publication, at least where it depends upon extrinsic facts, is within the class of cases in which there is a qualified privilege.⁴⁰ But where this appears upon its face it is said that the burden is upon the plaintiff to show that it was false and that it was prompted by actual malice.⁴¹ And as a general rule any proper evidence tending to prove or disprove any of these facts is admissible. Thus, the plaintiff may introduce proper evidence to show actual malice, including the falsity of the charge, and that the defendant knew

Miner, 18 Conn. 464; Atwater v. 60 N. W. 476; see also, Butler v. Morning News Co., 67 Conn. 504, 34 Atl. 865; Evening Post Co. v. Hunter, (Ky.) 33 S. W. 487; Lawler v. Earle, 5 Allen (Mass.) 22; Owen v. Dewey, 107 Mich. 67, 65 N. W. 8; Farr v. Rasco, 9 Mich. 353, 80 Am. Dec. 88; Arnold v. Jewett, 125 Mo. 241, 28 S. W. 614; Mosler v. Stoll, 119 Ind. 244, 20 N. E. 752, but the facts relied upon must have been known to the defendant at the time. Smith v. Smith, 76 Ind. 356; Butler v. Barrett, 130 Fed. 944, and last note to this section.

³⁸ Ritchie v. Stenius, 73 Mich. 563, 41 N. W. 687; for other illustrations of evidence to disprove malice, see, Gilman v. Lowell, 8 Wend. (N. Y.) 573; Smith v. Smith, 39 Pa. St. 441; Weaver v. Hendrick, 30 Mo. 502; Remington v. Congdon, 2 Pick. (Mass.) 310; Van Dereer v. Sutphin, 5 Ohio St. 293; Brunswick v. Pepper, 2 C. & K. 683.

³⁹ Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Moore v. Thompson, 92 Mich. 498, 50 N. W. 1000; Simons v. Burnham, 102 Mich. 189,

Barrett, 130 Fed. 944; Grant v. Herald Co., 42 App. Div. (N. Y.) 354; Lothrop v. Adams, 133 Mass. 471; Whitney v. Janesville Gazette, 5 Biss. (U. S.) 330.

⁴⁰ Dixon v. Allen, 69 Cal. 527, 11 Pac. 129; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. R. 622; Benton v. State, 59 N. J. L. 551, 36 Atl. 1041; Nord v. Gray, 80 Minn. 143, 82 N. W. 1082; Elam v. Badger, 23 Ill. 445; Brown v. Norfolk & C. R. Co., 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472.

⁴¹ Henry v. Boberly, 23 Ind. App. 305, 51 N. E. 497, but it is said by another court that if malice and bad faith are shown he may rely upon the presumption of falsity; Atwater v. Morning News Co., 67 Conn. 504, 34 Atl. 865; see, however, Youmans v. Paine, 86 Hun (N. Y.) 479; Green v. Meyers, 44 N. Y. S. 81; Bearce v. Bass, 88 Me. 521, 34 Atl. 411; Nevill v. Insurance Co., L. R. (1895) 2 Q. B. 156; Kirkpatrick v. Eagle Lodge, 26 Kans. 384.

it or acted recklessly from bad motives.⁴² So, on the other hand, the defendant may introduce evidence to show that he acted on probable cause without malice, and that the alleged libel was a bona fide comment on facts of public interest or the occasion otherwise a privileged one.⁴³

§ 2454. **Best evidence—Extrinsic evidence.**—In an action for libel the publication itself is the best evidence of the charges made in it,⁴⁴ and the original document containing the defamatory matter must generally be produced;⁴⁵ but where the original has been destroyed or lost and cannot be found, or is in the hands of an adverse party who refuses to produce it, secondary evidence of the contents is admissible upon laying the proper foundation therefor.⁴⁶ So, copies of newspapers, all printed at the same time from the same type, are primary evidence in libel cases.⁴⁷ It is competent, as a general rule, in an action of slander, to show all the facts and circumstances at-

⁴² See, *Harris v. Zanone*, 93 Cal. 59, 23 Pac. 845; *Behee v. Missouri Pac. R. Co.*, 71 Tex. 424, 9 S. W. 449; *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499, 16 Am. St. 594; *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846; *Conroy v. Pittsburgh & C. T. Co.*, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. 188; *Cooke v. Wildes*, 1 Jur. N. S. 610, 5 El. & Bl. 329, 85 E. C. L. 329; *Blagg v. Sturt*, L. R. 10 Q. B. 899, 59 E. C. L. 899; *Kelly v. Partington*, 2 N. & M. 460, 4 B. & Ad. 700, 24 E. C. L. 144.

⁴³ *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. 353-369, and authorities cited in notes to section on evidence as to malice; see *Odgers Lib. & S.* 575.

⁴⁴ *Schultze v. Jalonick*, 18 Tex. Civ. App. 296, 44 S. W. 580.

⁴⁵ *Wright v. Woodgate*, 2 C. M. & R. 573; *Gilpin v. Fowler*, 9 Exch. 615, 22 L. J. Exch. 156; *Ret v. Rosenstein*, 2 Car. & P. 414; *Fryer v. Gathercole*, 4 Exch. 262; *Adams v. Kelly*, R. & M. 157, 21 E. C. L. 722;

see also, *Strader v. Snyder*, 67 Ill. 404.

⁴⁶ *Rainy v. Bravo*, L. R. 4 P. C. 287, 20 W. R. 873, 27 L. T. N. S. 249; *Gathercole v. Miall*, 15 M. & W. 319; *Rex v. Aickles*, 1 Leach 438; *Reg. v. Llanfaethly*, 2 El. & Bl. 940, 75 E. C. L. 940; *Boyle v. Wiseman*, 11 Exch. 360; *Newton v. Chaplin*, 10 C. B. 356, 70 E. C. L. 356; *Attorney-General v. Le Merchant*, 2 Term R. 201, note a; *Fryer v. Gathercole*, 4 Exch. 262; *Weir v. Hoss*, 6 Ala. 881; *Strader v. Snyder*, 67 Ill. 404; *Winter v. Donovan*, 8 Gill (Md.) 370; *Carpenter v. Bailey*, 56 N. H. 283; *Behee v. Missouri Pac. R. Co.*, 71 Tex. 424, 9 S. W. 449; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805; *Gates v. Bowker*, 18 Vt. 23.

⁴⁷ *Duke of Brunswick v. Harmer*, 11 Ad. & E. 185, 68 E. C. L. 185; see also, *State v. McKee*, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542; Vol. I, §§ 322, 323; *Fry v. Bennett*, 4 Duer (N. Y.) 247; *Rex v. Watson*, 2 Stark. 104, 129; *Cooke v. O'Malley*, 109 La. Ann. 382, 33 So. 377.

tending or leading up to the speaking of the words, or in reference to which the words were spoken, that are material in determining the meaning,⁴⁸ and they may also be competent, in some instances, for other purposes as well.⁴⁹ It is also proper, as a rule, to admit in evidence the entire conversation or publication in the course of which the words alleged to be defamatory were used.⁵⁰ And where the publication upon which the action is based refers to some other publication the latter may also be admissible.⁵¹ It is held in some cases that an innuendo does not admit of being sustained by evidence,⁵² but upon this question and upon the particular question as to whether evidence is admissible of the sense in which the hearers or readers understood the words, there is a conflict among the authorities. Many courts have taken the view that it is competent for the witnesses who heard or read the words, where they are ambiguous, to testify as to the sense in which they understood them;⁵³ but a witness cannot testify as to his understanding of the meaning of the defendant, and that such

⁴⁸Williams v. Cawley, 18 Ala. 206; Barton v. Holmes, 16 Iowa 252; Kidd v. Ward, 91 Iowa 371, 59 N. W. 279.

⁴⁹Extrinsic evidence is often admissible, for instance, on the question of malice, and, on the other hand, in mitigation or justification; Childers v. San Jose &c. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. 40; Georgia v. Bond, 114 Mich. 196, 72 N. W. 232; Provost v. Brueck, 110 Mich. 136, 67 N. W. 114; Stowell v. Beagle, 57 Ill. 97; McKee v. Ingalls, 5 Ill. 30; Commonwealth v. Damon, 136 Mass. 441; Seip v. Deshler, 170 Pa. St. 334, 32 Atl. 1032.

⁵⁰Cooke v. Hughes, R. & M. 112, 21 E. C. L. 393; Searcy v. Sudhoff, 84 Ill. App. 148; Moorehead v. Jones, 2 B. Mon. (Ky.) 210, 36 Am. Dec. 600; Newbraugh v. Curry, Wright (Ohio) 511; Whitehead v. State, 39 Tex. Cr. App. 89; Winchell v. Strong, 17 Ill. 597; Newman v. Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. 447.

⁵¹Young v. Gilbert, 93 Ill. 595;

see also, Weaver v. Lloyd, 1 Car. & P. 295.

⁵²Dickson v. State, 34 Tex. Cr. App. 1, 28 S. W. 815, 53 Am. St. 694, and note; State v. Henderson, 1 Rich. L. (S. Car.) 179; Van Vechten v. Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339, and note; but see, McLaughlin v. Russell, 47 Ohio 475; Russell v. Kelley, 44 Cal. 641, 13 Am. R. 169; Smawley v. Stark, 9 Ind. 386; Enquirer Co. v. Johnston, 72 Fed. 443; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; People v. Ritchie, 12 Utah 180, 42 Pac. 209.

⁵³Chamberlin v. Vance, 51 Cal. 75; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Binford v. Young, 115 Ind. 174, 16 N. E. 142; Nidever v. Hall, 67 Cal. 79, 7 Pac. 136; Nelson v. Borchaines, 52 Ill. 236; Barton v. Holmes, 16 Iowa 252; Hess v. Fockler, 25 Iowa 9; Miller v. Butler, 6 Cush. (Mass.) 72, 52 Am. Dec. 768; Tompkins v. Wisener, 1 Sneed (Tenn.) 458; Smart v. Blanchard, 42 N. H. 137.

meaning must be decided upon by the jury from the words themselves or other facts and circumstances given in evidence.⁵⁴ If the words are clear and unambiguous, it would seem that no such evidence would be competent. But, whether evidence of the understanding of the hearers is admissible to show the party to whom they understood the words to refer, or not, proper extrinsic evidence identifying the plaintiff as such party and showing that they must or would naturally be taken as referring to him, by those who heard or read them, would seem to be admissible where the words themselves do not show to whom they refer.⁵⁵

§ 2455. **Hearsay Evidence.**—Where there is a denial that the libelous or slanderous statement was uttered, the issue under such denial is not whether the statement is true, but whether it was really made, and, as elsewhere explained, testimony by a witness that he heard it uttered is not hearsay but is original evidence of a fact in issue.⁵⁶ It does not, therefore, fall within the rule excluding hearsay. But as to matters properly within the rule, it applies, in general, in cases of libel and slander as well as in other cases.⁵⁷

§ 2456. **Justification—Truth.**—It is said that “the presumption respecting a libelous charge, in the absence of any statute upon the subject is that it is false and without sufficient excuse. A defendant, whether in a civil action or a criminal prosecution, who desires to urge that what he said was true, must, therefore, assume the burden of establishing it by competent and sufficient evidence.”⁵⁸ This is the

⁵⁴ *Snell v. Snow*, 13 Metc. (Mass.) 278, 46 Am. Dec. 730; *Gribble v. Pioneer-Press Co.*, 37 Minn. 277, 34 N. W. 30; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. 583; *Pittsburg &c. R. Co. v. McCurdy*, 114 Pa. St. 554, 8 Atl. 230, 60 Am. R. 363; *Cresinger v. Reed*, 25 Mich. 450.

⁵⁵ *Smith v. Sun Pub. Co.*, 50 Fed. 399; *Russell v. Kelly*, 44 Cal. 641, 13 Am. R. 169; *People v. Ritchie*, 12 Utah 180, 42 Pac. 209; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628; *Colvard v. Black*, 110 Ga. 642, 36 S. E. 80; *Knapp v. Fuller*, 55 Vt. 311,

45 Am. R. 618; *Wilson v. Fall River Daily Herald*, 143 Mass. 581, 10 N. E. 733; *Chubb v. Westley*, 6 Car. & P. 436, 25 E. C. L. 474; *Cook v. Ward*, 4 Car. & P. 99, 19 E. C. L. 117; *Odgers Lib. & Sl.* 567.

⁵⁶ Vol. I, § 323.

⁵⁷ *McDuff v. Detroit &c. Co.*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. 673; *People v. Thornton*, 74 Cal. 482, 16 Pac. 244; see Vol. I, § 323.

⁵⁸ *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. 369, note; citing, *Russell v. Anthony*, 21 Kans. 450.

general and prevailing rule, and if justification is the only plea, the defendant has the burden of proof, and the right to open and close.⁵⁹ At common law and in most of the States the truth of the charge is a complete defense in civil actions, and, in many of them, the truth is admissible in evidence and in criminal prosecution also, and may, under certain circumstances, constitute a good defense.⁶⁰ In civil actions, according to the weight of authority and the better reason, even though the charge imputes to the plaintiff the commission of a crime, it is sufficient for the defendant to satisfy the jury of the truth of his justification by a preponderance of the evidence,⁶¹ but there are a few authorities which hold that he must prove the plaintiff's guilt beyond a reasonable doubt.⁶²

§ 2457. Evidence to prove or rebut justification.—Mere hearsay or evidence of general repute is generally incompetent in justification of a charge imputing a crime where it would be inadmissible in a criminal prosecution.⁶³ But it has been held otherwise where the

⁵⁹ *Tull v. David*, 27 Ind. 377; *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188; *Ransone v. Christian*, 56 Ga. 351; *Stith v. Fullinwider*, 40 Kans. 73, 19 Pac. 314; *Nelson v. Wallace*, 48 Mo. App. 193; *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433; *Clark v. Bohms*, (Tex. Civ. App.) 37 S. W. 347.

⁶⁰ See, *State v. Rice*, 56 Iowa 431, 9 N. W. 343; *State v. Haskins*, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. 560; *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337; *Castle v. Houston*, 19 Kans. 417, 27 Am. R. 127; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. 282, note; *Warner v. Clark*, 45 La. Ann. 863, 21 L. R. A. 502, 508, note.

⁶¹ *Spruill v. Cooper*, 16 Ala. 791; *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499, 958; *Riley v. Norton*, 65 Iowa 306, 21 N. W. 649; *Wintode v. Renbarger*, 150 Ind. 556, 50 N. E. 570; *People v. Even-*

ing News, 51 Mich. 11, 16 N. W. 185, 691; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8; *Sloan v. Gilbert*, 75 Ky. 51, 23 Am. R. 73; *McBee v. Fulton*, 47 Md. 403, 28 Am. R. 465; *Edwards v. Knapp*, 97 Mo. 432, 10 S. W. 54; *Bell v. McGinness*, 40 Ohio St. 204, 48 Am. R. 673; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. 282, note, where the authorities on both sides are collected.

⁶² *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. 282, note. The rule in Illinois and Indiana to this effect has been changed by statute; *Wintode v. Renbarger*, 150 Ind. 556, 50 N. E. 570; *Tunnell v. Ferguson*, 17 Ill. App. 76; *Becherer v. Stock*, 49 Ill. App. 270.

⁶³ *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433; *State v. Butman*, 15 La. Ann. 166; *State v. White*, 7 Ired. L. (N. Car.) 180.

charge is of general bad character.⁶⁴ And in such cases it has been held that even specific acts going to establish the truth of the charge may be shown in evidence.⁶⁵ The evidence in justification is generally required to show the existence of every element essential to the existence of the crime charged;⁶⁶ and, where the defendant has introduced evidence in support of his plea of justification the plaintiff may introduce any competent evidence tending to rebut it.⁶⁷ It is not a justification to show that a rumor existed of the truth of the matter charged and that the defendant believed it.⁶⁸ Nor is the fact that the defendant was intoxicated when he made the charge or that he made it in the heat of passion, any justification;⁶⁹ nor is the fact that he afterwards apologized or retracted it, although such fact may be admissible in mitigation.⁷⁰ It has also been held, and properly, we think,

⁶⁴ *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251; *Leader v. State*, 4 Tex. App. 162.

⁶⁵ *Wagner v. State*, 17 Tex. App. 554; *Talmadge v. Baker*, 22 Wis. 625; *Adams v. Ward*, 1 Stew. (Ala.) 42; *Stowell v. Beagle*, 57 Ill. 97; *Lanpher v. Clark*, 149 N. Y. 472, 476, 44 N. E. 182; *Davis v. Lyon*, 91 N. Car. 444; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. 342, note; see Vol. I, § 171.

⁶⁶ *Peterson v. Murray*, 13 Ind. App. 420, 41 N. E. 836; *Tull v. David*, 27 Ind. 377; *Welker v. Butler*, 15 Ill. App. 209; *Murphy v. Olberding*, 107 Iowa 547, 78 N. W. 205; *Chandler v. Robison*, 29 N. Car. 480; *McClougherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

⁶⁷ *Justice v. Kirlin*, 17 Ind. 588; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48; *Page v. Merwin*, 54 Conn. 426, 8 Atl. 675; *State v. Keenan*, 111 Iowa 286, 82 N. W. 792; *Currier v. Richardson*, 63 Vt. 617, 22 Atl. 625.

⁶⁸ *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St.

863; *Fountain v. West*, 23 Iowa 9, 92 Am. Dec. 405; *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 80 Am. St. 527; *Harris v. Minvielle*, 48 La. Ann. 908, 19 So. 925; *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108, 47 Am. St. 737; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. 287, note. But, as will hereafter be shown, evidence of this character is sometimes held admissible in mitigation.

⁶⁹ *Jones v. Townsend*, 21 Fla. 431, 58 Am. R. 676; *McKee v. Ingalls*, 5 Ill. 30; *Reed v. Harper*, 25 Iowa 87, 95 Am. Dec. 774; *Flagg v. Roberts*, 67 Ill. 485; *Finch v. Finch*, 21 S. Car. 342; *Poissenot v. Reuther*, 51 La. Ann. 965, 25 So. 937, nor that the plaintiff had slandered him; *Bourland v. Eidson*, 8 Gratt. (Va.) 27; *Battell v. Wallace*, 30 Fed. 229; *Wakely v. Johnston, R. & M.* 422, 21 E. C. L. 480, unless in response to slanderous words in the same transaction or the like; *Myers v. Kalchen*, 75 Mich. 272, 42 N. W. 820.

⁷⁰ *Cass v. New Orleans Times*, 27 La. Ann. 214; *Williams v. McManus*, 38 La. Ann. 161, 58 Am. R. 171; *Davis v. Marhausen*, 103 Mich. 315, 61

that the fact that the plaintiff had not complained to the defendant of the libel or slander or brought suit or called him to account for other charges of the same kind is not admissible in justification;⁷¹ and that, where the language is plain, evidence of the defendant's construction of them, and secret intent not to charge a crime, or the like, is incompetent to prove a justification.⁷² But, while this rule is not denied,

N. W. 504; *Lehrer v. Elmore*, 100 Ky. 56, 37 S. W. 292; *Storey v. Wallace*, 60 Ill. 51.

⁷¹ *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 112, 513, 514; *Braybill v. De Young*, 140 Cal. 323, 73 Pac. 1067. In the first case it is said: "Whether plaintiff has brought other actions for other libels, whether of the same or of a different character, containing the same or other imputations of wrongdoing, was wholly immaterial, and would have no tendency to prove the truth of the article in question. Merely because plaintiff did not call defendant to account for the former libels would create in defendant no prescriptive right to continue his libelous publications, and the evidence was inadmissible; *Curtis v. Mussey*, 6 Gray (Mass.) 261; *Newell Defamation, Libel and Slander* (2d ed.), 893. Neither was the evidence competent for the purpose of showing the general bad character of plaintiff. It is settled law, no doubt, but the character of the plaintiff, in actions of this kind, is a proper subject for the consideration of the jury in assessing damages; but the authorities are very uniform that such character must be established, not from specific acts of wrongdoings on his part, but from his general reputation and standing in the community in which he lives. His failure to bring an action for libel would not tend to

show that he was a person of bad character."

⁷² *Mitchell v. Spradley*, 23 Tex. Civ. App. 43, 56 S. W. 134; *Belo v. Smith*, 91 Tex. 221, 42 S. W. 850; *Butler v. Barret*, 130 Fed. 944; *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 512, 514. In the last case just cited it is said: "The article must be construed in accordance with the common and ordinary understanding of its language, and the secret intent of defendant is not competent or material in defense. He may possibly have intended one thing, and made use of language meaning something entirely different; but he is, within all the authorities, answerable for what may naturally be inferred from his language. If the language be ambiguous and susceptible of an innocent meaning, it might, perhaps, be competent for the defendant to testify to the meaning intended by him; but where, as in the case at bar the language of the article is unambiguous and actionable per se, the secret intent of the defendant is no defense to the action. The damage and injury from libelous publications comes from the impression made upon the public mind, and the secret intent of the person publishing the libel, where the language is plain and unequivocal, is not communicated to the public with the libelous charge. Opinions are formed from the publication alone.

it is held that the defendant may testify directly that he did not intend to charge the plaintiff with the commission of a crime, where punitive damages are demanded, to negative malice in fact as distinguished from malice in law.⁷³ And declarations and statements of the plaintiff tending to establish the truth of the libel have been held proper evidence against himself.⁷⁴

§ 2458. Evidence in mitigation.—“There are various matters which it is said may be proved in mitigation of damages. We do not understand this expression to mean that any of these matters ought to or can deprive plaintiff of his right to recover such damages as he has actually suffered, but rather that they may wholly or partly remove the presumption of malice, which will otherwise be indulged, and will therefore relieve the defendant from the imposition of punitive damages.”⁷⁵ It has been held that a defendant may prove, in mitigation of damages, that he received letters purporting to have been written by reputable persons charging the plaintiff with certain wrongful acts; that these letters were, in fact, forgeries, and that he, believing them to be genuine, was imposed upon and induced to pub-

Hankinson v. Bilby, 16 Mees. & W. 445; *Gribble v. Pioneer Press*, 37 Minn. 277, 34 N. W. 30; *Curtis v. Mussey*, 6 Gray (Mass.) 261; *Stermau v. Marx*, 58 Ala. 608; *Hayes v. Ball*, 72 N. Y. 418; *Newell Defamation, Libel and Slander* (2d ed.), 301; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678, where substantially the same question was put to the defendant, and the court held that it was not objectionable. But that case is clearly distinguishable from that at bar. There the publication complained of was a statement of facts purporting to be disclosed by public records, and was not upon its face actionable per se. It was rendered actionable only by all allegations that the defendant intended by its publication to accuse the plaintiff of having embezzled public moneys while acting as a public officer. In cases of that kind it is

perhaps, proper to permit the defendant to testify whether he intended, by the publication, to charge the commission of a crime. But that rule can have no application in cases like that at bar, where the libelous article is actionable upon its face; charging, as it does, open and persistent violations of the law;” but see, *Friedman v. Pulitzer Pub. Co.*, 102 Mo. App. 683, 77 S. W. 340.

⁷³ *Short v. Acton*, (Ind. App.) 71 N. E. 505; *Wrege v. Jones*, (N. Dak.) 100 N. W. 705.

⁷⁴ *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 512; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. 413; *Bullard v. Lambert*, 40 Ala. 204.

⁷⁵ *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. 339, note; citing, *Rearick v. Wilcox*, 81 Ill. 77; *Shipp v. Story*, 68 Ga. 47; *Wozelka v. Hettrick*, 83 N. Car. 10.

lish the libel complained of, in the belief that it was true.⁷⁶ But it seems that if the defendant's belief in the truth of a libelous publication can be proved in mitigation of damages, it can only be in those cases in which he distinctly disavows all right to urge that the words published were true in fact, and merely seeks to remove the presumption of malice by disclosing "the circumstances which induced him erroneously to make the charge complained of."⁷⁷ In criminal prosecution for libel, there are cases where, though the truth of the defamatory publication is not a complete defense, it may be given in evidence in mitigation of the offense.⁷⁸ The general rule as to the reception of evidence in mitigation of damages is, that any circumstances may be proved "which tend to disprove malice, but do not prove the truth of the charge."⁷⁹ Evidence may therefore be admitted to show what were the motives of the defendant in making the publication.⁸⁰ There is also one class of evidence in mitigation which appears to establish rather than to disprove actual malice, that is, evidence of the existence of circumstances connected with the libelous charge, and showing provocation therefor received from the plaintiff.⁸¹ While the retraction of a libel does not relieve its publisher from liability for its publication, it may be proved in mitigation of damages.⁸² So, the alleged libel or slander is in the nature of a reply to the previous libel and in refutation of its charges, accompanied with disparaging remarks on the libeler not entirely irrelevant to the subject under consideration, the previous libel is in some instances received in justification, and in all proper cases is admissible in mitigation of damages.⁸³ And it has also been held that if the libelous statement purports to have been taken from a certain newspaper or the like the defendant may prove in mitigation that it had previously

⁷⁶ Storey v. Early, 86 Ill. 461.

⁷⁷ Minesinger v. Kerr, 9 Pa. St. 312; Shilling v. Carson, 27 Md. 175, 92 Am. Dec. 632; Howard v. Thompson, 21 Wend. (N. Y.) 319, 34 Am. Dec. 238; Petrie v. Rose, 5 Watts & S. (Pa.) 364.

⁷⁸ Commonwealth v. Morris, 1 Va. Cas. 175, 5 Am. Dec. 515; Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212.

⁷⁹ Storey v. Early, 86 Ill. 461.

⁸⁰ Hellman v. Shanklin, 60 Ind. 424, 441.

⁸¹ Knott v. Burwell, 96 N. Car. 279, 2 S. E. 588; May v. Brown, 3 Barn. & C. 113, 10 E. C. L. 24.

⁸² Cass v. New Orleans Times, 27 La. Ann. 214.

⁸³ Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803; Myers v. Kaichen, 75 Mich. 272, 42 N. W. 820; Stewart v. Minneapolis Tribune Co., 41 Minn. 71, 42 N. W. 787.

appeared in such paper.⁸⁴ But, in general, it is only such facts and circumstances as were known to the defendant and which might have influenced him in making the defamatory statements that are available in mitigation of damages.⁸⁵

§ 2459. **Character—Damages.**—The general bad character or reputation of the plaintiff may be shown in mitigation of damages.⁸⁶ There are also some instances, contrary to the prevailing rule, in which the reputation or report as to his guilt of the specific act has been held admissible.⁸⁷ So, there are some instances in which the character of the plaintiff has been deemed to be in issue and evidence of good character or as to specific acts has been admitted on that theory, but this general subject has been sufficiently treated elsewhere.⁸⁸ So, the subject of the competency of evidence to show the character, social relations, financial standing, or the like, of either of the parties, as well as to show the elements of damages generally, has been treated in this volume in the chapter on damages.

⁸⁴ *Wyatt v. Gore*, 1 Holt N. P. 303; see also, *McDonald v. Woodruff*, 2 Dill. (U. S.) 244; *Williams v. Greenwade*, 3 Dana (Ky.) 438; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Bennett v. Bennett*, 6 Car. & P. 586; but see, *Sun Print. & Pub. Co. v. Schenck*, 98 Fed. 925; *Gray v. Pub. Co.*, 55 N. Y. S. 35; *Tucker v. Lawson*, 2 Times L. R. 593; *Ingram v. Lawson*, 9 Car. & P. 326.

⁸⁵ *Sun Pub. Co. v. Scheuck*, 98 Fed. 925, 929; *Morning Journal Asso. v. Duke*, 128 Fed. 657; *Butler v. Barrett*, 130 Fed. 944; *Hatfield v. Lasher*, 81 N. Y. 246; *Bush v. Prosser*, 11 N. Y. 347.

⁸⁶ *Morning Journal Asso. v. Duke*, 128 Fed. 657; *Davis v. Hamilton*, 88

Minn. 64, 92 N. W. 512; *Lamos v. Snell*, 6 N. H. 415, 25 Am. Dec. 468; *Stone v. Varney*, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; *Clark v. Brown*, 116 Mass. 504; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; *Shaw v. State*, (Tex.) 12 S. W. 741.

⁸⁷ See, *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Sanders v. Johnson*, 6 Blackf. (Ind.) 50, 36 Am. Dec. 564; *Nelson v. Evans*, 1 Dev. (N. Car.) 9; *Calloway v. Middleton*, 2 A. K. Marsh. (Ky.) 372, 12 Am. Dec. 499; *Hallowell v. Guntle*, 82 Ind. 554; but see, *Gray v. Elzroth*, 10 Ind. App. 587, 37 N. E. 551.

⁸⁸ See Vol. I §§ 167, 171.

But many other authorities hold that the burden is upon the plaintiff to show that his case is not within the statute.⁸ This is generally held to be the rule, where the plaintiff in making out his case shows *prima facie* that it falls within the bar of the statute.⁹ The burden, in one sense at least is generally upon him, where in reply to a plea of the statute he sets up part payment or a new promise or acknowledgment,¹⁰ or a fraudulent concealment of the cause of action, or absence of the defendant, or similar exceptions taking the case out of the statute.¹¹ It is held, however, that when such an exception is shown it then devolves upon the defendant to show such facts or circumstances as prevent the operation of the exception.¹²

394; see also, *Wise v. Williams*, 72 Cal. 544, and note in 81 Am. Dec. 725, 726.

⁸*Hooker v. Worthington*, (N. Car.) 46 S. E. 726; *Houston v. Thornton*, 122 N. Car. 365, 29 S. E. 327, 65 Am. St. 699; *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425; *Taylor v. Spears*, 1 Eng. (Ark.) 381, 44 Am. Dec. 519; *Pond v. Gibson*, 5 Allen (Mass.) 19, 81 Am. Dec. 724, and note; *Ayres v. Hubbard*, 71 Mich. 594, 40 N. W. 10; *Robinson v. State*, 20 Fla. 804; *Stansbury v. Stansbury*, 20 W. Va. 23; *Apperson v. Pattison*, 11 Lea (Tenn.) 484. As frequently stated, under this doctrine, where the statute is set up as a defense and traversed the burden of proof is on the plaintiff to show both a cause of action and the suing out of process within the time limited by statute. *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174; 2 Greenleaf Ev., § 481; 2 Stark. Ev. (4th Am. ed.) 887.

⁹*Simpson v. Brown-Desnoyers Shoe Co.*, 70 Ark. 598, 70 S. W. 305; *Bromwell v. Bromwell*, 139 Ill. 424, 28 N. E. 1057; *McKinley v. Gaddy*, 26 S. Car. 573, 2 S. E. 497; *Warner v. Marr*, 7 Ohio Dec. 268, 4 Ohio N. P. 382; *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837; *Richardson v. Wil-*

Hamson, 24 Cal. 289; *Dielmann v. Citizens' Nat. Bank*, 8 S. Dak. 263, 66 N. W. 311; *Gallreath v. Knoxville*, (Tenn. Ch.) 59 S. W. 178.

¹⁰*Moore v. Lesser*, 18 Ala. 606; *Easter v. Easter*, 44 Kans. 151, 24 Pac. 57; *Paille v. Plant*, 109 Ga. 247, 34 S. E. 274; *Wellman v. Miner*, 73 Ill. App. 448; *Bender v. Blessing*, 91 Hun (N. Y.) 73; *Hopper v. Beck*, 83 Md. 647, 34 Atl. 474.

¹¹*Crissey v. Morrill*, 125 Fed. 878; *Condon v. Enger*, 113 Ala. 233, 21 So. 227; *Harding v. Durand*, 138 Ill. 515, 28 N. E. 948; *Memphis &c. R. Co. v. Shoecraft*, 53 Ark. 96, 13 S. W. 422; *Keith v. Hiner*, 63 Ark. 244, 38 S. W. 13; *French v. Watson*, 52 Ark. 168, 12 S. W. 328; *Lemster v. Warner*, 137 Ind. 79, 36 N. E. 900; *Richardson v. Williamson*, 24 Cal. 249. See further as to fraudulent concealment: *Bartelott v. International Bank*, 119 Ill. 259, 9 N. E. 898; *Sakopee First Nat. Bank v. Stralt*, 71 Minn. 69, 73 N. W. 645; *Salinger v. Black*, 68 Ark. 449, 60 S. W. 229; *Prewett v. Dyer*, 107 Cal. 154, 40 Pac. 105; *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885; *Manley v. Robertson*, 6 Kans. App. 921, 51 Pac. 795; *Phelps v. Elliott*, 29 Fed. 53.

¹²*Palmer v. Field*, 76 Hun (N. Y.)

§ 2462. **Special statutes affecting the right.**—As shown in the preceding section, under certain special statutes, particularly those creating new liabilities and rights, the special limitation therein contained is a limitation or condition of the right itself. It is the general rule that a party whose cause of action is based upon the statute must bring himself and his case within the statute. It is therefore held that under such statutes, even if the burden in other cases is upon the defendant as to the general statute of limitations, it is upon the plaintiff to show that his action based on such a special statute was instituted within the time therein limited. This subject is well explained by the court, in a recent case, as follows: "As the plaintiff failed in an essential respect to make out a case as defined by the statute, the defendant's motion for a nonsuit should have been granted. The burden was upon her to show that her action was begun within the time limited. Without such proof, the defendant's liability could not be claimed. Unlike the general statute of limitations, this special statute creating the right and giving the remedy does not merely confer a privilege upon the defendant to interpose a definite time limitation as a bar to the enforcement of a distinct and independent liability, but it defines and limits the existence of the right itself. In the one case the statute furnishes the defendant with a technical defense to which he may resort or not, as he sees fit; while in the other it gives the plaintiff a right conditioned upon its enforcement within a defined time. Hence, while it has been generally held that the defendant must plead the general statute of limitations, or set it out in a brief statement under the general issue, in order to be protected by it, the reasoning that leads to that result, as a matter of pleading, has no application, when, as in this case, the statute confers upon the plaintiff a peculiar right, which, if not exercised, ceases to exist by its own limitations."¹²

§ 2463. **Questions of law or fact.**—Where there is a trial by jury and the question is as to whether the cause of action is barred by the statute of limitations the court usually instructs the jury as to the law, as in other cases, and leaves the jury to determine the facts, and, in

230; *Smith-Frazer Boot &c. Co. v. Co.*, 72 N. H. 164, 55 Atl. 891, citing: *White*, 7 Kans. App. 11, 51 Pac. 790; *Bomar v. Hagler*, 7 Lea (Tenn.) 85; *Burnham v. Courser*, 69 Vt. 183, 37 Atl. 288; see also, *Faust v. Hosford*, 119 Iowa 97, 93 N. W. 58. § 375.

¹² *Poff v. New England Tel. &c.*

most instances, to apply the law to the facts in accordance with the court's instructions. When the question is as to an acknowledgment or new promise, if it is in writing,¹⁴ or even if oral¹⁵ where the statute does not require a writing, its legal effect is usually for the court and, if it is shown without conflict in the evidence the court may usually determine its effect as matter of law. But whether there was any such acknowledgment or new promise, and whether, when not specific, it referred to the debt in question, are usually questions for the jury.¹⁶ So, where the question is as to whether there has been such concealment on the part of the defendant as prevents the statute from being a bar has been held a question for the jury,¹⁷ and it is generally for the jury to say whether the plaintiff used due diligence.¹⁸

§ 2464. Proof of foreign statutes.—As elsewhere shown the courts will not take judicial notice of foreign statutes, and they must generally be pleaded and proved as facts.¹⁹ The manner of proving such statutes has already been considered,²⁰ and the question can seldom arise with respect to statutes of limitations. But where there is a special statute affecting the merits or right itself it may be controlling. In an Ohio case the court on appeal held that the statute of limitations

¹⁴ *Beasley v. Evans*, 35 Miss. 192, 196; *Johnston v. Hussey*, 89 Me. 488, 36 Atl. 993; *Morrell v. Frith*, 3 M. & W. 405, 8 C. & P. 246, 34 E. C. L. 373; but see, *Frost v. Bengough*, 1 Bing. 266, 8 E. C. L. 501; *Watkins v. Stevens*, 4 Barb. (N. Y.) 173; *Turnbull v. Witherspoon*, Walk. (Miss.) 351.

¹⁵ *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093; *Clark v. Dutcher*, 9 Cow. (N. Y.) 674, 679; *Oliver v. Gray*, 1 Har. & G. (Md.) 204; but see, *Heylin v. Hastings*, 1 Comyns 54; *Sands v. Gelston*, 15 Johns. (N. Y.) 521; *Criswell v. Criswell*, 56 Pa. St. 130.

¹⁶ *Gill v. Donovan*, 96 Md. 518, 54 Atl. 117; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Hancock v. Melloy*, 189 Pa. St. 569, 42 Atl. 292; *Becker v. Oliver*, 111 Fed. 672. So it has been held for the jury, where the evidence is conflicting as to

whether an indorsement was made by the debtor or by his authority or not. *Brockett v. Sagendorph*, 116 Mich. 643, 74 N. W. 999; see also, *Fowler v. Joslyn*, (Mich.) 97 N. W. 90; *Miller v. Cinnamon*, 168 Ill. 447, 48 N. E. 45.

¹⁷ *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. 249. But it would seem that the court ought to instruct as to what the law deems necessary to constitute such concealment.

¹⁸ *Faust v. Hosford*, 119 Iowa 97, 93 N. W. 58; *Alpha Mills v. Watertown & Co.*, 116 N. Car. 797, 21 S. E. 917; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382; *State v. Hawkins*, (Mo. App.) 77 S. W. 98; see also, *Gwin v. Brown*, 21 App. (D. C.) 295.

¹⁹ Vol. I, § 49.

²⁰ Vol. II, § 1282.

of another state pleaded as a defense must be proved as any other fact in the case, and that, in the absence of a showing it will not be presumed that such evidence was offered.²¹

§ 2465. Concealment.—Fraudulent concealment of the cause of action by the party liable, so that it is not discovered for that reason, usually prevents or postpones the running of the statute. As already shown, where the case appears to be within the statute the burden of showing or at least producing evidence to show such a concealment as postponed the operation of the statute is generally held to be upon the plaintiff or party seeking to evade the operation of the statute upon that ground. Unless there was such original fraud that mere silence thereafter would operate as a fraudulent concealment, some affirmative representation, act or conduct is ordinarily required in order to constitute such concealment. Evidence of the acts constituting the concealment and of the circumstances constituting the discovery is relevant on this issue.²² So, evidence generally is admissible to show that the cause of action could and ought to have been discovered by the exercise of due diligence, or the contrary.²³ And a public record or other constructive notice may usually be shown.²⁴

§ 2466. New promise or acknowledgment.—A new promise, or, under most of the statutes, an acknowledgment, takes the case out of the statute. There is some difference of opinion as to whether it merely revives the old cause of action or is itself a new cause of action, but, however this may be, the weight of authority is to the effect that it destroys the effect of the statute up to that time and fixes a new date from which it commences to run. Most of the statutes provide that it must be in writing, but, while parol evidence of a direct acknowledgment or promise is usually inadmissible under such stat-

²¹ *Whelan v. Kinsley*, 26 Ohio St. 312; *Mather v. Rogers*, 99 Iowa 292, 181. 68 N. W. 700.

²² *Stone v. Brown*, 115 Ind. 78, 18 N. E. 392; *Day v. Dages*, 17 Ind. App. 228, 46 N. E. 589.

²³ *Percy v. Cockrill*, 53 Fed. 372; *Wood v. Carpenter*, 101 U. S. 135; *Mower County v. Smith*, 22 Minn. 97, 115; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448; *Wynne v. Cornellson*, 52 Ind.

²⁴ *Rhino v. Emery*, 65 Fed. 326; *Scruggs v. Decatur & Co.*, 86 Ala. 173, 5 So. 440; *Clark v. Van Loon*, 108 Iowa 250, 79 N. W. 88; *Bory v. Knox*, 38 La. Ann. 379; *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286; *Norris v. Haggin*, 28 Fed. 275, 280. But where there is a record affirmative acts of the party liable may sometimes constitute concealment.

utes,²⁵ a payment on the debt may constitute a *prima facie* acknowledgment or promise and may be shown by parol evidence in a proper case.²⁶ So, it may be admissible to identify the debt, or the like.²⁷ There are many decisions in which the question, by whom and to whom the promise must be made, is considered, but this question is not fairly within the scope of this work. There is also some conflict among the authorities as to just what is necessary to constitute such a new promise or acknowledgment, and the view upon these questions taken in the particular jurisdiction determines to some extent the question as to what evidence is admissible to show such a new promise or acknowledgment. It is generally held, however, that the acknowledgment must be clear and that it must be consistent, at least, with a promise to pay.²⁸ And evidence of the circumstances and manner of making the acknowledgment is generally relevant and material.²⁹ It is not necessary, however, under most statutes that there should be an express promise to pay, and admissions and acknowledgments consistent with a promise, especially when fairly implying a promise, have

²⁵ *Kisler v. Sanders*, 40 Ind. 78; *Pac. 45*; *Cross v. Zellerbach*, (Cal.) 8 Pac. 714; *Illsley v. Jewett*, 2 Metc. (Mass.) 168; *Edmunds v. Downes*, 2 C. & M. 459 (to show date); see also, *Kincaide v. Archibald*, 73 N. Y. 189.

²⁶ *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867; *Brudi v. Trentman*, 16 Ind. App. 512, 44 N. E. 932; *Kirk v. Williams*, 24 Fed. 437, 448; *Foster v. Starkey*, 12 Cush. (Mass.) 324, 327; *Utica First Nat. Bank v. Bal-lou*, 49 N. Y. 155; *Kelly v. Leach-man*, 3 Idaho 629, 33 Pac. 46; but under a few of the statutes a different view is taken; see, *Willis v. Newham*, 3 Y. & J. 518; *Hale v. Wil-son*, 70 Iowa 311, 30 N. W. 739; *Perry v. Ellis*, 62 Miss. 718.

²⁷ *McGinty v. Henderson*, 41 La. Ann. 382, 6 So. 658; *Russell & Co. v. Davis*, 51 Minn. 482, 53 N. W. 766; *Kelly v. Leachman*, 3 Idaho 629, 33

²⁸ *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Cocks v. Weeks*, 7 Hill (N. Y.) 45; *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56; *Bell v. Mor-rison*, 1 Pet. (U. S.) 352; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309; *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537; *Tillet v. Linsey*, 6 J. J. Marsh. (Ky.) 337; *Taylor v. Foster*, 132 Mass. 30; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *En-sign v. Batterson*, 68 Conn. 298, 36 Atl. 51; *Holt v. Gage*, 60 N. H. 536, 541.

²⁹ *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. 260; *Brady v. Doherty*, 30 Miss. 40; *Southern Pac. Co. v. Pros-ser*, 122 Cal. 413, 55 Pac. 145; *Drake v. Sigerfoos*, 39 Minn. 367, 40 N. W. 257; *Bourdin v. Greenwood*, L. R. 13 Eq. 281.

often been held sufficient.³⁰ But, on the other hand a mere admission that the debt was once due or even that it is unpaid without acknowledging its justness or present existence has been held insufficient,³¹ and so has the fact that it was included by the debtor in a schedule under an assignment for the benefit of the creditors,³² or in application for a discharge in bankruptcy or the like.³³ Although most statutes require a writing, no particular form is required, except that under most of the statutes it must be signed by the party to be charged or some one thereunto lawfully authorized by him. Almost any writing whether executed for the purpose or not, is sufficient if it is so signed and contains a sufficient acknowledgment.³⁴ Thus, in many instances, even letters have been held sufficient.³⁵

§ 2467. **Payment.**—Evidence of mere payment of money by the debtor to the creditor is not enough to show a new promise or to take the case out of the statute without connecting it with the debt in question.³⁶ But part payment of the debt in suit under such circumstances

³⁰ *Hunter v. Starkes*, 8 Humph. (Tenn.) 658; *Pickering v. Frink*, 62 N. H. 342; *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149; *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 515; *Lee v. Willmont*, L. R. 1 Exch. 364. In some jurisdictions a mere admission that the debt exists unpaid is made sufficient by statute. *Stewart v. McFarland*, 84 Iowa 55, 50 N. W. 221; *Reymond v. Newcomb*, 10 N. Mex. 151, 61 Pac. 205; *Elder v. Dyer*, 26 Kans. 604, 40 Am. R. 320.

³¹ *Levistones v. Marigny*, 13 La. Ann. 353; *Taylor v. New Orleans*, 41 La. Ann. 891, 6 So. 723; *Prescott v. Vershire*, 63 Vt. 517, 22 Atl. 655; *McLean v. Thorp*, 4 Mo. 256; *Clementson v. Williams*, 8 Cranch. (U. S.) 72; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Davis v. Davis*, 98 Me. 135, 56 Atl. 588; *Warren v. Cleveland*, (Tenn.) 76 S. W. 910; *Tridell v. Munhall*, 124 Fed. 802.

³² *Kaufman's Estate*, In re, 22 Pa. Co. Ct. 385; but see, *Pickett v. King*, 34 Barb. (N. Y.) 193.

³³ *Morgan v. Metayer*, 14 La. Ann. 612, 621; *Richardson v. Thomas*, 13 Gray (Mass.) 381, 74 Am. Dec. 636; *Bryer v. Willcocks*, 3 Cow. (N. Y.) 159; *Hidden v. Cozzens*, 2 R. I. 401, 60 Am. Dec. 93; *Yates v. Wing*, 42 App. Div. (N. Y.) 356; *Prescott v. Vershire*, 63 Vt. 517, 22 Atl. 655.

³⁴ *Morton v. Knox County*, 65 Fed. 369; *Olvey v. Johnson*, 106 Ind. 286, 4 N. E. 149; *Manchester v. Braedner*, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. 829.

³⁵ *Osment v. McElrath*, 68 Cal. 466, 58 Am. R. 17, 9 Pac. 731; *Miller v. Beardsley*, 81 Iowa 720, 45 N. W. 756; *Deep River Nat. Bank, In re*, 73 Conn. 341, 47 Atl. 675; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483; *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896; a letter to an agent was held sufficient in, *Bond v. Wilson*, 131 N. Car. 505, 42 S. E. 956; see also, *Brown v. Warner*, 116 Wis. 358, 93 N. W. 17.

³⁶ *Livermore v. Rand*, 26 N. H. 85; *Landis v. Roth*, 109 Pa. St. 621, 1 Atl. 49; but it may be so connected

was held not to be against interest and inadmissible to show payment.⁵¹ And entries by the debtor in his book of accounts, while said to be some evidence of an acknowledgment, have been held not to be sufficient in and of themselves.⁵²

Pac. 42; Libby v. Brown, 78 Me. 492, 7 Atl. 114. v. Olin, 140 N. Y. 150, 35 N. E. 448, when made by his clerk without

⁵¹ Small v. Rose, 97 Me. 236, 54 Atl. 726. his knowledge; but compare, Bluehill Academy v. Ellis, 32 Me. 260;

⁵² Stiles v. Laurel &c. Oil &c. Co., 47 W. Va. 838, 35 S. E. 989; Adams Coulson v. Hartz, 47 Ill. App. 20.

CHAPTER CXIII.

MALICIOUS PROSECUTION.

Sec.

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§ 2470. Generally.—It is the right of every man who believes that he has a just demand against another to institute an action therefor and to endeavor to obtain the proper redress. It is also the right of every man to institute or set on foot criminal proceedings when he has cause to believe and does believe that a public offense has been committed. But, on the other hand it is a duty which every man owes not to institute proceedings maliciously, which he has no good reason to believe are well founded in law and in fact.¹ Where an action or prosecution has been instituted without any probable cause therefor

¹ Cooley Torts, (1st ed.) 180; see also, *Teal v. Fissel*, 28 Fed. 351; *Ferguson v. Arnow*, 142 N. Y. 580, 37 N. E. 626; *Kolka v. Jones*, 6 N. Dak. 461, 71 N. W. 558, to the effect that public policy favors the prosecution of crime and the enforcement of rights and redress of wrongs in the courts. For review of authorities upon the general subject of actions for malicious prosecution see, note in *Emerson v. Cochran*, 111

Pa. 619, 4 Atl. 500-506; notes in, *Ross v. Hixon*, 46 Kans. 550, 26 Am. St. 127-164; *Frowman v. Smith*, Litt. Sel. Cas. 7, 12 Am. Dec. 265-268; *Williams v. Hunter*, 3 Hawk. (N. Car.) 545, 14 Am. Dec. 599-603; *Dennis v. Ryan*, 65 N. Y. 385, 22 Am. R. 639-644; *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. R. 495-499; *Pope v. Pollock*, 46 Ohio St. 367, 4 L. R. A. 255-260.

and the motive in instituting it was malicious and the prosecution has terminated in the acquittal or discharge of the accused, an action for malicious prosecution will lie by the party injured against the party who instituted such proceedings, in all jurisdictions where the proceeding so instituted was a criminal prosecution and in many jurisdictions even though the proceeding so instituted was a civil action.

§ 2471. **Malicious prosecution of civil actions.**—It is sometimes said that an action will not lie for damages for the malicious prosecution of a civil action, but there are few jurisdictions in which this is the law without qualification or limitation. In many jurisdictions, however, it is true that no action will lie in such a case unless there has been an arrest of the person, an attachment or seizure of property or the like causing special injury. But in almost, if not quite, an equal number of jurisdictions it is held that an action will lie for the malicious prosecution of a civil action without probable cause even though there has been no arrest or seizure of property. As this, however, depends upon the substantive law of the particular jurisdiction, rather than upon any principle or rule of evidence, an extended treatment of the subject would be out of place.² But it may be well to note that in a recent case it is held that where there has been a wrongful attachment of property an action will lie, and that where, because of such attachment in a foreign jurisdiction, the plaintiff was refused a loan by a bank, which it had previously promised him, evidence is admissible as bearing on the question of damages by tending to show a loss of credit.³

§ 2472. **Burden of proof.**—The burden of proof is upon the plaintiff in an action for malicious prosecution to establish all the essential elements of his cause of action.⁴ The burden is upon him to show a want of probable cause and this will not be presumed from the mere

²For consideration of the subject and citation of conflicting authorities and comparison of the different views, see articles in, 18 Cent. L. J. 346-348; Luby v. Bennett, 111 Wis. 613, 56 L. R. A. 261, and 338.

242, 29 Cent. L. J. 53; 41 Cent. L. J. 449; and notes in, Williams v. Hunter, 3 Hawk. (N. Car.) 545, 14 Am. Dec. 599-603; McCardle v. McGinley, 86 Ind. 538, 44 Am. R.

³Tamblyn v. Johnston, 126 Fed. 267.

⁴See note in, Ross v. Hixon, 46 Kans. 550, 26 Am. St. 153, 154, and authorities cited; St. Louis &c. R. Co. v. Wallin, 71 Ark. 422, 75 S. W. 477.

failure of the prosecution,⁵ nor does malice necessarily establish a want of probable cause.⁶ So the burden of showing that the prosecution was malicious is upon the plaintiff.⁷ But as will hereafter be shown, malice in this connection does not necessarily mean actual malevolence or corrupt design. It must also be shown that the prosecution terminated favorably to the party who is plaintiff in the action for malicious prosecution.⁸ But when the plaintiff has introduced evidence making a prima facie case of want of probable cause the burden, at least in the sense of going forward with evidence upon the subject, is said to shift to the defendant.⁹ And it has been held that the burden

⁵ *Boyd v. Cross*, 35 Md. 194, and cases cited; *Good v. French*, 115 Mass. 201; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. 322, 11 S. W. 223; *Levy v. Brannan*, 39 Cal. 485; *Wilkinson v. Arnold*, 11 Ind. 45; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. R. 505; *Stewart v. Sonneborn*, 98 U. S. 187. But as hereafter shown, in many jurisdictions the failure of an examining magistrate to commit or of a grand jury to indict is admissible as evidence on the question.

⁶ *Williams v. Taylor*, 6 Bing. 183, 186; *Ross v. Innis*, 35 Ill. 487, 85 Am. Dec. 373; and see, *Heyne v. Blair*, 62 N. Y. 19, 22; *Foshay v. Ferguson*, 2 Denio (N. Y.) 617; *Skidmore v. Bricker*, 77 Ill. 164; *Krug v. Ward*, 77 Ill. 603; *Chapman v. Cawrey*, 50 Ill. 512; *Casperson v. Sproule*, 39 Mo. 39; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357; *Bell v. Percy*, 5 Ired. L. (N. Car.) 83; *Center v. Spring*, 2 Clarke (Iowa) 393; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Kidder v. Parkhurst*, 3 Allen (Mass.) 393; *Travis v. Smith*, 1 Pa. St. 234. But it has been said that because want of cause involves proof of a negative, and especially after proof of malice, slight evidence of want of probable cause is sufficient. *Williams v. Van-*

meter, 8 Mo. 339, 41 Am. Dec. 644; *Grant v. Deuel*, 3 Rob. (La.) 17, 38 Am. Dec. 228; see also, *Frowman v. Smith*, Litt. Sel. Cas., 7, 12 Am. Dec. 265.

⁷ *Dietz v. Langfitt*, 63 Pa. St. 234; *Sutton v. Anderson*, 103 Pa. St. 151; *Purcell v. McNamara*, 9 East. 361; *Savil v. Roberts*, 1 Salk. 14, 15; *Williams v. Taylor*, 6 Bing. 183; *Alrath v. North Eastern R. Co.*, 11 App. Cas. 247, 55 L. J. Q. B. 451; *McKown v. Hunter*, 30 N. Y. 625; *Flickinger v. Wagner*, 46 Md. 581; *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. 79; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Carey v. Sheets*, 67 Ind. 375; *Hidy v. Murray*, 101 Iowa 65, 69 N. W. 1138; *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914; *Hatjle v. Hare*, 68 Vt. 247, 35 Atl. 54.

⁸ *St. Louis & C. R. Co. v. Wallin*, 71 Ark. 422, 75 S. W. 477, and authorities in last two preceding notes. So, in some jurisdictions, in actions for damages for malicious prosecution of a civil proceeding facts giving rise to special damages, such as an arrest or interference with property must be shown.

⁹ *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914; *Hidy v. Murray*, 101 Iowa 65, 69 N. W. 1138; *Smith v. Eastern Bldg. & C. Asso.*, 116 N. Car.

of proving probable cause must be assumed by the defendant if the plaintiff was tried and acquitted,¹⁰ and in Louisiana it is held that where he pleads justification the burden is upon him to show that he acted on probable cause.¹¹

§ 2473. **Questions of law or fact.**—There is much apparent conflict among the authorities as to whether probable cause or want of probable cause in a particular case is a question of law or a question of fact. As an abstract question it is generally conceded that it is one of law, and there are numerous authorities which state in general terms that where there is no conflict in the evidence the question is one of law for the court,¹² but in a few of the same authorities and in some others it is said that when the evidence is conflicting the question as to whether probable cause existed in the particular case is for the jury.¹³ At first blush it may seem that there is no conflict between these statements, but further consideration, we think, shows that there is some conflict, and it is somewhat questionable whether either statement is entirely accurate. It is unquestionably for the jury, as a general rule, to weigh the evidence and determine whether the facts exist that are claimed to constitute probable cause, and, upon the other hand, it is for the court to determine what in law is necessary to constitute probable cause. In one sense, at least, it would therefore seem proper to call the question one of mixed law and fact. In actions for malicious prosecutions however,

73, 20 S. E. 963; *Josselyn v. McAlister*, 25 Mich. 45; *Burhans v. Sanford*, 19 Wend. (N. Y.) 417; *Butcher v. Hoffman*, 99 Mo. App. 239, 73 S. W. 266; *Cotton v. James*, 1 B. & Ad. 128, 20 E. C. L. 358. But ordinarily, we think the burden of showing want of probable cause upon the whole case is upon the plaintiff; see, *Newell Malic. Pros.* 282, § 17.

¹⁰ *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. 79, and note; *Barhight v. Tammarry*, (Pa.) 28 Atl. 135; but see, *Ullman v. Abrams*, 9 Bush. (Ky.) 738; see also, *Scott v. Dewey*, 23 Pa. Super. Ct. 396.

¹¹ *Sibley v. Lay*, 44 La. Ann. 936, 11 So. 581.

¹² *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Staunton v. Goshorn*, 94 Fed. 52; *Lancaster v. McKay*, (Ky.) 45 S. W. 887; *Bell v. Atlantic City R. Co.*, 58 N. J. L. 227, 33 Atl. 211; *Clark v. Folkers*, 1 Neb. 96, 95 N. W. 328; *Bechel v. Pacific Ex. Co.*, (Neb.) 91 N. W. 853; *Hucklestein v. New York L. Ins. Co.*, 205 Pa. St. 27, 54 Atl. 461.

¹³ *McClay v. Hicks*, 119 Mich. 65, 77 N. W. 636; *Langley v. East River Gas Co.*, 41 App. Div. (N. Y.) 470; *Grout v. Cottrell*, 22 N. Y. S. 336; *Buckl & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 233; *Anderson v. Keller*, 67 Pa. 58; *Heldt v. Webster*, 60 Tex. 207.

it can hardly be said that the jury determine whether probable cause exists in the particular case as one of fact, for the court, in most jurisdictions, and in most instances, applies the law to the facts found or directs the jury as to whether if they find certain facts to exist or not to exist there was or was not probable cause as the case may be.¹⁴ So, on the other hand it seems to us that there may be cases, although not very frequently met with, in which more than one reasonable inference might be drawn as to some element in regard to which the law makes no presumption or necessary inference, and that in such a case the question might be left to the jury, under proper instructions even if there was no conflict in the evidence. All that can be safely said, however, is that the prevailing view seems to be that quoted and approved by the Supreme Court of the United States¹⁵ as follows: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law."¹⁶ This is the doctrine generally adopted.¹⁷ It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what fact it proves, with instructions that the facts found amount to proof of probable cause, or that they do not."¹⁸ Malice is generally said to be a question of fact for the jury.¹⁹ But it is believed that it

¹⁴ Heyne v. Blair, 62 N. Y. 19; Cochran v. Toher, 14 Minn. 385; Anderson v. Keller, 67 Ga. 58; Ball v. Rawles, 93 Cal. 222, 27 Am. St. 174, 28 Pac. 937.

¹⁵ Stewart v. Sonneborn, 98 U. S. 187, 194.

¹⁶ Quoting Sutton v. Johnstone, 1 Term R. 493.

¹⁷ McCormick v. Sisson, 7 Cow. (N. Y.) 715; Besson v. Southard, 10 N. Y. 236; see also, Provident & Co. v. Johnson, (Ky.) 72 S. W. 754; Acker v. Gundy, (Pa.) 12 Atl. 595; Ball v. Rawles, 93 Cal. 222, 27 Am. St. 174; 28 Pac. 937; Lytton v. Baird, 95 Ind. 349; Johnson v. Miller, 63 Iowa 529, 50 Am. R. 758, 82 Iowa 693, 31 Am. St. 514, 17 N. W. 34; Plummer v. Gheen, 3 Hawks

(N. Car.) 66, 14 Am. Dec. 572; Jackson v. Bell, 5 S. Dak. 257, 58 N. W. 671; French v. Smith, 4 Vt. 365, 24 Am. Dec. 516; Gee v. Culver, 12 Ore. 228; Vinal v. Core, 18 W. Va. 1; Hogg v. Pinckney, 16 S. Car. 387; Williams v. Norwood, 2 Yerg. (Tenn.) 329; Wilder v. Holden, 24 Pick. (Mass.) 8; Lewton v. Hower, 35 Fla. 58; Brown v. Smith, 83 Ill. 291; Wells v. Parsons, 3 Harr. (Del.) 505; Greenwade v. Mills, 31 Miss. 464.

¹⁸ Taylor v. Willans, 2 B. & A. 845.

¹⁹ Helwig v. Beckner, 149 Ind. 131, 46 N. E. 644; Lawrence v. Leathers, 31 Ind. App. 414, 68 N. E. 179; Hidy v. Murray, 101 Iowa 65, 69 N. W. 1138; Besson v. Southard, 10 N. Y.

cused otherwise than by his discharge by the grand jury or the committing magistrate, it is generally agreed that such termination is not evidence of the absence of probable cause. It is therefore held that although the plaintiff proves a verdict of acquittal and a judgment in his favor thereon, he must still offer some evidence tending to show that his prosecution was without probable cause.³² The same evidence sometimes tends to show both want of probable cause and malice, and when it does not tend to show both it may nevertheless be admissible as tending to show one. No general rule can be laid down as to what evidence is admissible to show want of probable cause other than the rule that if it legitimately tends to show that fact and is not rendered inadmissible by some rule of exclusion it should be received. Illustrative cases are cited below³³ and others will be referred to in subsequent sections.

§ 2476. **Evidence of probable cause.**—As a general rule, the conviction of the plaintiff is not only evidence, but is while it remains in force, conclusive evidence of probable cause.³⁴ But evidence that he

³² *Grant v. Deuel*, 3 Rob. (La.) 17, 38 Am. Dec. 228; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. R. 505; *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. 322, 11 S. W. 223; *Stewart v. Sonneborn*, 98 U. S. 187; *Ullman v. Abrams*, 9 Bush. (Ky.) 738; *Purcell v. MacNamara*, 9 East 361, 1 Camp. 199; *Sweeney v. Porney*, 40 Kans. 102, 19 Pac. 328; as to the failure to succeed in a civil suit alleged to have been maliciously prosecuted, see, *Stewart v. Sonneborn*, 98 U. S. 187; *Kolka v. Jones*, 6 N. Dak. 461; *Hay v. Weakley*, 5 Car. & P. 361, 24 E. C. L. 361.

³³ *Schofield v. Ferrers*, 47 Pa. St. 194, 86 Am. Dec. 532; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Gould v. Gregory*, (Mich.) 95 N. W. 414; *Tabert v. Cooley*, 46 Minn. 366, 49 N. W. 124. Evidence of conversations at the time of executing a written contract is not

rendered inadmissible by the parol evidence rule when introduced for the purpose of showing want of probable cause for the arrest of the plaintiff on the claim that he had obtained money under false pretenses in procuring the execution of such contract: *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916; see also, *Walker v. Camp*, 69 Iowa 741, 27 N. W. 800.

³⁴ *Blackman v. West Jersey &c. R. Co.*, 126 Fed. 252; *Crescent City Co. v. Butchers Co.*, 120 U. S. 141, 7 Sup. Ct. 472; *Griffin v. Sellars*, 3 Dev. & B. L. (N. Car.) 492, 31 Am. Dec. 422; *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804; *Ross v. Hixon*, 46 Kans. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. 123, and numerous authorities cited in note; see also, as to civil actions, *Crescent City &c. Co. v. Butchers &c. Co.*, 120 U. S. 141, 7 Sup. Ct. 472; *Short v. Spragins*, 104 Ga. 628, 30 S. E. 810; *Clement*

was held to answer or bound over by an examining magistrate or indicted by the grand jury, while usually admissible and generally treated as *prima facie* evidence of probable cause, it is not conclusive.³⁵ Although it is generally held that one who is shown to have been guilty of the offense charged cannot maintain an action for malicious prosecution, yet as a general rule the defendant cannot justly claim to have had probable cause unless he had some knowledge of the facts at the time he prosecuted the plaintiff, and it is therefore held that although there were other existing circumstances of which he afterwards became aware, and which, had he known them at the time, would have strengthened his conviction and made it more reasonable, yet as he, from not knowing them, could not have acted upon them, evidence of them should not be received to show that he had probable cause and justify his action.³⁶ But where the defendant not only relied on statements contained in a letter from a third person, but also calls upon such third person to testify in support of such statements, the plaintiff, on cross-examination of such person, has the right to show their falsity although the defendant believed them to be true.³⁷ It has also been held that the effect of circumstances, known to the prosecutor, though weakened by other explanatory or exculpatory facts of which he had no knowledge or notice, may tend to establish the existence of probable cause.³⁸ But information upon which the defendant acted in instituting the prosecution may be shown when it tends to prove probable cause and show his good faith, and, as elsewhere explained, the admission of such evidence introduced for that purpose is not in viola-

v. *Odorless &c. Co.*, 67 Md. 461, 1 Am. St. 409; *Dolan v. Thompson*, 129 Mass. 205.

³⁵ *Ross v. Hixon*, 46 Kans. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. 123; *Diemer v. Herber*, 75 Cal. 287, 17 Pac. 205; *Ricord v. Cent. Pac. R. Co.*, 15 Nev. 167; *Peck v. Chouteau*, 91 Mo. 138, 60 Am. R. 236; and note in, *Ross v. Hixon*, 46 Kans. 550, 26 Am. St. 158. So the disagreement of the jury is *prima facie* evidence of probable cause; *Johnson v. Miller*, 63 Iowa 529, 50 Am. R. 758, 17 N. W. 34.

³⁶ *Harkrader v. Moore*, 44 Cal. 144; *Thompson v. Beacon &c. Rubber Co.*, 56 Conn. 493, 16 Atl. 554;

Delegal v. Highley, 2 Bing. N. Cas. 959; *Louisville &c. R. Co. v. Hendricks*, 13 Ind. App. 10, 40 N. E. 82; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Galloway v. Stewart*, 49 Ind. 156, 19 Am. R. 677; *Turner v. Ambler*, 10 Q. B. 252, 59 E. C. L. 252, 6 Jur. 346, 11 L. J. Q. 158; *Three-foot v. Nuckols*, 68 Miss. 116; *Bell v. Percy*, 5 Ired. L. (N. Car.) 233; *McIntire v. Levering*, 148 Mass. 546, 12 Am. St. 594, 20 N. E. 191; *Josselyn v. McAllister*, 25 Mich. 45.

³⁷ *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179.

³⁸ *King v. Colvin*, 11 R. I. 582; *Swaine v. Stafford*, 4 Ired. L. (N. Car.) 392.

tion of the hearsay rule, although it consists of the statement of others.³⁹

§ 2477. **Evidence of good reputation of plaintiff.**—It has been said in two or three cases that the plaintiff in an action for malicious prosecution ought not to be allowed to prove that his reputation before the prosecution was good.⁴⁰ But, certainly if the defendant is permitted to show that the reputation of the plaintiff was bad both on the question of damages and as tending to show probable cause or a belief of guilt it would seem that the plaintiff should be allowed to show his good reputation and most of the authorities so hold.⁴¹ Indeed, it is held that such evidence, where the good reputation of the plaintiff is known to the defendant, or ought to have been and is presumptively known to him, is admissible for the plaintiff in chief and not merely in rebuttal.⁴²

§ 2478. **Evidence of bad reputation of plaintiff.**—As the injury to the reputation of one whose reputation is already bad is not, ordinarily at least, so great as if his reputation had been good, and as one may well be more likely to entertain a reasonable belief in the guilt of a person of bad reputation, evidence of the bad reputation of the plaintiff before the charge was preferred against him is generally held admissible both in mitigation of damages and as tending to show that his prosecution was not without probable cause, at least where it was known to the defendant.⁴³ It has also been held that the defendant is entitled to show that when the plaintiff was arrested he

³⁹ Vol. I, § 324.

⁴⁰ *Kennedy v. Holladay*, 25 Mo. App. 503; *Skidmore v. Bricker*, 77 Ill. 164.

⁴¹ *Blizzard v. Hays*, 46 Ind. 166, 15 Am. R. 291; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. R. 135, 20 N. E. 728; *San Antonio & C. R. Co. v. Griffin*, 20 Tex. Civ. App. 91; *Coleman v. Heurich*, 2 Mackey (D. C.) 189; *Ross v. Innis*, 35 Ill. 487, 85 Am. Dec. 373; *Israel v. Brooks*, 23 Ill. 526.

⁴² *McIntire v. Levering*, 148 Mass. 546, 20 N. E. 191, 12 Am. St. 594;

Woodworth v. Mills, 51 Wis. 44, 50 Am. R. 135, 20 N. E. 728; *Funk v. Amor*, 4 Ohio C. C. 271, 2 Ohio Dec. 541.

⁴³ *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. R. 169, 3 N. E. 93; *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773; *Fitzgibbon v. Brown*, 43 Me. 169; *Rodriguez v. Tadmire*, 2 Esp. 721; *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693; *Gee v. Culver*, 13 Ore. 598, 11 Pac. 302; *Pullen v. Glidden*, 68 Me. 559; see also, *Hiersche v. Scott*, (Neb.) 95 N. W. 494.

was in the company of a person of bad character, and thereby exposed himself to suspicion.⁴⁴ In Wisconsin, while the general rule is not questioned it has been held that evidence of such reputation is not admissible under the general issue.⁴⁵ The plaintiff is not required however to meet charges of specific offenses;⁴⁶ nor can the defendant support his defense of probable cause by proving that though the plaintiff did not commit the crime of which he was accused, yet that he did at or about the same time commit another and entirely different offense.⁴⁷ But when a guilty knowledge is essential to the crime of which the plaintiff was accused, it has been held that the defendant may prove facts and circumstances, known to him at the time of the prosecution, sufficient to create a belief in the mind of a reasonable man, and in fact creating a belief in the defendant's mind, that the accused had committed other offenses like that for which he was prosecuted.⁴⁸

§ 2479. Evidence as to malice.—A prosecution is malicious when actuated by personal hostility and ill-will or vindictive motives, and proper evidence thereof is admissible.⁴⁹ And such ill-will or malice may be shown by conduct as well as words.⁵⁰ So, evidence of prior unfriendly relations has been held competent upon the question.⁵¹ But malice in this connection is not confined to ill-will or the like. It includes any improper sinister and wrongful motive for instituting the proceeding. It need not be shown by direct and positive testimony, but may be inferred from circumstances and established by circumstantial evidence.⁵² Proper evidence of the acts, conduct, and declarations of

⁴⁴ *Hitchcock v. North*, 5 Rob. (La.) 328, 39 Am. Dec. 540.

⁴⁵ *Scheer v. Keown*, 34 Wis. 349.

⁴⁶ *Gregory v. Thomas*, 2 Bibb. (Ky.) 286, 5 Am. Dec. 608; *Rodriguez v. Tadmire*, 2 Esp. 721; *O'Brien v. Frasier*, 47 N. J. L. 349, 54 Am. R. 170.

⁴⁷ *Carson v. Eggeforth*, 43 Mich. 241, 5 N. W. 282; *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414; *Chrisman v. Carney*, 33 Ark. 316.

⁴⁸ *Thelin v. Dorsey*, 59 Md. 539; *Thomas v. Russell*, 9 Ex. 764.

⁴⁹ *Caddy v. Barlow*, 1 M. & R. 275; *Langley v. East River Gas Co.*, 41 App. Div. (N. Y.) 470; *Christian v. Hanna*, 58 Mo. App. 37.

⁵⁰ *Thompson v. Force*, 65 Ill. 370; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728, 50 Am. R. 135; *Wild v. Odell*, 56 Cal. 136; *Garvey v. Wayson*, 42 Md. 178.

⁵¹ *Lyon v. Hancock*, 35 Cal. 372; *Parker v. Parker*, 102 Iowa 500, 71 N. W. 421; *Bruington v. Wingate*, 55 Iowa 140, 7 N. W. 478; *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; see also, *Clark v. Folkers*, 1 Neb. 96, 95 N. W. 328.

⁵² *Lunsford v. Deitrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. 79; *Lemay v. Williams*, 32 Ark. 166; *Blass v. Gregor*, 15 La. Ann. 421; *Christian v. Hanna*, 58 Mo. App. 37; *Brooks v. Jones*, 11 Ired. L. (N. Car.) 260;

the defendant with regard to the plaintiff and the proceedings complained of is admissible.⁵³ Thus it may be shown that the defendant was active and zealous in pushing the prosecution against the plaintiff.⁵⁴ So, evidence of successive suits by the defendant on the same groundless claim or successive complaints of attempts to prosecute on the same charges is admissible to show malice.⁵⁵ Again, evidence that the accomplishment of some personal or private end was sought by a criminal prosecution is admissible,⁵⁶ and it has also been held competent to take into consideration the insignificance of the amount in-

Ramsey v. Arrott, 64 Tex. 323; *Messman v. Ihelfeldt*, 89 Wis. 585, 62 N. W. 522; *Young v. Lyall*, 57 N. Y. Super. Ct. 39. It may, indeed, be inferred by the jury from want of probable cause or at least, in many instances, from the same facts that show want of probable cause; *Harpham v. Whitney*, 77 Ill. 32; *Williams v. Vanmeter*, 8 Mo. 339, 41 Am. Dec. 644; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. R. 366; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Sharpe v. Johnston*, 76 Mo. 660; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415; but see, *Coleman v. Botsford*, 85 N. Y. S. 1; *Anderson v. How*, 116 N. Y. 336, 338, 22 N. E. 695.

⁵³ *Motes v. Bates*, 80 Ala. 382; *Lunsford v. Dietrich*, 93 Ala. 565, 30 Am. St. 79; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. St. 505; *Walker v. Pitman*, 108 Ind. 341; *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; *Chapman v. Dodd*, 10 Minn. 350; *Christian v. Hanna*, 58 Mo. App. 37; *Holden v. Merritt*, 92 Iowa 707, 61 N. W. 390; *Hidy v. Murray*, 101 Iowa 65, 69 N. W. 1038; *Parker v. Parker*, 102 Iowa 500, 71 N. W. 421; *Brooks v. Jones*, 11 Ired. L. (33 N. Car.) 260; *Strehlow v. Pettit*, 96 Wis. 22, 71 N. W. 102; *Zantzinger*

v. Weightman, 2 Cranch (U. S.) 478; *Marks v. Hastings*, 101 Ala. 165, 13 So. 97; *Gilliford v. Windel*, 108 Pa. St. 142; *Wuest v. American Tobacco Co.*, 10 S. Dak. 394, 73 N. W. 903; *Willard v. Pettit*, 153 Ill. 663, 39 N. E. 991.

⁵⁴ *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. 79; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. R. 505; *Smith v. McDaniel*, 5 Ind. App. 581, 32 N. E. 798; *Straus v. Young*, 36 Me. 246; *Smith v. Maben*, 42 Minn. 516, 44 N. W. 792; *Vanderbilt v. Mathias*, 5 Duer (N. Y.) 304; *Gifford v. Hassam*, 50 Vt. 704; *Cooney v. Chase*, 81 Mich. 203, 45 N. W. 833; *Brockleman v. Brandt*, 10 Abb. Pr. (N. Y.) 141.

⁵⁵ *Schumann v. Torbett*, 86 Ga. 25, 12 S. E. 185; *Payne v. Donegan*, 9 Ill. App. 566; *Cooney v. Chase*, 81 Mich. 203, 45 N. W. 833; *Severns v. Brainard*, 61 Minn. 265, 63 N. W. 477; *Reynolds v. Haywood*, 77 Hun (N. Y.) 131; *Magner v. Renk*, 65 Wis. 364, 27 N. W. 26.

⁵⁶ *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. 79; *Tryon v. Pingree*, 112 Mich. 338, 70 N. W. 905; *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101; see also, *Watt v. Greenlee*, 2 Hawks (N. Car.) 186.

volved, or the value of the property alleged to have been stolen.⁵⁷ Indeed, it may be stated, with some degree of accuracy, as a general rule that whatever tends to show the motive or intent of the prosecutor in instigating or instituting the proceedings, unless within some particular rule of exclusion, is properly admissible on the question of malice.⁵⁸ The defendant in those states in which he is permitted to testify in his own behalf is allowed to give direct evidence of his motives and purposes in the prosecution.⁵⁹ So, he may show by other proper evidence that he acted in good faith, without malice, and upon probable cause.⁶⁰

§ 2480. **Advice of counsel.**—The fact that the defendant in instituting the proceeding complained of acted in good faith upon the advice of a disinterested and reputable attorney to whom he stated all the material facts known to him is generally held to constitute a complete defense,⁶¹ or at least to tend to do so. Evidence as to these

⁵⁷ *Olson v. Neal*, 63 Iowa 214, 18 N. W. 863; *Parker v. Parker*, 102 Iowa 500, 71 N. W. 421; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728, 50 Am. R. 135; *Olmstead v. Partridge*, 16 Gray (Mass.) 381; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380.

⁵⁸ *McCann v. Preneveau*, 10 Ont. 573; *Brown v. Willoughby*, 5 Colo. 1; *Roy v. Goings*, 6 Ill. App. 140; *Vansickle v. Brown*, 68 Mo. 627; *Palmer v. Broder*, 78 Wis. 483, 47 N. W. 744; *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. R. 505; *Griffin v. Keeney*, 27 App. Div. (N. Y.) 492; *Wilkinson v. Arnold*, 11 Ind. 45; *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375; *Montgomery v. Sutton*, 58 Iowa 697, 12 N. W. 719.

⁵⁹ *Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 121 Fed. 469; *Sherburne v. Rodman*, 51 Wis. 474, 8 N. W. 414; *Greer v. Whitfield*, 4 Lea (Tenn.) 85; *Vansickle v. Brown*, 68 Mo. 627; *McCormack v. Perry*, 47 Hun (N. Y.) 71; *Coleman*

v. Heurich, 2 Mackey (U. S.) 189; *Heap v. Parrish*, 104 Ind. 36, 3 N. E. 549; *Turner v. O'Brien*, 5 Neb. 542; *Spalding v. Lowe*, 56 Mich. 366, 23 N. W. 46; *Sparling v. Conway*, 75 Mo. 510.

⁶⁰ See, *Collins v. Hayte*, 50 Ill. 387, 99 Am. Dec. 521; *Collins v. Fisher*, 50 Ill. 359; *Brown v. Willoughby*, 5 Colo. 1; *Wright v. Hanna*, 98 Ind. 217; *Hopkins v. McGillicuddy*, 69 Me. 273; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937; *Lunsford v. Dietrich*, 86 Ala. 250, 5 So. 461, 11 Am. St. 37.

⁶¹ *Kansas & Coal Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Dunlap v. New Zealand & Co. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Hess v. Oregon Baking Co.*, 31 Ore. 503, 49 Pac. 803; *Terre Haute & Co. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332; *Jordan v. Alabama & Co. R. Co.*, 81 Ala. 220, 8 So. 191; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Pawlowski v. Jenks*, 115 Mich. 275, 73 N. W. 238; *Bartlett v. Brown*, 6 R. I. 37, 75 Am. Dec. 675; *Bell v.*

facts, including the advice given by the attorney, is therefore relevant and admissible.⁶² The authorities, however, are not agreed as to whether such advice shows probable cause or more properly bears upon the question of malice. Some of them consider it as showing probable cause,⁶³ others as showing or tending to show that there was no malice,⁶⁴ and still others as bearing upon both questions. Indeed, as will be seen from the authorities already cited in the notes, it is sometimes said in the same jurisdiction in one case that such evidence is admissible upon the question of probable cause and in another upon the question of malice. It is not, perhaps, very important upon which matter the evidence is admissible except for one consideration, and that is that where malice is held to be a question of fact and probable cause a question of law, if the advice of counsel only goes to the question of malice there would be much more reason for holding that if there were other evidence of malice the jury might find that the prosecution was malicious notwithstanding the facts were all laid before counsel and his advice was acted upon, whereas if evidence of such advice shows probable cause it would generally be conclusive and constitute a complete defense if properly asked, obtained and acted upon.⁶⁵

Atlantic City R. Co., 58 N. J. L. 227, 33 Atl. 211; see also, note in, *Ross v. Hixon*, 46 Kans. 550, 26 Am. St. 143-147; but see, *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Brewer v. Jacobs*, 22 Fed. 217; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477; *Lemay v. Williams*, 32 Ark. 166; in some jurisdictions, however, it must also appear that he exercised reasonable diligence in making inquiries and learning the facts. See, *Parker v. Parker*, 102 Iowa 500, 71 N. W. 421; *Manning v. Finn*, 22 Neb. 511, 37 N. W. 314; *Ahrens Mfg. Co. v. Hoehner*, 106 Ky. 692, 51 S. W. 194.

⁶² *Terre Haute &c. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332, and authorities cited in first note to this section.

⁶³ *Terre Haute &c. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Genevey v. Edwards*, 55 Minn. 78, 56 N. W. 578; *Wuest v. American Tobacco Co.*, 10 S. Dak. 394, 73 N. W. 903; *Kansas &c. Coal Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521.

⁶⁴ *Brewer v. Jacobs*, 22 Fed. 217; *Glasgow v. Owen*, 69 Tex. 167, 6 S. W. 527; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Emerson v. Cochran*, 111 Pa. St. 86, 4 Atl. 498; see also, *Paddock v. Watts*, 116 Ind. 149, 18 N. E. 518, 9 Am. St. 832, 836.

⁶⁵ *Struby-Estabrook &c. Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Whitfield v. Westbrook*, 40 Miss. 311; *Collins v. Hayte*, 50 Ill. 337, 99 Am. Dec. 521; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; see also, *Terre Haute &c. R. Co. v.*

§ 2481. **Evidence of character of parties.**—As already shown, evidence of the bad reputation of the plaintiff, known to the defendant before he instituted or instigated the proceedings complained of in an action for malicious prosecution is admissible as tending to show that he had reasonable grounds⁶⁶ or motives for so doing as well as upon the question of damages, and so, it seems, is evidence of good reputation admissible for the plaintiff. But the character of the defendant is not, ordinarily, in issue in such a case, and evidence thereof is generally inadmissible.⁶⁷ Evidence of his bad character or reputation for truth and veracity may, however, be admissible to impeach his credibility as a witness, as in other cases.⁶⁸

§ 2482. **Evidence of financial condition.**—Evidence of the defendant's financial condition is competent upon the question of damages where punitive or exemplary damages may be recovered.⁶⁹ It has also been held that in an action for malicious prosecution for an alleged fraudulent disposition of mortgaged property evidence that the plaintiff had a large amount of property is competent upon the question of probable cause.⁷⁰ But evidence of the defendant's social position or family relations is not admissible.⁷¹

§ 2483. **Damages and elements thereof.**—The amount of damages is largely a question for the jury, under proper instructions,⁷² but damages that are too remote should not be included.⁷³ The expense of the plaintiff in defending the proceedings complained of, so far as reasonable, may be recovered.⁷⁴ Mental suffering is also an element

⁶⁶ See § 2478; see also, Vol. 1, § 170.

⁶⁷ *Rogers v. Lamb*, 3 Blackf. (Ind.) 155; *Vansickle v. Shenk*, 150 Ind. 413, 417, 50 N. E. 381; *Horne v. Sullivan*, 83 Ill. 30; but compare, *Scott v. Fletcher*, 1 Overt. (Tenn.) 488; *Goodrich v. Warner*, 21 Conn. 432.

⁶⁸ *Goodrich v. Warner*, 21 Conn. 432.

⁶⁹ *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. 105; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204, 11 Am. St. 449; *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506; *Winn v. Peckham*, 42 Wis. 493; *Peck v. Small*, 25 Minn. 465, 29 N. W. 69; *Weaver v. Page*, 6 Cal. 581.

⁷⁰ *Reisan v. Mott*, 42 Minn. 49, 43 N. W. 691, 18 Am. St. 489.

⁷¹ *Renfro v. Prior*, 22 Mo. App. 403.

⁷² *Hiatt v. Kinkaid*, 28 Neb. 721, 45 N. W. 236; *Chapman v. Dood*, 10 Minn. 350; *Marks v. Hastings*, 101 Ala. 165, 13 So. 297.

⁷³ *Fletcher v. Chicago &c. R. Co.*, 109 Mich. 363, 67 N. W. 330; *Donnell v. Jones*, 18 Ala. 490, 48 Am. Dec. 59; *Hampton v. Jones*, 58 Iowa 317, 12 N. W. 276; see also, *Oldfather v. Zent*, 14 Ind. App. 89, 41 N. E. 555.

⁷⁴ *Murphy v. Larson*, 77 Ill. 172; *Krug v. Ward*, 77 Ill. 603; *Eastin v. Stockton Bank*, 66 Cal. 123, 4 Pac.

that may be considered in a proper case.⁷⁵ So, there may be a recovery for injury to the plaintiff's reputation and credit.⁷⁶ If he was wrongfully deprived of his liberty⁷⁷ or his property was wrongfully seized⁷⁸ these facts may also be considered as elements of damage. Exemplary or punitive damages may also be recovered in a proper case where actual malice is shown or the circumstances are such as to justify the award of such damages.⁷⁹ As to the damages actually suffered by the plaintiff there cannot well be any mitigation.⁸⁰ But, his previous bad reputation may generally be shown in mitigation because the injury or damages in such a case would probably not be so great.⁸¹ Evidence tending to disprove the malice is also competent in mitigation of punitive or exemplary damages.⁸²

1106, 56 Am. R. 77; *Slater v. Kimbo*, 91 Ga. 217, 18 S. E. 296, 44 Am. St. 19; *Lockenour v. Sides*, 57 Ind. 360, 26 Am. R. 58; *Wheeler v. Hanson*, 161 Mass. 379, 37 N. E. 382, 42 Am. St. 408; *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363; *Rowland v. Samuel*, 11 Q. B. 39, 63 E. C. L. 39; but see as to attorney's fees in some jurisdictions, *Stewart v. Sonneborn*, 98 U. S. 187; *Sinclair v. Eldred*, 4 Taunt. 7; *Webber v. Nicholas*, R. & M. 419, 21 E. C. L. 479.

⁷⁵ *Killebrew v. Carlisle*, 97 Ala. 535, 12 So. 167; *Davis v. Seeley*, 91 Iowa 583, 60 N. W. 183, 51 Am. St. 356; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. 408; *McWilliams v. Hoban*, 42 Md. 56.

⁷⁶ *Slater v. Kimbro*, 91 Ga. 217, 18 S. E. 296, 44 Am. St. 19; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. 408; *Hamilton v. Smith*, 39 Mich. 222; *Kennedy v. Meacham*, 18 Fed. 312; see also, *Sheldon v. Carpenter*, 4 N. Y. 578, 55 Am. Dec. 301.

⁷⁷ *Hamilton v. Smith*, 39 Mich.

222; *Cassinelli v. Cassinelli*, 24 Nev. 182, 51 Pac. 252. Loss of time and interruption of business. *Wilson v. Bowen*, 64 Mich. 133 31 N. W. 81; *Blunk v. Atchison & Co. R. Co.*, 38 Fed. 311.

⁷⁸ *Gundermann v. Buschner*, 73 Ill. App. 180; *Newark Coal Co. v. Upson*, 40 Ohio St. 17; *Moffatt v. Fisher*, 47 Iowa 473.

⁷⁹ *Parkhurst v. Masteller*, 57 Iowa 474; *McWilliams v. Hoban*, 42 Md. 56; *Cooper v. Utterbach*, 37 Md. 283; *Lytton v. Baird*, 95 Ind. 349; *Ellis v. Hampton*, 123 N. Car. 194, 31 S. E. 473; *Rice v. Miller*, 70 Tex. 613, 8 S. W. 317, 8 Am. St. 630; *Brown v. Master*, 111 Ala. 397, 20 So. 344; *Russell v. Bradley*, 50 Fed. 515; see also, Ch. XCVII.

⁸⁰ See, *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501; *Wilson v. Young*, 31 Wis. 594.

⁸¹ *Fitzgibbon v. Brown*, 43 Me. 169; *O'Brien v. Frazier*, 47 N. J. L. 349, 1 Atl. 465, 54 Am. R. 170; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. R. 169; *Bacon v. Towne*, 4 Cush. (Mass.) 217.

⁸² *Bradner v. Faulkner*, 93 N. Y. 515; *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375.

CHAPTER CXIV.

MARRIAGE.

Sec.	Sec.
2484. Meaning of term.	2491. Evidence in general—Written evidence, records, certificates.
2485. Burden of proof.	2492. Evidence in general—As to insanity at time of marriage.
2486. Presumptions—In general.	2493. Evidence in general—What not admissible.
2487. Conflicting presumptions.	2494. Evidence in general—Weight.
2488. Presumptions—Rebuttal.	
2489. Questions of law or fact.	
2490. Evidence in general—Oral testimony and witnesses.	

§ 2484. **Meaning of term.**—Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil *status* of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is thus founded on the distinction of sex. In another sense, it is a contract, according to the form prescribed by law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife. The word also signifies the act, ceremony, or formal proceeding by which persons take each other for husband and wife.¹ "As between the immediate parties, under the law, marriage is a civil contract; but as between them and the state, or organized society, marriage is more than a civil contract, it is a status or relation."²

§ 2485. **Burden of proof.**—The rule is that where a marriage in fact is shown, the burden of proof is generally on the party assailing its validity.³ Thus, where the validity of a woman's second marriage

¹ Black Law Dict.

R. 792; State v. Bittick, 103 Mo.

² McCabe v. Berge, 89 Ind. 225; 183, 191, 15 S. W. 325, 23 Am. St. see also, Harvey v. Farnie, 8 App. 869; State v. Duket, 90 Wis. 272, 63 Cas. (L. R.) 43, 47; Gregory v. Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. N. W. 83, 48 Am. St. 928.

³ Jones v. Gilbert, 135 Ill. 27, 25

is contested on the ground that she has a former husband living, from whom she is not divorced, the burden of proof is on the party who alleges the invalidity.⁴ And so where a second husband sues for a divorce, alleging that his wife has another husband living, the burden of showing definitely that such first husband is not dead rests on the plaintiff.⁵ He must also overcome the presumption of law that the former marriage has been legally dissolved.⁶ And it is held that the burden of proving the validity of a prior marriage, in such a case, is upon the party who alleges it.⁷ The burden of proof of showing the invalidity of a marriage on the ground of the lack of authority of the person officiating is upon the party attacking the marriage.⁸ It is held, however, that when a prior marriage is established by one attacking the validity of a subsequent marriage, it is the duty of the defendant to show that the prior marriage is a nullity.⁹ Thus in an action brought by a wife against her husband, on the ground that he had another wife living at the time of his marriage to her, if the petitioner shows that there was a former marriage between the defendant and another person than herself, and the relation of husband and wife between the parties thereto was still subsisting at the time of the marriage of the petitioner to the defendant, it is then held to be the duty of the defendant to show that the first marriage is a nullity.¹⁰ Where a plaintiff seeks to set aside his marriage on the ground of duress, the burden of showing its invalidity rests on him.¹¹ So, where one bases his claim to land upon the alleged invalidity of a marriage, he must by proper proof, remove every presumption in favor of the legality of the marriage, although to do this he must prove a negative.¹² But it has been held, however, that if the circumstances attending the com-

N. E. 566; *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 60 Am. St. 936; 41 N. E. 800; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81.

Boulden v. McIntire, 119 Ind. 574, 21 N. E. 445; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600. ⁷ *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. 180.

⁸ *Meggins's Estate*, In re, 21 Ore. 387, 28 Pac. 388.

⁹ *Patterson v. Gaines*, 6 How. (U. S.) 550; see also, *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 443. ¹⁰ *Lindsay v. Lindsay*, 42 N. J. Eq. 150, 7 Atl. 666; see also, *Ferrell v. State*, (Fla.) 34 So. 220.

¹¹ *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 52 Am. St. 180. ¹² *Bassett v. Bassett*, 72 Ky. 696.

¹³ *Wenning v. Teeple*, 144 Ind. 189, 574, 21 N. E. 445, 12 Am. St. 453.

mencement of cohabitation show an illicit union, the presumption that the original condition continued must be overcome by whoever asserts that a later cohabitation was matrimonial.¹³ In nullity suits for impotency, the burden of proof is upon the party alleging the impotency to establish the fact of impotency at the time of the marriage and also that it is incurable.¹⁴ And the rule is also said to be that where one contests a foreign marriage on the ground of its illegality in the foreign country he has the burden of proof to establish affirmatively what the law was in the foreign country at the time of the marriage.¹⁵ But the burden has been held to be on the one who claims the goods of an intestate by marriage to show the marriage.¹⁶ So, the burden has been held to be on a woman, who claims to be the widow of the deceased, to establish such fact.¹⁷

§ 2486. **Presumptions in general.**—After a marriage is proved every presumption is, ordinarily, in favor of its validity.¹⁸ Thus, where a marriage celebration is proved, the contract, capacity of the parties, and the validity of the marriage will be presumed.¹⁹ And it is held that any legitimate presumption in which a jury may indulge for the purpose of arriving at a verdict in favor of the marriage, if founded on any evidence whatever, will be upheld.²⁰ The following presumptions among others arise as to the formalities of a marriage: that the parties consented;²¹ that the parties were competent;²² that the person who performed the ceremony was authorized;²³ that the

¹³ *Cargile v. Wood*, 63 Mo. 501; see also, Vol. I, § 109, note 135, and § 123.

¹⁴ *Lorenz v. Lorenz*, 93 Ill. 376.

¹⁵ *Hynes v. McDermott*, 7 Abb. N. Cas. (N. Y.) 98; see, *Summerville v. Summerville*, 31 Wash. St. 411, 72 Pac. 84.

¹⁶ *Clark v. Cassidy*, 62 Ga. 407.

¹⁷ *Davis' Estate*, In re, 204 Pa. St. 602, 54 Atl. 475.

¹⁸ *Ward v. Dulaney*, 23 Miss. 410; *Hynes v. McDermott*, 10 Daly (N. Y.) 423; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *State v. Worthingham*, 23 Minn. 528; see also, Vol. I, § 123.

¹⁹ *United States v. Chaves*, 6 N. Mex. 180, 27 Pac. 489; *People v. Calder*, 30 Mich. 85; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *Lancot v. State*, 98 Wis. 136, 73 N. W. 575; *Meggison's Estate*, In re, 21 Ore. 387, 28 Pac. 388, 14 L. R. A. 540, and note.

²⁰ *Hynes v. McDermott*, 10 Daly (N. Y.) 423.

²¹ *Fleming v. People*, 27 N. Y. 329.

²² *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105.

²³ *Commonwealth v. Kenney*, 120 Mass. 387; *Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 758.

license was valid;²⁴ and that all the proceedings were regular.²⁵ So, it is held that every reasonable presumption is to be allowed in favor of marriage as against concubinage.²⁶ And it is generally held that no presumption of a prior marriage arises as against a subsequent formal marriage.²⁷ So, the first husband may be presumed to be dead or otherwise the second marriage would be criminal.²⁸ And the law may presume a divorce in case of a subsequent formal marriage.²⁹ And the weight of the later decisions is to the effect that there is a presumption that a subsequent marriage is valid.³⁰ That is, it is presumed that a prior marriage has been dissolved in some way and the second marriage is valid. Thus in case a party marries a second time there are certain presumptions that arises that favor the validity of the subsequent marriage, as, for instance, there may be a presumption against bigamy,³¹ a presumption of remarriage after removal of disability³² and a presumption that a disability had been removed by death.³³ And even in a jurisdiction where informal or common law marriages are not valid it has been held that a formal marriage will be presumed from cohabitation, acknowledgment and reputation.³⁴ And in those jurisdictions where informal marriages are recognized as valid, a presumption of marriage may arise from any one or more of the elements mentioned

²⁴ *Botts v. Botts*, 108 Ky. 414, 56 S. W. 677, 961. And even if not valid, or if there was no license, while this might subject parties to a criminal prosecution, it would not, in most jurisdictions at least, necessarily render the marriage void; *Teter v. Teter*, 101 Ind. 129, 51 Am. R. 742.

²⁵ *People v. Calder*, 30 Mich. 85.

²⁶ *State v. Worthingham*, 23 Minn. 528; *Guardians of Poor v. Nathans*, 2 Brewst. (Pa.) 149; see also, Vol. I, §§ 123, 124.

²⁷ *Jones v. Jones*, 48 Md. 391, 30 Am. R. 466; *Jenkins v. Jenkins*, 83 Ga. 283, 9 S. E. 541, 20 Am. St. 316; compare, however, *Scott v. Scott*, (Ky.) 77 S. W. 1122.

²⁸ *Spears v. Burton*, 31 Miss. 547; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445, 12 Am. St. 453.

²⁹ *Blanchard v. Lambert*, 43 Iowa 228, 22 Am. R. 245; *Potter v. Clapp*,

203 Ill. 592, 68 N. E. 81; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600.

³⁰ *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; see also, *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81; *Caujolle v. Ferrie*, 23 N. Y. 90; *Teter v. Teter*, 101 Ind. 129, 137, 51 Am. R. 742, and authorities cited there and in the following note below.

³¹ *Dixon v. People*, 18 Mich. 84; *Greensboro v. Underhill*, 12 Vt. 604; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753.

³² *Stein v. Stein*, 66 Ill. App. 526; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600; *Jackson v. Claw*, 18 Johns. (N. Y.) 346.

³³ *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232, 55 Am. R. 883.

³⁴ *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713.

above. Some jurisdictions, however, hold that at least both cohabitation and general reputation must be established.³⁵ Cohabitation and a treatment by each other and by others as husband and wife is often sufficient to raise the presumption of an actual marriage.³⁶ But where the relation between man and woman was meretricious in its inception, marriage will not be presumed from cohabitation and reputation, but proof of a subsequent actual marriage is necessary.³⁷ That is, when an illicit relation is once established it is generally presumed to continue until the fact of marriage is established.³⁸ And it has been held that the presumption of marriage which arises from cohabitation and reputation does not prevail when there has been proof that the man had a wife alive and was not divorced from her.³⁹ But there are many instances in which, notwithstanding the connection was in some sense meretricious in the beginning or there was a bar at the time they first entered into the relation, a subsequent marriage may be presumed or inferred after the removal of the bar.⁴⁰ This is especially true where the object is to support the legitimacy of offspring. A presumption in favor of marriage has been held to be stronger than the presumption in favor of the continuance of a state of insanity, for the former as has been held makes for morality and not immorality, marriage and not concubinage, legitimacy and not bastardy.⁴¹ A presumption, however, has been held to arise that one was insane at the time of marriage when he was before the marriage found insane by an in-

³⁵ *Hooper v. McCaffery*, 83 Ill. App. 341; *Ashford v. Metropolitan L. Ins. Co.*, 80 Mo. App. 638; *Dunbarton v. Franklin*, 19 N. H. 257; *Grimm's Estate*, 131 Pa. St. 199, 18 Atl. 1061, 17 Am. St. 796; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477; see also, generally, Vol. I, § 123.

³⁶ *Rose v. Clark*, 8 Paige (N. Y.) 574.

³⁷ *Clark v. Cassidy*, 64 Ga. 662; *Reading F. Ins. & Co.*, Appeal of, 113 Pa. 204, 6 Atl. 60; *Jones v. Jones*, 45 Md. 144; *Maher's Estate*, In re, 204 Ill. 25, 68 N. E. 159; *Shank v. Willson*, 33 Wash. St. 612, 74 Pac. 812, it is held that evidence showing a common law marriage is not overcome by a subsequent ceremonial marriage.

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³⁸ *Raudlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Collins v. Voorhees*, 47 N. J. Eq. 555, 22 Atl. 1054; *Williams v. Williams*, 46 Wis. 464, 1 N. W. 98, 32 Am. R. 722; *Crymble v. Crymble*, 50 Ill. App. 544; *State v. Worthingham*, 23 Minn. 528; *White v. White*, 82 Cal. 427, 23 Pac. 276.

³⁹ *Henry v. McNealey*, 24 Colo. 456, 50 Pac. 37.

⁴⁰ *Teter v. Teter*, 101 Ind. 129, 51 Am. R. 742; *Land v. Land*, 206 Ill. 288, 68 N. E. 1109; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. R. 677; *Adger v. Ackerman*, 115 Fed. 124; Vol. I, § 123, n. 258.

⁴¹ *Castor v. Davis*, 120 Ind. 231, 22 N. E. 110; contra: *Smith v. Smith*, 47 Miss. 211; see, *Aldrich v. Steen*, (Neb.) 100 N. W. 311.

origin.⁶⁵ It is said, however, that when a question arises as to a marriage many years thereafter, in connection with the legitimacy of children, the presumption of marriage can only be rebutted by disproving every reasonable possibility.⁶⁴

§ 2489. **Questions of law or fact.**—When there is no dispute as to the facts and legitimate inferences therefrom the question as to whether or not a marriage really exists is a question for the court to decide. When there is a dispute as to facts, the question is one for the jury to decide under proper instructions from the court. Thus, it has been held that the question of the existence of a marriage where there is a conflict of testimony is a question for the jury.⁶⁶ And whether from all the evidence a marriage ought to be inferred is usually a question for the jury to decide.⁶⁶ Thus, where it appeared that a woman went through a marriage ceremony with great reluctance, and that she never consented to it and would not live with the husband, the question of whether there was a marriage was held to be one of fact for the jury.⁶⁷ It is held that the contract cannot be implied as a matter of law, yet there may be an inference from facts proved, which fairly lead to the conclusion that there was a contract.⁶⁸ And an inference of a contract may be drawn from circumstances in the absence of impediments of precontract, consanguinity, affinity or incapacity.⁶⁹

§ 2490. **Evidence in general—Oral testimony and witnesses.** Marriage may be proved, in civil actions, by either direct or circumstantial evidence.⁷⁰ The conduct of the parties is competent evidence to prove a marriage,⁷¹ and so may be any proper circumstantial evidence tending to establish the fact.⁷² The fact of marriage is usually

⁶⁵ *Physick's Estate*, In re, 2 Brewst. (Pa.) 179; *Wiseman v. Wiseman*, 89 Ind. 479.

⁶⁶ *Ferrie v. Public Adm.*, 4 Bradf. (N. Y.) 28.

⁶⁷ *Cockrill v. Calhoun*, 1 Nott. & McC. (S. Car.) 285.

⁶⁸ *Jackson v. Jackson*, 80 Md. 176, 80 Atl. 752.

⁶⁹ *Doe v. Roe*, 2 Houst. (Del.) 49.

⁷⁰ *Stribley v. Welz*, 8 Ohio C. C. 571.

⁶⁶ *Caujolle v. Ferrie*, 23 N. Y. 90.

⁶⁷ *Moore v. Commonwealth*, 9 Leigh (Va.) 639; *Beaulieu v. Ternoir*, 5 La. Ann. 476; *Casley v. Mitchell*, 121 Iowa 96, 96 N. W. 725; *State v. Williams*, 20 Iowa 98; see also, *Castor v. Davis*, 120 Ind. 231, 22 N. E. 110; *Mason v. Mason*, 101 Ind. 25.

⁷¹ *Buchanan v. State*, 55 Ala. 154; *Kenyon v. Ashbridge*, 35 Pa. 157.

⁷² *Clayton v. Wardell*, 4 N. Y. 230.

proved by the record of it and the identification of the parties.⁷³ But it is not essential that the proof of the fact of marriage be by the record of the marriage or by other documentary evidence.⁷⁴ It is held that such evidence is not necessarily the "best evidence."⁷⁵ Even in those states where the statutes provide that the record of marriage shall be competent evidence of the marriage it is not considered the only evidence nor the best evidence.⁷⁶ That is, other evidence than the record is admissible.⁷⁷ And so it has been held that the record is not conclusive proof in face of other evidence.⁷⁸ So also declarations of parties since deceased and family reputation are held admissible in proof of the fact of marriage.⁷⁹ The following facts have also been held admissible on the question of a marriage: that a woman assumed and went by the name of defendant,⁸⁰ and that the parties cohabited together, had children and christened them with the man's surname.⁸¹ And it has been held that where no better evidence is obtainable, hearsay and traditionary evidence are admissible for the purpose of proving marriage.⁸² Thus, whether the parents of a child born eighty-seven years ago were married, there being no living witness or documentary evidence, may be proved by hearsay.⁸³ It has also been held that a marriage celebrated in one state may be proved by parol in another state in the absence of statutory requirements.⁸⁴ The following persons have been held competent as witnesses to give their testimony as to the fact of marriage:

⁷³ *Brewer v. State*, 59 Ala. 101; 492; *State v. Tillinghast*, 25 R. I. 391, 56 Atl. 181.
⁷⁴ *Lowry v. Coster*, 91 Ill. 182; *Casley v. Mitchell*, 121 Iowa 96, 96 N. W. 725.
⁷⁵ *Rice v. State*, 7 Humph. (Tenn.) 14.

⁷⁶ *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450; *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016; *Jackson v. People*, 3 Ill. 231; *Bronnenburg v. Charman*, 80 Ind. 475.
⁷⁷ *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Shorten v. Judd*, 56 Kans. 43, 42 Pac. 337, 54 Am. St. 587; *Wiseman v. Wiseman*, 89 Ind. 479.

⁷⁸ *State v. Worthingham*, 23 Minn. 528.
⁷⁹ *Langtry v. State*, 30 Ala. 536; 528.
⁸⁰ *Murphy v. State*, 50 Ga. 150; *Miller v. White*, 80 Ill. 580; *Hospital Trust Co. v. Thorndike*, 24 R. I. 105, 52 Atl. 873.
⁸¹ *State v. Worthingham*, 23 Minn. 528.
⁸² *Chamberlain v. Chamberlain*, 71 N. Y. 423.

⁸³ *State v. Marvin*, 35 N. H. 22; ⁸⁴ *Picken's Estate*, In re, 163 Pa. 14, 29 Atl. 875.
⁸⁴ *White v. Holsten*, 4 Mart. (La.) 471; *Nixon v. Brown*, 4 Blackf. (Ind.) 157.

⁸⁵ *State v. Wilson*, 22 Iowa 364; *Commonwealth v. Norcross*, 9 Mass.

persons who saw the marriage ceremony performed;⁸⁶ the person who performed the ceremony,⁸⁷ and generally the contracting parties themselves.⁸⁷ The clergyman or officer who performed the ceremony may testify as to his authority to perform the act.⁸⁸ And oral testimony of witnesses testifying to such fact is sufficient without proving the election or appointment of such person as a clergyman or justice of the peace or one authorized to perform the ceremony.⁸⁹ The fact of marriage may also be established by the admissions of the contracting parties without the necessity of producing other evidence. In such cases it is held that further proof, as proof of the record or certificate of marriage, is not essential.⁹⁰

§ 2491. Evidence in general—Written evidence, records, certificates.—A written contract of marriage duly signed is admissible to prove marriage in a proper case.⁹¹ And a bond given by an intended husband as a legal preliminary to the issuance of a marriage license has been held relevant and competent in proof of the marriage.⁹² So declarations of a defendant, contained in letters written by him, have been held competent to show his marriage.⁹³ And where a statute requires a return on a marriage license by the person officiating at the marriage, such license and the return thereon are good evidence as to the fact of marriage.⁹⁴ And entries in books or in the church records

⁸⁶ *Wolverton v. State*, 16 Ohio 173, 47 Am. Dec. 373; *Nixon v. Brown*, 4 Blackf. (Ind.) 157; *People v. Perri-man*, 72 Mich. 184, 40 N. W. 425; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *State v. Clark*, 54 N. H. 456; *Chew v. State*, 23 Tex. App. 230, 5 S. W. 373; *Commonwealth v. Little-john*, 15 Mass. 163; *Boughman v. Boughman*, 29 Kans. 283.

⁸⁷ *People v. Imes*, 110 Mich. 250, 68 N. W. 157; *State v. Goodrich*, 14 W. Va. 834.

⁸⁸ *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. 468; *Bissell v. Bissell*, 55 Barb. (N. Y.) 325; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445.

⁸⁹ *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. 468.

⁹⁰ *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Taylor v. State*, 52 Miss. 84.

⁹¹ *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *Commonwealth v. Caponi*, 155 Mass. 534, 30 N. E. 82; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; see also, *State v. Bonce*, 79 Mo. 600; *Halbrook v. State*, 34 Ark. 511, 36 Am. R. 17; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *State v. Seals*, 16 Ind. 352.

⁹² *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 61 Am. St. 419; *State v. Behrman*, 114 N. Car. 797, 19 S. E. 220.

⁹³ *Martin v. Martin*, 22 Ala. 86.

⁹⁴ *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442.

⁹⁵ *Squire v. State*, 46 Ind. 459; *Taylor's Succession*, 15 La. Ann.

made by a clergyman, since deceased, are admissible as evidence of the fact of marriage.⁹⁵ And this is held to be the rule even in those jurisdictions where it is not required that such records be kept by the clergyman.⁹⁶ Where there are family Bibles kept in the family with entries made as to marriages and like matters, such entries are also admissible.⁹⁷ In case there is a certificate of marriage in the possession of one or both of the married parties and it is offered in evidence by one or both as proof of the fact of marriage, it is admissible.⁹⁸ In a recent partition case the issue was raised as to the marriage of the plaintiff's parents, and it was held that the certificate of marriage was admissible to identify the parties, in connection with evidence that it was produced from the custody of plaintiff's father and claimed by him as his marriage certificate, although his name was Sharpe and the name in the certificate was Shaw.⁹⁹ And in another recent case, which was a criminal action for non-support, where the complainant testified that she was married to the defendant by a justice, and that the justice a few days afterwards gave her a marriage certificate, and the defendant claimed that there was no marriage, but that as the parties were the parents of an illegitimate child he had arranged with the justice to prepare and record a fraudulent marriage certificate, a certified copy of which he put in evidence, it was held that the certificate which the complainant held was properly admitted in evidence although it was marked "copy" and was never recorded.¹⁰⁰ In some jurisdictions as to the marriage certificate it is held that the authority of the officer and his signature must be proved if the certificate is offered as original evidence.¹⁰¹ So, in some jurisdictions it is held that the certificate of a marriage performed in another state need not be authenticated as it is treated as an original document.¹⁰² So marriage registers and certified copies of the records are admissible in proof

313; *Tucker v. People*, 122 Ill. 583, Am. Dec. 754; *People v. Isham*, 109 3 N. E. 809. Mich. 72, 67 N. W. 819; *State v.*

⁹⁵ *Weaver v. Leiman*, 52 Md. 708; *Isenhardt*, 32 Ore. 170, 52 Pac. 569.

Maxwell v. Chapman, 8 Barb. (N. Y.) 579; *Blackburn v. Crawford*, 3 ⁹⁶ *Dailey v. Frey*, 206 Pa. St. 227, 55 Atl. 962.

Wall. (U. S.) 175; see also, *Casley* ¹⁰⁰ *State v. Tillinghast*, 25 R. I. 391, 56 Atl. 181.
v. Mitchell, 121 Iowa 96, 96 N. W. 726. ¹⁰¹ *State v. Colby*, 51 Vt. 291;

⁹⁷ *Clark v. Society &c.*, 21 Hun contra, *Northrop v. Knowles*, 52 (N. Y.) 95. Conn. 522, 52 Am. R. 613.

⁹⁸ *Weaver v. Leiman*, 52 Md. 708. ¹⁰² *Erwin v. English*, 61 Conn. 502,

⁹⁹ *State v. Abbey*, 29 Vt. 60, 67 23 Atl. 753.

of marriage.¹⁰³ It is held, however, that the copies must be certified by the officer required to keep the originals in his custody.¹⁰⁴ And a statute making certified records presumptive evidence of marriage has been held to apply to records made and kept without the state as well as to those within the state.¹⁰⁵ But as to proof of a foreign marriage by record, it is held that the copy of the marriage record to be admissible must be certified by the proper officers.¹⁰⁶ And it is held that it must further appear that in the other jurisdiction the keeping of a marriage record was required,¹⁰⁷ or at least, authorized. For complete proof of marriage by record the identity of the contracting parties as named in the certificate or record should be satisfactorily shown.¹⁰⁸ It has been held that marriage registers, independent of any declaratory statute are admissible in evidence on principle.¹⁰⁹ So an attested copy of the record of marriage kept by a town clerk is presumptive evidence of the fact of marriage.¹¹⁰ The following have also been admissible: a copy of an entry in a parish register;¹¹¹ a copy of a marriage record kept by a justice of the peace;¹¹² and an entry of a marriage in a book by the officiating minister, since deceased.¹¹³ Parol proof of the marriage by reputation was held admissible where the officiating magistrate was dead, and the vital statistics record disclosed no proof of the marriage.¹¹⁴ So, as already shown, parol evidence is generally admissible in civil actions to show the fact of marriage.

§ 2492. Evidence in general—As to insanity at time of marriage.

The question to be determined where the validity of a marriage, when one of the parties is claimed to have been insane, is in issue, is the mental condition at the time of the marriage ceremony, but evi-

¹⁰³ *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. 468; *State v. White*, 19 Kans. 445, 27 Am. R. 137.

¹⁰⁴ *State v. Matlock*, 70 Iowa 229, 30 N. W. 495; *Taylor's Succession*, 15 La. Ann. 313.

¹⁰⁵ *Hawes v. State*, 88 Ala. 37, 7 So. 302.

¹⁰⁶ *Otto v. Trump*, 115 Pa. St. 425, 8 Atl. 786; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49.

¹⁰⁷ *Tucker v. People*, 117 Ill. 88, 7 N. E. 51; *Patterson v. State*, 17 Tex. App. 102.

¹⁰⁸ *Johnson v. Clancy*, 105 Iowa 242, 74 N. W. 760; *State v. Brink*, 68 Vt. 659, 35 Atl. 492.

¹⁰⁹ *Maxwell v. Chapman*, 8 Barb. (N. Y.) 579.

¹¹⁰ *Shutesbury v. Hadley*, 133 Mass. 242.

¹¹¹ *Groom v. Parables*, 28 Ill. App. 152.

¹¹² *Homans v. Corning*, 60 N. H. 418.

¹¹³ *Johnson v. Cowdrey*, 19 N. Y. S. 678.

¹¹⁴ *Mitchell v. Mitchell*, 11 Vt. 134.

dence of the mental condition both before and after is admissible in a proper case.¹¹⁵ Thus, evidence of hereditary taint, declarations and admissions and proper circumstances before and after the marriage may be introduced in evidence on the question of insanity at the time of the marriage.¹¹⁶ The court in one case says: "I must look at the nature of that insanity, and form an opinion from the general history of the case whether it is recent and sudden in its inception, or whether it has been of slow growth and whether it had begun before the marriage and had by that time reached a stage which incapacitated the respondent from entering into the contract."¹¹⁷ A mere want of age or understanding does not, in most jurisdictions at least, make the marriage absolutely void, in the sense that it cannot be ratified by cohabitation and the like after becoming of age and of sound mind.¹¹⁸ The distinction between such a case and one where the marriage is absolutely void because one of the parties has a living spouse and has never been divorced is pointed out in an Indiana case, but even in such a case it is held that while there can be no ratification there may, under certain circumstances, be a presumption of a valid marriage from further cohabitation in good faith after a divorce.¹¹⁹

§ 2493. **Evidence in general—What not admissible.**—Individual opinion that certain parties were married, as distinguished from a statement of fact and from reputation, is not admissible to prove the marriage.¹²⁰ Neither is the testimony of the husband or wife as to reputation competent since reputation consists of the speech or expressed opinion of those who have known the parties, and not of the statements of the parties themselves, and should generally be proved by neighbors and acquaintances.¹²¹ So, evidence of general reputation and belief in the neighborhood is not competent as primary evidence in the first instance, for the purpose of disproving the fact of marriage,¹²² at least where a formal marriage has been proved.¹²³ As be-

¹¹⁵ *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634, 28 Atl. 439.

¹¹⁶ *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. 837.

¹¹⁷ *Durham v. Durham*, L. R. 10 P. D. 80.

¹¹⁸ *Koonce v. Wallace*, 7 Jones L. (N. Car.) 194.

¹¹⁹ *Teter v. Teter*, 88 Ind. 494; *Redden v. Baker*, 86 Ind. 191.

¹²⁰ *Jackson v. Jackson*, 80 Md. 126, 30 Atl. 752.

¹²¹ *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198.

¹²² *Henderson v. Cargill*, 31 Miss. 367; *Bartlett v. Musliner*, 28 Hun (N. Y.) 235; see also, *Badger v. Badger*, 88 N. Y. 547, 42 Am. R. 263; *Marble v. Marble*, 36 Mich. 386; *Clement v. Kimball*, 98 Mass. 536.

¹²³ *Northrop v. Knowles*, 52 Conn. 522, 52 Am. R. 613.

tween the parties themselves they may in some cases be prohibited from denying the marriage relation, or, at least its validity or effect. Thus, it has been held that where persons have represented themselves to be married, or have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such, though not in fact married, they will be conclusively presumed to sustain such relation to each other and will not be permitted to disprove or deny the marriage as between themselves when either is seeking to disturb or defeat rights which may have been acquired by the other, either directly or indirectly, on the faith of the marriage.¹²⁴

§ 2494. **Evidence in general—Weight.**—The extent to which the evidence must go, and the weight to be given particular evidence must depend largely upon the issues and the nature and circumstances of the case. In civil cases competent evidence that satisfies the court or jury, as the case may be, that there was a marriage is generally sufficient,¹²⁵ but, owing in some instances to the different presumptions that obtain under different circumstances stronger evidence is required in some cases than in others. Thus, when a man and woman have contracted marriage in due form, the law will require clear proof to remove the presumption that such contract is valid.¹²⁶ So it has been held that the uncorroborated testimony of the petitioner or the admissions of the defendant are not of sufficient weight of themselves for a court to grant relief in nullity suits for impotency.¹²⁷ And it has been held that to maintain a bill of annulment of marriage on the alleged ground that assent to the marriage was obtained by fraud, there must be satisfactory evidence sustaining the charge, irrespective of the declarations, confessions and admissions of the parties.¹²⁸ Admissions as to one's own marriage have been held entitled to more weight than denials.¹²⁹

¹²⁴ *Johnson v. Johnson*, 1 Cald. (Tenn.) 626; *Deeds v. Strobe*, 6 Idaho 317, 96 Am. St. 267, note.

¹²⁵ *Martin v. Martin*, 22 Ala. 86; see generally, for evidence held sufficient to establish marriage, the following recent cases: *Davis' Estate*, In re, 204 Pa. St. 602, 54 Atl. 475; *Mullaney v. Mullaney*, (N. J.) 54 Atl. 1086; *Summerville v. Summerville*, 31 Wash. St. 411, 72 Pac. 84. Evidence showing a common law marriage not overcome by proof of

a subsequent ceremonial marriage; *Shank v. Wilson*, 33 Wash. St. 612, 74 Pac. 812.

¹²⁶ *Wilkie v. Collins*, 48 Miss. 497; *Teter v. Teter*, 88 Ind. 494.

¹²⁷ *Lorenz v. Lorenz*, 93 Ill. 376; *Wiseman v. Wiseman*, 89 Ind. 479.

¹²⁸ *Dawson v. Dawson*, 18 Mich. 335.

¹²⁹ *Greenawalt v. McEnelley*, 85 Pa. 852; *Teter v. Teter*, 101 Ind. 129, 51 Am. R. 742.

CHAPTER CXV.

NEGLIGENCE.

Sec.	Sec.
2495. Generally.	2511. Defects in highways—What plaintiff must show—Burden of proof.
2496. Breach of duty.	2512. Defects — Material circumstances.
2497. Proximate cause.	2513. Defects—Notice.
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2500. Burden—Contributory negligence.	2516. Defects — Other accidents — Subsequent repairs.
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2502. Circumstantial evidence.	2518. Defects—Remedy over.
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2507. Evidence of experience and tests.	2523. Railroad crossings—Contributory negligence.
2508. Evidence of repairs and precautions after the accident.	
2509. Expert and opinion evidence.	
2510. Admissions and declarations.	

§ 2495. **Generally.**—In this chapter it is proposed to state the general rules in regard to negligence, in so far at least as they relate to questions of evidence, and then to show their application to particular cases or classes of cases, so far as they are not elsewhere treated. Labored attempts have been made to define negligence, but no one definition has been universally accepted as entirely accurate and helpful.¹ Without attempting to give an entirely accurate definition, we

¹One of the most careful and of Law (1st ed.) 387, et seq.; see thorough attempts to define and also, Shearman & Redfield Negligence, § 1-5; Smith Law of Negligence, § 1-5; Smith Law of Negligence, § 1-5; Smith Law of Negligence, § 1-5.

may describe it in a general way as the absence of care according to circumstances, or, in other words, the failure to exercise such care as the circumstance demand, by doing what there is a duty to leave undone or failing to do what there is a duty to do. If the duty is owing to the party injured and the injury proximately results from such breach of the duty there is usually actionable negligence for which damages may be recovered unless the injured party was himself guilty of contributory negligence. But if the injury was purposely inflicted or there was such a reckless disregard of consequences as to evince a willingness to inflict it under such circumstances that it was likely to be a proximate result there would usually be wilfulness rather than mere negligence, and contributory negligence would not, ordinarily at least, be a defense.

§ 2496. **Breach of duty.**—The right to recover in cases of negligence rests upon a breach of a legal duty, and where there is no duty there is no cause of action. It is, therefore, incumbent upon the plaintiff to make it appear that there was a legal duty. This general doctrine is illustrated in many cases.² But it is not necessary, in order to establish the legal duty, to do more than prove the facts from or out of which the duty springs, for where the necessary facts are established the law will fix the duty. The duty violated, however, must be one that was owing to the plaintiff or injured party by the defendant at the time and place of the injury,³ and in order to establish negligence it must generally be shown that the defendant did what he ought not to have done, or omitted something that it was his duty to do.

§ 2497. **Proximate cause.**—There is no liability for a pure accident,⁴ nor is the defendant liable for negligence which was not the

gence, 1; Beven Negligence 1, et seq.; Baltimore &c. R. Co. v. Jones, 95 U. S. 439; Blyth v. Birmingham Waterworks Co., 25 L. J. Exch. 212, 11 Exch. 781; Cooley Torts (1st ed.) 630.

²Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460, 463; Fuller v. Citizens' Nat. Bank, 15 Fed. 875; Oyshterbank v. Gardner, 17 Jones & S. (N. Y.) 263; Columbus &c. Co. v. Troesch, 68 Ill. 545; Norfolk &c. Co. v. Ferguson, 79

Va. 241; Frech v. Philadelphia, 39 Md. 574; Schultz v. Pacific R. Co., 36 Mo. 13; Button v. Frink, 51 Conn. 342; Faris v. Hoberg, 134 Ind. 269, 274, 33 N. E. 1028; Gaston v. Bailey, 14 Ind. App. 581, 584, 43 N. E. 254.

³Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641, 37 N. E. 720; Murphy v. Brooklyn, 118 N. Y. 575, 23 N. E. 887; Biggs v. Huntington, 32 W. Va. 55, and authorities cited in last preceding note.

⁴Wabash &c. R. Co. v. Locke, 112 Ind. 404, 14 N. E. 391; Evansville

proximate cause of the injury complained of.⁵ This, then, is another element that must be shown in order to entitle the plaintiff to recover for negligence. Negligence may of course, be the proximate cause of an injury if it is the efficient cause although it is not the nearest and most immediate in point of time. A responsible agent intervening, however, may cut off the line of causation,⁶ and, in most instances where no such result could reasonably have been foreseen or expected from the alleged negligence or if it is a mere condition and not an efficient cause there is no liability.⁷ The question as to what was the proximate cause of the injury in a particular case, as will hereafter be shown, is usually, but not always, one of fact for the jury.

§ 2498. Presumptions.—It is frequently said that negligence is not presumed from the mere happening of an accident,⁸ and this is true as a general rule in a general sense; but negligence may be pre-

McC. R. Co. v. Krapf, 143 Ind. 647, 36 N. E. 901; *Henby v. Grand Ave. R. Co.*, 113 Mo. 525, 21 S. W. 214; *Grant v. Enfield*, 42 N. Y. S. 107; *Rea v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 73 S. W. 555.

⁵ *Check v. Oak Grove Lumber Co.*, (N. Car.) 46 S. E. 488, 489, 490, quoting *Elliott R. R.*, § 711; *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571, 52 N. E. 1013; *Evansville &c. R. Co. v. Welch*, 25 Ind. App. 308, 58 N. E. 88; *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, 37 N. E. 601; *Lake Erie &c. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *Elliott v. Allegheny &c. Light Co.*, 204 Pa. St. 568, 54 Atl. 278; *Smart v. Kansas City*, 91 Mo. App. 586; *State v. Baltimore &c. R. Co.*, 58 Md. 482; *Wabash R. Co. v. Coker*, 81 Ill. App. 660.

⁶ See, for instance, *Cole v. German Sav. &c. Soc.*, 124 Fed. 113, 63 L. R. A. 416, and note; *Claypool v. Wigmore*, (Ind. App.) 71 N. E. 509, and numerous authorities cited.

⁷ Thus, as will hereafter be shown, even the violation of a statute or

city ordinance, though negligent in itself, if it had nothing to do with the accident, as where a bell was not rung on an engine at a crossing but the plaintiff already had ample warning and knowledge of the approaching engine, is not a proximate cause of the injury.

⁸ *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108, 1109; *Merritt v. Richey*, 127 Ind. 400, 27 N. E. 131; *Wabash &c. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Kincaid v. Oregon &c. R. Co.*, 22 Ore. 35, 29 Pac. 3; *Bohn v. Chicago &c. R. Co.*, 106 Mo. 429, 17 S. W. 580; *Colbourn v. Wilmington*, (Del.) 56 Atl. 605; *Seybolt v. New York &c. R. Co.*, 95 N. Y. 562; *Harris v. Perry*, 89 N. Y. 308, 315; *Short v. New Orleans &c. R. Co.*, 69 Miss. 848, 13 So. 826; *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350; *Goshorn v. Smith*, 92 Pa. St. 435; *Ford v. Anderson*, 139 Pa. St. 261, 21 Atl. 18; *Fenderson v. Atlantic City R. Co.*, 56 N. J. L. 708, 31 Atl. 767; *Tarpnell v. Red Oak Junction*, 76 Iowa 744, 39 N. E. 884; Vo. I, § 94.

sumed in a proper case from the circumstances of the so called accident, and is usually presumed where the circumstances are such that the doctrine *res ipsa loquitur* applies. This doctrine, or rule, however, seldom applies except where some such relation as that of carrier and passenger exists.⁹ Yet it is not confined entirely to such cases.¹⁰ The rule has been applied in cases where objects within the exclusive control of the defendant have fallen upon and injured the plaintiff,¹¹ and in a number of somewhat similar cases.¹² In the absence of anything to the contrary, the presumption generally is that persons and corporations have done or will do their duty.¹³ So, in some jurisdictions, it is held that from the disposition of men to avoid injury to themselves and the love of life and instinct of self-preservation, the presumption in the absence of anything to the contrary, is against contributory negligence,¹⁴ and this is one reason that, in many jurisdic-

⁹ It has been fully treated, as applicable to such cases, in the chapter on carriers; see also, Vol. I, § 94, n. 8; that it is not so often applicable in other cases, see, *Talley v. Beaver*, (Tex. Civ. App.) 78 S. W. 23; *Bahr v. Lombard & Co.*, 24 Vroom. (N. J.) 233; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259; *East End Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa. St. 353, 42 Atl. 707; *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519, 39 Atl. 292; *Huff v. Austin*, 46 Ohio St. 386; *Walker v. Chicago & C. R. Co.*, 71 Iowa 658, 33 N. W. 224; *Huey v. Gahlenbeck*, 121 Pa. St. 238; *Weideman v. Tacoma R. Co.*, 7 Wash. St. 517, 35 Pac. 414.

¹⁰ For elaborate notes upon the subject, see *Barnowski v. Helson*, 89 Mich. 523, 15 L. R. A. 33; *Long v. Pennsylvania R. Co.*, 147 Pa. 343, 30 Am. St. 732, 736; *Fleming v. Pittsburgh & C. R. Co.*, 158 Pa. 130, 38 Am. St. 835, 837.

¹¹ *Travers v. Murray*, 84 N. Y. S. 558; *Vincett v. Cook*, 4 Hun (N. Y.) 318; *Klitzke v. Webb*, (Wis.) 97 N. W. 901; see also, *Western U. T. Co. v. State*, 82 Md. 293, 33 Atl. 763;

Mulcairns v. Janesville, 67 Wis. 24; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870; *Denver Consolidated Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499; *Kearney v. London & C. R. Co.*, L. R. 6 Q. B. 759.

¹² See, *Thomas v. Western U. Tel. Co.*, 100 Mass. 156; *Brush Electric & C. Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812; *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268; *Snyder v. Wheeling & C. Co.*, 43 W. Va. 661, 28 S. E. 733; *Mitchell v. Nashville & C. R. Co.*, 100 Tenn. 329, 45 S. W. 337; *Carmody v. Boston & C. Co.*, 162 Mass. 539, 39 N. E. 184; *Boyd v. Portland & C. Elec. Co.*, 40 Ore. 126, 68 Pac. 810, 57 L. R. A. 619, and note.

¹³ *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259; *St. Louis & C. R. Co. v. Weaver*, 35 Kans. 412, 424, 11 Pac. 408; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Terre Haute & C. R. Co. v. Becker*, 146 Ind. 202, 45 N. E. 96. And that an employe was competent. *Louisville & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108.

¹⁴ *Texas & C. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104; *Allen v.*

tions, the burden of proving contributory negligence is held to be upon the defendant. But this doctrine is not universally accepted.¹⁵ In some jurisdictions, where the burden is held to be upon the plaintiff to show freedom from contributory negligence, the presumption is said to be against him, and in others, no matter which party has the burden, there is said to be no presumption either way.

§ 2499. **Burden of proof.**—In a recent case it is said: "In every case involving actionable negligence, there are necessarily three elements essential to its existence: (1.) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. (2.) A failure by the defendant to perform that duty; and (3.) An injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient."¹⁶ In other words, in actions for damages on account of negligence the burden is on the plaintiff to prove a duty owing to him from the defendant, a breach of such duty and an injury to the plaintiff proximately caused by such breach.¹⁷ The plaintiff in order to recover substantial damages must

Willard, 57 Pa. St. 374; *Cleveland &c. R. Co. v. Rowan*, 66 Pa. St. 393; *Northern Cent. R. Co. v. State*, 31 Md. 257; *Mynning v. Detroit &c. R. Co.*, 64 Mich. 93; *Chicago &c. R. Co. v. Hinds*, 56 Kans. 758, 44 Pac. 993; *Blewett v. Wyandotte &c. R. Co.*, 72 Mo. 583; *Cassidy v. Angell*, 12 R. I. 447; *Atchison v. Wills*, 21 App. (D. C.) 548.

¹⁵ See *Tucker v. New York &c. R. Co.*, 124 N. Y. 308, 26 N. E. 916; *Cordell v. New York &c. R. Co.*, 75 N. Y. 330; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 208; *Cincinnati &c. R. Co. v. Butler*, 103 Ind. 21, 2 N. E. 138; *Hathaway v. Toledo &c. R. Co.*, 46 Ind. 25. It is often held inapplicable where there is direct evidence upon the subject. *Burk v. Walsh*, 118 Iowa 397, 92 N. W. 65; *Atchison &c. R. Co. v. Aderhold*, 58 Kans. 293, 49 Pac. 83; many of the authorities upon the general subject are classi-

fied by states in *Black's Law & Pr. in Acc. Cas.*, § 171.

¹⁶ *Paris v. Hoberg*, 134 Ind. 269, 274, 33 N. E. 1028; approved in, *Scott v. Cleveland &c. R. Co.*, 144 Ind. 125, 132, 43 N. E. 133; *Gaston v. Bailey*, 24 Ind. App. 24, 26, 53 N. E. 1021; *Cleveland &c. R. Co. v. Stephenson*, 139 Ind. 641, 643, 37 N. E. 720.

¹⁷ *Button v. Frink*, 51 Conn. 342; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 376, 45 N. E. 479; and numerous authorities cited, including 3 *Elliott Railroads*, §§ 1155, 1156; see also, to same effect, *Cleveland &c. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Wabash R. Co. v. Coker*, 81 Ill. App. 660; *Angus v. Lee*, 40 Ill. App. 304; *State v. Baltimore &c. R. Co.*, 58 Md. 482; *McGrell v. Buffalo &c. Co.*, 153 N. Y. 265, 273, 47 N. E. 305; *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679;

As a general rule, however, where both the duty and the extent of performance are to be ascertained as facts, the jury should be left to determine what reasonable and ordinary care is required under the circumstances as well as the question of the defendant's failure to exercise such care; or, in other words, it is in a sense, for them to determine in such a case what is negligence as well as whether it has been proved.²⁴ But where the duty is defined, the failure to perform it is negligence and may be so declared by the court.²⁵ So, where there is no evidence from which negligence can reasonably be inferred, or where the facts are undisputed and but one reasonable inference can be drawn from them, the question becomes one of law for the court and should generally be taken from the jury.²⁶ The same rules apply,

170, 28 N. E. 616; *Ashman v. Flint & C. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Osborne v. Detroit*, 32 Fed. 36.

²⁴ *McCully v. Clarke*, 40 Pa. St. 399, 80 Am. Dec. 584; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259; *Philadelphia City Pass. R. Co. v. Hassard*, 75 Pa. St. 376, 377; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569, 575; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 30 Am. & Eng. R. Cas. 571; see also, *Ohio & C. R. Co. v. Collarn*, 73 Ind. 261; *Pennsylvania R. Co. v. Frana*, 112 Ill. 398; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Worthington v. Central Vermont R. Co.*, 64 Vt. 107, 23 Atl. 590; *Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. 752; *Connolly v. Waltham*, 156 Mass. 368, 31 N. E. 302; *Fisher v. Cambridge*, 133 N. Y. 527, 30 N. E. 663; *Griffin v. Auburn*, 58 N. H. 121; and see, particularly, *Gratlot v. Missouri Pac. R. Co.*, 116 Mo. 450, 16 L. R. A. 189, 195, et seq., opinion of Thomas, J., on petition for rehearing, where the entire subject is elaborately considered and forcibly presented.

²⁵ *Empire Trans. Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14; *Schum v.*

Pennsylvania R. Co., 107 Pa. St. 8; *Hoag v. Lake Shore & C. R. Co.*, 85 Pa. St. 293; *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 11 So. 51; 16 L. R. A. 43; *Karle v. Kansas City & C. R. Co.*, 55 Mo. 476; *Delaware & C. R. Co. v. Converse*, (U. S.) 4 Lewis Am. R. & Co. Cas. 434; *Grand Trunk & C. R. Co. v. Ives*, (U. S.) 6 Lewis' Am. R. & Co. Cas. 130, and note; *Terre Haute & C. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20, 24; *Chicago & C. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. R. 761. In North Carolina, it is said in general terms, that "what amounts to negligence is a question of law." *Herring v. Wilmington & C. R. Co.*, 10 Ired. L. (N. Car.) 402, 51 Am. Dec. 395; *Brock v. King*, 3 Jones L. (N. Car.) 45; *Emry v. Raleigh & C. Co.*, 109 N. Car. 589, 14 S. E. 352.

²⁶ *Purcell v. English*, 86 Ind. 34; *Pittsburgh & C. R. Co. v. Selvers*, (Ind. App.) 67 N. E. 680; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Rush v. Coal Bluff Min. Co.*, 131 Ind. 135, 30 N. E. 904; *Moore v. Westervelt*, 21 N. Y. 103; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Borden v. Delaware & C. R. Co.*, 131 N. Y. 671, 30 N. E. 586; *Koons*

in general, to the question of contributory negligence.²⁷ The question as to what was the proximate cause of the injury which is usually involved in the question of actionable negligence is generally a question of fact or a mixed question of law and fact.²⁸ But it, too, may be or become a question of law.²⁹ Indeed, cases are often taken from the jury upon this question.³⁰

§ 2502. **Circumstantial evidence.**—It is not necessary that the evidence of negligence should be direct and positive. Negligence may

v. Western Un. Tel. Co., 102 Pa. St. 164; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Holland v. West End St. R. Co., 155 Mass. 387, 29 N. E. 622; Houston v. Culver, 88 Ga. 34, 13 S. E. 953; Chaffee v. Old Colony &c. R. Co., 17 R. I. 658, 24 Atl. 141; Chicago &c. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Dahl v. Milwaukee &c. R. Co., 62 Wis. 652, 22 N. W. 755; Hathaway v. East Tennessee R. Co., 29 Fed. 489; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Luckel v. Century Bldg. Co., (Mo.) 76 S. W. 1035; Van Pelt v. New Athens Mill Co., 106 Ill. App. 623; Chicago Title &c. Co. v. Standard &c. Co., 106 Ill. App. 135; Kelly &c. Co. v. Central R. Co., (N. J.) 56 Atl. 145; Metropolitan St. R. Co. v. Hanson, 67 Kans. 256, 72 Pac. 773.

²⁷ Dunworth v. Grand Trunk &c. R. Co., 127 Fed. 307; National &c. Co. v. Maroni, 123 Fed. 410; Cincinnati &c. Co. v. Brown, 32 Ind. App. 58, 69 N. E. 197; Jenkins v. Baltimore &c. R. Co., (Md.) 56 Atl. 966; Hone v. Mammoth Min. Co., 27 Utah 168, 75 Pac. 381; Chicago &c. R. Co. v. Burrige, 107 Ill. App. 23; Baltimore &c. R. Co. v. Landrigan, 20 App. (D. C.) 135; Blumenthal v. Boston &c. R. Co., 97 Me. 255, 54 Atl. 747, and authorities cited in preceding notes to this section.

²⁸ Southern R. Co. v. Drake, 107

Ill. App. 12; Missouri Mal. Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Carson v. Southern R. Co., 68 S. Car. 55, 46 S. E. 525, affirmed in, Southern R. Co. v. Carson, 194 U. S. 136, 24 Sup. Ct. 609; Gudfelder v. Pittsburgh &c. R. Co., 207 Pa. St. 629, 57 Atl. 70; Atchison &c. R. Co. v. Parry, 67 Kans. 515, 73 Pac. 105; Schumpert v. Southern R. Co., 65 S. Car. 332, 43 S. E. 813; Tobin v. Missouri Pac. R. Co., (Mo.) 18 S. W. 996; Louisville &c. R. Co. v. Caster, (Miss.) 5 So. 388; Ewing v. North Versailles Tp., 146 Pa. St. 309, 23 Atl. 338.

²⁹ Lake Shore &c. R. Co. v. Lidtke, 69 Ohio St. 384, 69 N. E. 653; Pike v. Grand Trunk R. Co., 39 Fed. 255; Russell v. Railroad Co., 118 N. Car. 1098, 24 S. E. 512; Henry v. St. Louis &c. R. Co., 76 Mo. 288, 293; West Mahanoy Tp. v. Watson, 112 Pa. St. 574, 3 Atl. 866; Trapnell v. Red Oak Junction, 76 Iowa 744, 39 N. W. 884; Dull v. Cleveland &c. R. Co., 21 Ind. App. 571, 52 N. E. 1013; Cleveland &c. R. Co. v. Stewart, 24 Ind. App. 374, 56 N. E. 917; Louisville &c. R. Co. v. Johnson, 81 Fed. 679.

³⁰ Cole v. German Sav. &c. Soc., 124 Fed. 113, 63 L. R. A. 416; Claypool v. Wigmore, (Ind. App.) 71 N. E. 509; New York &c. R. Co. v. Perriquet, 138 Ind. 414, 34 N. E. 238, and cases cited in last note, supra.

mere surmise or conjecture⁴² from a mere scintilla of evidence is not. The plaintiff must do more than show the possible liability of the defendant for the injury.⁴³ So, while he need not always prove every specific act of negligence alleged,⁴⁴ he must at least prove actionable negligence in some respect as alleged in his complaint, and not merely make a case of negligence which is not within the theory of his complaint.⁴⁵

§ 2504. **Violation of statutes and ordinances.**—According to what seems to be the better doctrine, the violation of a valid statute or ordinance prescribing what shall be done at a railroad crossing or on approaching a crossing by the company is negligence *per se*,⁴⁶ although it is often stated to be merely evidence of negligence.⁴⁷ But it may

⁴² *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182, 185, 42 N. E. 579; *Hudson v. Rome &c. R. Co.*, 145 N. Y. 408, 40 N. E. 8; *Bond v. Smith*, 113 N. Y. 378, 385, 21 N. E. 128; *Sherman v. Menominee &c. Co.*, 77 Wis. 14, 45 N. W. 1079; *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48; *Griffin v. Boston &c. R. Co.*, 148 Mass. 143, 19 N. E. 166; *Brunner v. Blaisdell*, 170 Pa. St. 25, 32 Atl. 607.

⁴³ *Suburban Electric Co. v. Nugent*, 29 Vr. (N. J.) 658; *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128; *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66; *Baltimore &c. R. Co. v. State*, 71 Md. 591, 18 Atl. 969.

⁴⁴ *Chicago &c. R. Co. v. Barnes*, (Ind.) 68 N. E. 166; *Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. 1038; *O'Connor v. Railroad Co.*, 135 Mass. 352; *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

⁴⁵ *Terre Haute &c. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 12 Am. St. 453; see also, Vol. I, § 194; and

as to wilfulness, see, *Wilson v. Chipewa Val. &c. Co.*, (Wis.) 98 N. W. 536; *Louisville &c. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Cleveland &c. R. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552.

⁴⁶ *Pennsylvania R. Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Pennsylvania R. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843; *Dugan v. St. Paul &c. R. Co.*, 40 Minn. 544, 42 N. W. 538; *Correll v. Burlington &c. R. Co.*, 38 Iowa 120; *Gothard v. Alabama &c. R. Co.*, 67 Ala. 114; *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. 817; *Western &c. R. Co. v. Young*, 81 Ga. 397; 3 *Elliott Railroads*, § 1155, and numerous authorities cited.

⁴⁷ *Connor v. Electric Trac. Co.*, 173 Pa. St. 602, 34 Atl. 238; *Reidel v. Philadelphia &c. R. Co.*, 87 Md. 153, 39 Atl. 507; *McGrath v. New York &c. R. Co.*, 63 N. Y. 522; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Blanchard v. Lake Shore &c. R. Co.*, 126 Ill. 416, 18 N. E. 799.

not be actionable negligence, for it may not be a proximate cause of the injury complained of.⁴⁸ It is not, therefore, always sufficient to show that the defendant violated a statute or an ordinance. Nor, on the other hand, is compliance with a statute or ordinance always sufficient to relieve the defendant from the charge of negligence. Due care may require something more than the statute or ordinance prescribes, under the circumstances of the particular case. An ordinance to be admissible, must usually be pleaded in the manner required in the particular jurisdiction.⁴⁹ The manner of proving it has been considered elsewhere.⁵⁰

§ 2505. Evidence of custom and practice.—A custom or usage cannot well justify a negligent act, and evidence of such a custom or usage is usually inadmissible for that purpose.⁵¹ Nor is evidence of a custom ordinarily admissible to show negligence.⁵² But the absence of the usual and customary precautions at a known place of danger may sometimes be shown as bearing upon the issue of negligence or contributory negligence. Thus, where a collision occurred at a street crossing, evidence that a flagman had always been kept at the crossing, and that he was absent at the time of the accident was held compe-

* *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Chicago &c. R. Co. v. Richardson*, 28 Neb. 118, 44 N. W. 103; *Story v. Chicago &c. R. Co.*, 79 Iowa 402, 44 N. W. 690; *Chicago &c. R. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286; *State v. Baltimore &c. R. Co.*, 69 Md. 339, 14 Atl. 685; *Central Texas &c. R. Co. v. Nycum*, (Tex.) 34 S. W. 460; *Horn v. Baltimore &c. R. Co.*, 4 C. C. A. 346, 54 Fed. 301; 3 *Elliott Railroads*, § 1155; see, also, note in, *Shatts v. Erie R. Co.*, 59 C. A. 5, 121 Fed. 678, on the general subject.

* But see, *Faber v. St. Paul &c. R. Co.*, 29 Minn. 465, 13 N. W. 902.

* Vol. I, § 212; Vol. II, §§ 1283, 1304, 1490.

* *Central R. Co. v. De Bray*, 71 Ga. 406; *Cleveland v. New Jersey &c. Co.*, 5 Hun (N. Y.) 523; *Eppen-*

dorf v. Brooklyn City &c. R. Co., 69 N. Y. 195; *Wright v. Boller*, 42 Hun (N. Y.) 77; *Chicago &c. R. Co. v. Carpenter*, 12 U. S. App. 392, 56 Fed. 451; *Lawrence v. Hudson*, 12 Helsk. (Tenn.) 671; *Mason v. Missouri Pac. R. Co.*, 27 Kans. 83; *Thompson v. Boston &c. R. Co.*, 153 Mass. 391, 26 N. E. 1070; *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171; *Crocker v. Schureman*, 7 Mo. App. 358; *Temperance Hall Asso. v. Giles*, 4 Vr. (N. J.) 260; *McNerney v. Reading*, 150 Pa. St. 611, 25 Atl. 57; Vol. I, § 186, and authorities cited.

* *Gulf &c. R. Co. v. Evansich*, 61 Tex. 3; see also, *Cleveland &c. R. Co. v. Newell*, 75 Ind. 542; *Peoria &c. R. Co. v. Clayberg*, 107 Ill. 644; *Earl v. Crouch*, 16 N. Y. S. 770; but compare, *Nadau v. White River &c. Co.*, 76 Wis. 120, 43 N. W. 1185.

tent.⁵⁴ So, evidence as to the usual and ordinary distance of erecting⁵⁵ tell-tales from a bridge has been held admissible upon the question of contributory negligence and so has evidence that it was the custom and usage of the defendant's train to carry passengers and the usual stopping place of freight trains at the station.⁵⁶ In an Iowa case evidence that it was an order and custom of the railroad company to block all frogs was held admissible for the purpose of showing that the company conceded that unblocked frogs were dangerous.⁵⁸ And in an Illinois case, it was held error to refuse an inquiry as to the custom in the yard of a railroad company concerning the running of cars.⁵⁷ So, in other cases, evidence as to the usual practice has been received as tending to show negligence or ordinary care.⁵⁸ It has also been held in a number of cases that the usual practice of others in the same business or employment, under like circumstances, may be shown upon the question as to whether ordinary care was used in the particular instance;⁵⁹ as for example, when the act of the plaintiff was not negligent *per se*, it has been held competent to show that persons interested in the performance of the same act, under similar circumstances, performed it as he did.⁶⁰ But what certain persons customarily do

⁵⁴ McGrath v. New York &c. R. Co., 63 N. Y. 522; and see, Casey v. New York &c. R. Co., 78 N. Y. 518; Pittsburg &c. R. Co. v. Yundt, 78 Ind. 373.

⁵⁵ Wallace v. Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1069; see also, Boyce v. Wilbur Lumber Co., 119 Wis. 642, 97 N. W. 563.

⁵⁶ McGee v. Missouri Pacific R. Co., 92 Mo. 208; Schultz v. Chicago &c. R. Co., 44 Wis. 638; see also, International &c. R. Co. v. Gray, 65 Tex. 32; Sutherland v. Troy &c. R. Co., 74 Hun (N. Y.) 162.

⁵⁷ Coates v. Burlington &c. R. Co., 62 Iowa 486, 17 N. W. 760.

⁵⁸ Pennsylvania Co. v. Stoelke, 104 Ill. 201; see, also, as to evidence of custom to show contributory negligence, McKean v. Burlington &c. R. Co., 55 Iowa 192, 7 N. E. 105; Black Law & Pr. in Acc. Cas., 193.

⁵⁹ Schnable v. Providence &c. Market, 24 R. I. 477, 53 Atl. 634; Water-

house v. Jos. Schlitz Brew. Co., (S. Dak.) 94 N. W. 587; Prosser v. Montana &c. R. Co., 17 Mont. 372, 43 Pac. 81; Daley v. American &c. Co., 152 Mass. 581, 26 N. E. 135; but see, Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

⁶⁰ Maynard v. Buck, 100 Mass. 40; Kolsti v. Minneapolis &c. R. Co., 32 Minn. 133, 19 N. W. 655; Cass v. Boston &c. R. Co., 14 Allen (Mass.) 448; Holly v. Boston Gas Light Co., 8 Gray (Mass.) 123; Fuller v. Naugatuck R. Co., 21 Conn. 557; Belleville Stone Co. v. Comblen, 32 Vr. (N. J.) 353; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Chicago &c. R. Co. v. Clark, 108 Ill. 113; Chicago &c. R. Co. v. Carpenter, 12 U. S. App. 392, 56 Fed. 451; Jochen v. Robinson, 72 Wis. 199, 39 N. W. 383; Vol. I, § 186.

⁶¹ Prosser v. Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81.

under similar circumstances is no test of ordinary care when the act is so obviously dangerous as to constitute negligence, as a matter of law.⁶¹ When, however, the sufficiency of the appliance or machinery or the adequacy of the method employed in doing a particular thing can be determined only by experiment, there are some courts which hold that it may be shown whether the act from which the injury resulted was done in the usual and customary way. Thus, it has been held that the plaintiff may show that the uncoupling of cars, while in motion was usual.⁶² So, it has been held competent for the defendant to introduce evidence of the mode generally adopted by prudent railroad men in switching their car under like circumstances,⁶³ and to prove that the fastenings to the guard of a railroad turntable in question were similar in character to those in general use on such turntables.⁶⁴ So, the failure to adopt a known and uniform usage among travelers, in the management of loaded teams upon a steep part of a highway, has been held competent evidence of negligence.⁶⁵ But evidence that either the plaintiff or the defendant was negligent at other times, or as to his habits as to carefulness is generally incompetent.⁶⁶

§ 2506. Evidence of similar accidents.—There is conflict among the authorities as to whether evidence of previous similar accidents at the same place is admissible, but we think the better rule is that such evidence is not admissible, ordinarily at least, to prove negligence at the time in question.⁶⁷ But it has been held in some cases that

⁶¹ *Douglas v. Chicago &c. R. Co.*, 100 Wis. 405, 76 N. W. 356.

⁶² *Jeffrey v. Keokuk &c. R. Co.*, 56 Iowa 546, 9 N. W. 784; see also, Vol. I, § 186, or that the course the plaintiff pursued was usual; *Whitsett v. Chicago &c. R. Co.*, 67 Iowa 150, 25 N. W. 104.

⁶³ *Houston &c. R. Co. v. Cowser*, 57 Tex. 293.

⁶⁴ *Kolsti v. Minneapolis &c. R. Co.*, 32 Minn. 133, 19 N. W. 655; *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98, 9 N. W. 588.

⁶⁵ *Aldrick v. Monroe*, 60 N. H. 118; see also, *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103, 9 N. W. 575.

⁶⁶ *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269, 68 N. E. 238; *Kington v. Ft. Wayne &c. R. Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; Vol. I, § 186, notes 315, 316.

⁶⁷ *Potter v. Cave*, 123 Iowa 98, 98 N. W. 569; *Matthews v. Cedar Rapids*, 80 Iowa 459, 45 N. W. 894, 20 Am. St. 436, and note; *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256, 257, citing, *Elliott Roads & Streets* (2nd ed.), § 863; *Goble v. Kansas City*, 148 Mo. 470, 50 S. W. 84; *Davis v. Oregon &c. R. Co.*, 8 Ore. 172; *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537.

evidence of the happening of prior accidents at the same place, in a sidewalk for instance, tended to show that, tested by actual use, it had been demonstrated to be unsafe,⁶⁸ and much the same view has been taken in a few cases in regard to machinery.⁶⁹ So, in a few instances, it has been held competent to show, on the other hand that no such accident had happened before.⁷⁰ But, while evidence of prior accidents might have been admissible in some of these cases on the question of notice,⁷¹ it raises too many distinct and collateral issues, and evidence that there were or were not prior accidents is of very little if any probative value without a knowledge of all the facts and conditions at such other times, and is usually unnecessary because the facts in regard to the condition and circumstances at the time in question are susceptible of direct proof.⁷²

§ 2507. Evidence of experience and tests.—There is a class of cases in which it is held admissible to show that no prior accident has resulted in the actual use and experience with a particular structure, appliance or machine,⁷³ and, while much may be said upon the other side of this question, there is some reason for so holding in a limited class of cases. So, experiments with the same or similar appliance, after the injury, under the same conditions, have often been

⁶⁸ *Gillrie v. Lockport*, 122 N. Y. 403, 25 N. E. 357; *Wooley v. Grand St. &c. R. Co.*, 83 N. Y. 121; *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947.

⁶⁹ *Morse v. Minneapolis &c. R. Co.*, 30 Minn. 465, 16 N. W. 358; see also, *Galveston &c. R. Co. v. Evansich*, 63 Tex. 54; *Chicago &c. R. Co. v. Netrollicky*, 67 Fed. 565.

⁷⁰ *Field v. Davis*, 27 Kans. 400; *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194, and authorities cited in first note to next section.

⁷¹ *Delphi v. Lowery*, 74 Ind. 520; *Dist. of Columbia v. Armes*, 107 U. S. 519, 17 Cent. L. J. 50; *Darling v. Westmoreland*, 52 N. H. 401; *Chicago v. Powers*, 42 Ill. 169.

⁷² *Temperance Hall Asso. v. Giles*,

4 Vr. (N. J.) 260; *Anderson v. Taft*, 20 R. I. 362, 39 Atl. 191; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387; *Blair v. Pelham*, 118 Mass. 420; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605; Vol. I, § 185, and numerous authorities cited in notes 306, 308.

⁷³ *Loftus v. Union &c. Co.*, 84 N. Y. 455; *Birmingham v. Rochester City &c. R. Co.*, 137 N. Y. 13, 32 N. E. 995; *Burke v. Witherbee*, 98 N. Y. 562; *Missouri Pac. R. Co. v. Neiswanger*, 41 Kans. 621, 21 Pac. 582; see also, *Chase v. Blodgett &c. Co.*, 111 Wis. 655, 87 N. W. 826; *Cleveland &c. R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118; *Byard v. Palace &c. Co.*, 85 Minn. 363, 88 N. W. 998; Vol. I, § 187.

held admissible.⁷⁴ But the admission of such evidence should be carefully guarded.⁷⁵

§ 2508. **Evidence of repairs and precautions after the accident.** It has elsewhere been shown that evidence of repairs and precautions after the injury was received is not admissible to prove antecedent negligence, but that it may be admissible to show notice or that the premises or the like belonged to and were under the control of the defendant.⁷⁶ It has also been held that evidence that an employé was discharged thereafter is not admissible to show that he was incompetent and careless.⁷⁷ So, where an injury was caused by a flood, evidence of subsequent floods was held incompetent.⁷⁸ And it has likewise been held that a subsequent change in the manner of carrying on the business cannot be shown to prove antecedent negligence.⁷⁹

§ 2509. **Expert and opinion evidence.**—The subject of expert and opinion evidence has been so fully treated elsewhere,⁸⁰ that it is unnecessary to consider it here to any great extent. The application of the rules upon the subject in negligence cases will also be illustrated in sections in this chapter on negligence in particular classes of cases. Decisions in which certain expert evidence has been held admissible⁸¹ in negligence cases and in which such evidence has been held inadmissible⁸² are cited in the notes.

⁷⁴ *Bradley v. Hartford &c. Co.*, 19 Fed. 246; *Searles v. Manhattan &c. R. Co.*, 17 Jones & S. (N. Y.) 425.

⁷⁵ Vol. I, § 1250, et seq., where the authorities are reviewed.

⁷⁶ Vol. I, §§ 186, 228.

⁷⁷ *Couch v. Watson Coal Co.*, 46 Iowa 17.

⁷⁸ *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; see also, *Denver &c. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345.

⁷⁹ *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677; see also, *Stevens v. Boston &c. Co.*, 184 Mass. 476, 69 N. E. 338; *Wager v. Lamont*, (Mich.) 98 N. W. 1; but see, *Harvey v. New York Cent. &c. R. Co.*, 19 Hun (N. Y.) 556.

⁸⁰ As to opinions of ordinary witnesses, see Vol. I, §§ 672, 674, 675, 683; as to opinions of experts, see, Vol. II, §§ 1041, 1042, 1078-1095, 1098, 1108, 1113, 1114.

⁸¹ *Cincinnati &c. R. Co. v. Smith*, 22 Ohio St. 227; *Ward v. Charleston City R. Co.*, 19 S. Car. 521; *Fitts v. Cream City R. Co.*, 59 Wis. 323, 18 N. W. 186; *Sowden v. Idaho &c. Min. Co.*, 55 Cal. 443; *Storrie v. Grand Trunk El. Co.*, (Mich.) 96 N. W. 569; *Kansas City &c. R. Co. v. Blaker*, (Kans.) 75 Pac. 71, 64 L. R. A. 81; *International &c. R. Co. v. Mills*, (Tex. Civ. App.) 78 S. W. 11; *Wabash Screen Door Co. v. Black*, 126 Fed. 721.

⁸² *Wood v. Chicago &c. R. Co.*, 51 Wis. 196, 8 N. W. 214; *Chicago &c.*

§ 2510. **Admissions and declarations.**—Admissions of a party against his interest are competent in negligence cases as in other cases.⁸³ So, declarations of the parties, and even of bystanders in some instances where they become actors in a sense, are admissible when part of the *res gestae* whether against interest or not.⁸⁴ This general subject has been treated and numerous decisions in negligence cases have been cited, but it may be well further to consider the subject in this connection. A statement made by the deceased immediately after the accident, that he had jumped from the car, has been held competent as an admission against the plaintiff;⁸⁵ and so has such an admission as to the cause of the injury;⁸⁶ or, by the plaintiff, as to the nature and extent of the injury.⁸⁷ Admissions and declarations made by the defendant against his interest are admissible in evidence against himself on the same principle that admissions of the plaintiff are received, but it has been held that the admissions of one defendant in tort are not admissible against his co-defendant.⁸⁸ So, an admission by one that he caused the accident is not, necessarily, an admission that he was in fault.⁸⁹ Yet it has been held that an assignment by the defendant of all his property on the day after the accident, or giving it to his wife without any consideration, is evidence that the defendant

R. Co. v. Moranda, 108 Ill. 576; Stowe v. Bishop, 58 Vt. 498, 3 Atl. 494; Central R. Co. v. De Bray, 71 Ga. 406; Hill v. Portland &c. R. Co., 55 Me. 438; Ivory v. Deer Park, 116 N. Y. 476; King v. Missouri Pac. R. Co., 98 Mo. 235; East Tennessee &c. R. Co. v. Lindamood (Tenn.) 78 S. W. 99; Mathews v. Daly-West Min. Co., 27 Utah 193, 75 Pac. 722; Vant Hyl v. Great Northern R. Co., 90 Minn. 329, 96 N. W. 789.

⁸³ See, Vol. I, Ch. XI, and §§ 252, 254, 255, 564.

⁸⁴ See, Vol. I, §§ 537, 538, 542, 550, 557, 565, especially the last two sections in relation to negligence cases.

⁸⁵ Stein v. Grand Ave. R. Co., 10 Phila. (Pa.) 440.

⁸⁶ Entwistle v. Feighner, 60 Mo. 214; Perigo v. Chicago &c. R. Co., 55 Iowa 326, 7 N. W. 627; Murray v.

Boston &c. R. Co., 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495; Stowe v. Bishop, 58 Vt. 498, 3 Atl. 494; Zemp v. Wilmington &c. R. Co., 9 Rich. L. (S. Car.) 84; Schier v. Quirin, 177 N. Y. 568, 69 N. E. 1130; but see, Bumgardner v. Southern R. Co., 132 N. Car. 438, 43 S. E. 948; Pledger v. Chicago &c. R. Co., (Neb.) 95 N. W. 1057; McCowen v. Gulf &c. R. Co., (Tex. Civ. App.) 73 S. W. 46.

⁸⁷ Gardner v. Bennett, 6 Jones & S. (N. Y.) 197; see, Firkins v. Chicago &c. R. Co., 61 Minn. 31, 63 N. W. 172.

⁸⁸ De Benedetti v. Mauchin, 1 Hilt. (N. Y.) 213.

⁸⁹ Lansing v. Stone, 37 Barb. (N. Y.) 15, 20; see also, Swift Electric Light Co. v. Grant, 90 Mich. 469, 51 N. W. 539.

was conscious of liability, and is admissible, its weight to be determined by the jury.⁹⁰ Admissions and declarations by agents and officers of a corporation rest in the main upon the same principles that apply to other agents, although they may be said in one sense to be admissible as part of the *res gestae*.⁹¹ Thus the admissions of the agent of a railroad company which were made in the performance of a duty of the company and which concerned a defect in the structure of the road have been held competent as the admissions of the corporation itself.⁹² And a declaration made by a motorman, of an electric car, while the car was still on the body of one whom he had run down, that the reason he did not stop was that he could not reverse the car, was held admissible as part of the *res gestae* in a suit for the injury.⁹³ So, generally, declarations and admissions of servants or agents of the plaintiff or defendant are usually admissible in favor of either party, if part of the *res gestae*,⁹⁴ or if made at the time of the accident while acting within the scope of their agency⁹⁵ for the party against whom they are offered.⁹⁶ The declarations of a conductor, an engineer, or the like, about the time of the accident and so connected with it as to form part of the *res gestae* have been received in many cases.⁹⁷

⁹⁰ *Banfield v. Whipple*, 10 Allen (Mass.) 27; *Heneky v. Smith*, 10 Ore. 349; but see, *Lucas v. Nichols*, 7 Jones L. (N. Car.) 32.

⁹¹ See Vol. I, §§ 252, 255, 264; also, *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112; *Marion v. Chicago &c. R. Co.*, 64 Iowa 568, 21 N. W. 86; *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202; *Baker v. Westmoreland Gas Co.*, 157 Pa. St. 593, 27 Atl. 789; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Clapper v. Waterford*, 131 N. Y. 382, 30 N. E. 240.

⁹² *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202.

⁹³ *Springfield Consolidated R. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034; *Sample v. Consolidated &c. Co.*, 50 W. Va. 472, 40 S. E. 597, 57 L. R. A. 186; see also, *Kansas City &c. R. Co. v. Moles*, 58 C. C. A. 29, 121 Fed. 351.

⁹⁴ *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Mullan v. Philadelphia &c. Steamship Co.*, 78 Pa. St. 25; *Ashmore v. Pennsylvania Steam Towing &c. Co.*, 9 Vr. (N. J.) 13; *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 73-75; *Ohio & Mississippi R. Co. v. Stein*, 138 Ind. 243, 19 L. R. A. 733.

⁹⁵ *Lafayette &c. R. Co. v. Ehman*, 30 Ind. 83; *Huntington &c. R. Co. v. Decker*, 82 Pa. St. 119; *Darling v. Oswego Falls Mfg. Co.*, 30 Hun (N. Y.) 276; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

⁹⁶ *Abbott Tr. Ev.*, p. 588, § 17; *Black Law & Pr. in Acc. Cas.*, § 199.

⁹⁷ *Chicago &c. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Tri-City R. Co. v. Brennan*, 108 Ill. App. 471; *East St. Louis R. Co. v. Allen*, 54 Ill. App. 27; *Consolidated R. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1043;

§ 2511. **Defect in highway—What plaintiff must show—Burden of proof.**—In an action to recover damages for injuries received from a defect in a highway the burden of proof is generally upon the plaintiff to show that the place where he was injured was a highway,¹ that the defect existed, that it proximately caused his injury,² that the

Keyser v. Chicago &c. R. Co., 66 Mich. 390, 33 N. W. 867; Robinson v. Fitchburg &c. R. Co., 7 Gray (Mass.) 92; Huntington &c. R. Co. v. Decker, 82 Pa. St. 119; Michigan Central R. Co. v. Gougar, 55 Ill. 503; Central R. Co. v. Kelly, 58 Ga. 107; Alsever v. Minneapolis &c. R. Co., 115 Iowa 338, 88 N. W. 841, 56 L. R. A. 748; Pennsylvania R. Co. v. Books, 57 Pa. St. 339; Tanner v. Louisville &c. R. Co., 60 Ala. 521; Bellefontaine R. Co. v. Hunter, 38 Ind. 335; Ohio &c. R. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 19 L. R. A. 733, and note; Lane v. Bryant, 9 Gray (Mass.) 245; East Tennessee &c. R. Co. v. Eanes, 8 Baxt. (Tenn.) 221; Alabama &c. R. Co. v. Hawk, 72 Ala. 112; Aldridge v. Midland Blast Furnace Co., 78 Mo. 559; Strode v. Conkey, 105 Mo. App. 12, 78 S. W. 678; American Steamship Co. v. Landreth, 102 Pa. St. 131; Prideaux v. Mineral Point, 43 Wis. 513; Martin v. New York &c. R. Co., 103 N. Y. 626, 9 N. E. 505; Roach v. Western &c. R. Co., 93 Ga. 785; Taylor v. Grand Trunk R. Co., 48 N. H. 304; Lissak v. Croker Estate Co., 119 Cal. 442, 51 Pac. 688; but see Fitzgerald v. Weston, 52 Wis. 354, 9 N. W. 13; Cleveland &c. R. Co. v. Mara, 26 Ohio St. 185; Chicago &c. R. Co. v. Howard, 6 Ill. App. 569; Marshall v. Chicago &c. R. Co., 48 Ill. 475; Vicksburg &c. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, and authorities cited; Luman v. Golden &c. Min. Co., 140 Cal. 700, 74 Pac. 307; Gotwald v. St.

Louis &c. Co., 102 Mo. App. 492, 77 S. W. 125; Briggs v. East &c. Coal Co., 206 Pa. St. 564, 56 Atl. 36.

¹ 2 Shearman & Redfield Neg., 382; see also, Spaulding v. Groton, 68 N. H. 77, 44 Atl. 88; Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900; Louisville v. Snow, (Ky.) 54 S. W. 860. A statement of a member of the council that it was a highway has been held insufficient; Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832; see also, Hoffman v. Port Huron, 110 Mich. 616, 68 N. W. 546; but compare Hampson v. Taylor, 15 R. I. 83, 23 Atl. 732; this is essential, because the liability springs from the duty to exercise reasonable care to keep the highway in a safe condition for travel. But, as appears from what has been said, it is not always necessary to prove that the highway was regularly established in due form of law; it is generally enough to prove that it has been treated as a highway and that travel upon it has been expressly or impliedly invited; Huntington v. McClurg, 22 Ind. App. 261, 53 N. E. 658, 661; Schafer v. Mayor of New York, 154 N. Y. 466, 48 N. E. 749.

² Lester v. Pittsford, 7 Vt. 158; Pennsylvania R. Co. v. Hensill, 70 Ind. 569; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; Mayor of Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Small v. Prentice, 102 Wis. 256, 78 N. E. 415; absence of guard rail held proximate cause in Boone v. East Norwegian Tp., 192 Pa. St. 206, 43 Atl. 1025.

defendant was negligent or in fault for not repairing it,¹⁰⁰ and, in many jurisdictions, that he was himself free from contributory negligence.¹⁰¹ Where notice of the claim is made a prerequisite to an action against the city, it also must be shown.¹⁰²

§ 2512. **Defects—Material circumstances.**—For the purpose of showing the existence of the defect, it is competent to prove the condition of the place, where it has remained unchanged, for several days before or after the accident.¹⁰³ But evidence that other sidewalks in the neighborhood were out of repair is generally inadmissible.¹⁰⁴ The

¹⁰⁰ The mere happening of an accident is not ordinarily sufficient proof of negligence; *Beatty v. Gilmore*, 16 Pa. St. 463; *Hale v. Smith*, 78 N. Y. 480; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Wabash &c. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. 193, 14 N. E. 391, and as already stated it must appear that there was a breach of duty to the plaintiff; *Anderson v. East*, 117 Ind. 126, 10 Am. St. 35, 19 N. E. 726.

¹⁰¹ Upon this question there is a wide diversity of opinion. See ante, § 2500.

¹⁰² *Wentworth v. Summit*, 60 Wis. 281, 19 N. W. 97; *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928; *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 729; overruling, *Nagel v. Buffalo*, 34 Hun (N. Y.) 1; *Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98; *Parday v. Mechanicsville*, 101 Iowa 266, 70 N. W. 189 (holding this a material allegation); but see *Frisby v. Marshall*, 119 N. Car. 570, 26 S. E. 251 (holding such an allegation unnecessary in the complaint); it was held in *May v. Boston*, 150 Mass. 517, 23 N. E. 220, that the fact that the plaintiff was ill, and for part of the time under the influence of opiates, was not sufficient to excuse the failure to give notice. The court cited *McNulty v. Cambridge*, 130

Mass. 275; *Lyons v. Cambridge*, 132 Mass. 534; *Mitchell v. Worcester*, 129 Mass. 525; so in *Saunders v. Boston*, 167 Mass. 595, 46 N. E. 98; but see, as to what is a sufficient excuse, *Barclay v. Boston*, 167 Mass. 596, 46 N. E. 113.

¹⁰³ *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Berrenberg v. Boston*, 137 Mass. 231; *De Forest v. Utica*, 69 N. Y. 614; *Ablene v. Hendricks*, 36 Kans. 196, 13 Pac. 121; *Indianapolis v. Scott*, 72 Ind. 196; *Hall v. Austin*, 73 Minn. 134, 75 N. W. 1121; *Lorig v. Davenport*, 99 Iowa 479, 68 N. W. 717; *Bailey v. Centerville*, 108 Iowa 20, 78 N. W. 831; *Wissler v. Atlantic*, 123 Iowa 11, 98 N. W. 131; *Butts v. Eaton Rapids*, 116 Mich. 539, 74 N. W. 872.

¹⁰⁴ *Ruggles v. Nevada*, 63 Iowa 185, 18 N. W. 866; *Dundas v. Lansing*, 75 Mich. 499, 42 N. W. 1011; compare *Cox v. Westchester Turnpike Co.*, 33 Barb. (N. Y.) 414. Evidence of general bad condition of the same sidewalk in the neighborhood has, however, been held admissible; *Lyons v. Red Wing*, (Minn.) 78 N. W. 868; *Bailey v. Centerville*, 108 Iowa 20, 78 N. W. 831; *Kansas City v. McDonald*, 60 Kans. 481, 57 Pac. 123, 45 L. R. A. 429; *Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444; *Haynes v. Hillsdale*, 113 Mich. 44, 71 N. W. 466.

plaintiff may generally prove all relevant and material circumstances attending the accident,¹⁰⁵ as well as such declarations of the parties at the time as form part of the *res gestae*;¹⁰⁶ but declarations of the injured person not forming part of the *res gestae*, and not coming within the rule allowing proof of statements indicative of pain, are not competent.¹⁰⁷ Whatever is so connected with the act, event or transaction as to form part of it is competent, but self-serving declarations made subsequently are not admissible in evidence, so that the test of competency is generally supplied by ascertaining whether the declarations are so blended and interwoven with the act, event or transaction as to be a part of it.

§ 2513. **Defects—Notice.**—Where the defect which caused the injury is attributable to the act of the public corporation itself, then, it is not ordinarily incumbent upon the plaintiff to prove notice,¹⁰⁸ but this rule has an exception, apparent rather than real, for, where the defect is a latent one, the municipality is not liable, unless there is evidence charging it with notice.¹⁰⁹ There is, obviously, an important distinction between concealed defects such as ordinary care would not reveal and defects open to discovery by the exercise of ordinary care.

¹⁰⁵ *Hallahan v. New York &c. R. Co.*, 102 N. Y. 194, 6 N. E. 287; *Clayton v. Brooks*, 31 Ill. App. 62. 168; *Boltz v. Sullivan*, 101 Wis. 608, 77 N. W. 870.

¹⁰⁶ *Lund v. Inhabitants*, 6 Cush. (Mass.) 36; *Frink v. Coe*, 4 Greene (Iowa) 255; *Brownell v. Pacific R. Co.*, 47 Mo. 239; *Stoeckman v. Terre Haute &c. R. Co.*, 15 Mo. App. 503; *Harriman v. Stowe*, 57 Mo. 93; *Casey v. New York &c. R. Co.*, 78 N. Y. 518; *Baker v. Gausin*, 76 Ind. 317; *Leahey v. Cass Ave. &c. R. Co.*, 97 Mo. 165, 10 S. W. 58; *Chicago &c. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524; *Augusta &c. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674.

¹⁰⁷ *Martin v. New York &c. R. Co.*, 103 N. Y. 626, 9 N. E. 505; *Waldele v. New York &c. R. Co.*, 95 N. Y. 274; see also, *Austin v. Rutz*, 72 Tex. 391, 9 S. W. 884; Vol. I, § 565.

¹⁰⁸ See also, *Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167,

¹⁰⁹ *Joliet v. Walker*, 7 Ill. App. 267; *Scanlon v. New York*, 12 Daly (N. Y.) 81; *Hunt v. New York*, 52 N. Y. Super. Ct. 198; *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249. In the case last cited it was said: "We think the defect must be one which the proper officers either had knowledge, or, by the exercise of reasonable care and diligence, might have had knowledge of in time to have remedied it, or to have prevented the injury complained of." The court cited as supporting its ruling, *Lyman v. Hampshire*, 140 Mass. 311, 5 N. E. 211; *Purple v. Greenfield*, 138 Mass. 1; *Rooney v. Randolph*, 128 Mass. 580; *Harriman v. Boston*, 114 Mass. 241.

But the rule protecting municipal corporations from liability for latent defects, where knowledge is not brought home to them, does not protect them where ordinary care would have revealed the defect, nor does it protect them where reasonable care and skill would have enabled them to foresee and provide against injury from the defect.¹¹⁰ This rule requires them to exercise ordinary care and diligence to provide against the decay and weakening of timber from age or the action of the elements.¹¹¹ The authorities recognize two kinds of notice, actual and constructive; and notice imparted by the nature of the work itself, or given to some officer of the municipality,¹¹² may be considered as actual notice, while notice inferred from lapse of time or other circumstances may be considered as constructive notice.¹¹³ Constructive notice is generally proved by showing the existence of the defect for such a length of time as to create the inference that it could not have so long existed unprotected or unremedied without negligence on the part of the municipal officers, but we suppose time is not universally the controlling element, for the character of the defect, its location and surroundings must often exert an important influence upon the question. For the purpose of proving actual notice, it is competent to show an entry in a book of the corporation containing information of the condition of the street,¹¹⁴ and it is also proper to give in evidence for the same purpose the report of the street commis-

¹¹⁰ *Cusick v. Norwich*, 40 Conn. 375; *Kunz v. Troy*, 104 N. Y. 344, 10 N. E. 442; *Market v. St. Louis*, 56 Mo. 189; *Weed v. Ballston Spa*, 76 N. Y. 329; *Gubasko v. New York*, 12 Daly (N. Y.) 183; *Boucher v. New Haven*, 40 Conn. 456.

¹¹¹ *Indianapolis v. Scott*, 72 Ind. 196; *Rapho v. Moore*, 68 Pa. St. 404; *Furnell v. St. Paul*, 20 Minn. 117; *Elliot Roads & Streets* (2d ed.), § 627.

¹¹² We have already considered the question of notice to city officers, and we need here do little more than to call attention to what was said; ante, §§ 626-630; *Salina v. Trosper*, 27 Kans. 544; *Monies v. Lynn*, 119 Mass. 273; *Foster v. Boston*, 127 Mass. 290; *Rogers v. Shirley*, 74 Me. 144; *Ripon v. Bittel*, 30

Wis. 614; *Welch v. Portland*, 77 Me. 384; *Sprague v. Rochester*, 159 N. Y. 20, 53 N. E. 697. Notice to a citizen is not notice to the corporation; *Donaldson v. Boston*, 16 Gray (Mass.) 508; contra, *Springer v. Bowdoinham*, 7 Greenl. (Me.) 442.

¹¹³ *Requa v. Rochester*, 45 N. Y. 129; *Diveny v. Elmira*, 51 N. Y. 506; *Todd v. Troy*, 61 N. Y. 506; *Albrittin v. Huntsville*, 60 Ala. 486; *Board of Commissioners v. Dombke*, 94 Ind. 72; *Dotton v. Common Council*, 50 Mich. 129, 15 N. W. 46; *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Chicago v. Fowler*, 60 Ill. 322; *Decatur v. Besten*, 169 Ill. 340, 48 N. E. 186 (holding it a question of fact for the jury).

¹¹⁴ *Blake v. Lowell*, 143 Mass. 296, 9 N. E. 627.

sioner.¹¹⁵ Evidence contained in a resolution directing repairs to be made is also competent upon the question of notice.¹¹⁶

§ 2514. **Defects—Defenses.**—The place where the injury occurred is sometimes an important matter for consideration; especially is it so upon the question of notice, for what would be negligence respecting a street in a densely populated and much frequented part of a city or incorporated town might not be so in a remote and little used street or alley.¹¹⁷ In most cases the question of whether the corporation ought to have acquired knowledge is dependent upon the locality and its surroundings, and is generally a question of fact for the jury. It is, therefore, proper to place before them the facts concerning the locality, whether it was much frequented, whether it was such as ordinary prudence required should be often inspected or looked after, and like matters. So, too, it is competent for the defense to show that barriers, lights or other warnings and guards were placed about the dangerous place, and that they were subsequently removed by a stranger or wrong-doer.¹¹⁸ It is competent, also, to show that the defect was one not open to discovery by persons using ordinary care, and upon this point it is competent to prove that persons habitually using the street had not observed it,¹¹⁹ but it cannot be shown that others passed the place in safety.¹²⁰ It is also proper to show that the place was well lighted.¹²¹ So, too, it may be proper in some instances to

¹¹⁵ *Bond v. Biddeford*, 75 Me. 538. *Jones County*, 80 Iowa 351, 45 N. W.

¹¹⁶ *Erd v. St. Paul*, 22 Minn. 443; 883.

Aurora v. Pennington, 92 Ill. 564; ¹¹⁷ *Broburg v. Des Moines*, 63 Iowa

in *Delphi v. Lowery*, 74 Ind. 520, 523, 19 N. W. 340. ¹¹⁸ *Temperance Hall v. Giles*, 33 N. J. L. 260; *Bauer v. Indianapolis*, 99 Ind. 56; *Anderson v. Taft*, 20 R. I. 362, 39 Atl. 191, 192.

Beardstown v. Clark, 204 Ill. 524, 68 N. E. 378. ¹¹⁹ While such evidence is admissible, yet it does not necessarily follow in all cases that a city has done its full duty in providing a light. *Giffen v. Lewiston*, (Idaho) 55 Pac. 545. The presence or absence of a light, however, is often an important consideration upon the question of contributory negligence, and may also be important upon the question of the negligence of the city.

¹²⁰ *Reed v. Mayor*, 31 Hun (N. Y.) 311; *Arthur v. Charleston*, 46 W. Va. 88, 32 S. E. 1024, 1025, quoting, *Elliott Roads & Streets* (2d ed.), § 858.

¹²¹ *Mullen v. Rutland*, 55 Vt. 77; *Klatt v. Milwaukee*, 53 Wis. 196, 10 N. W. 162; *Walker v. Ann Arbor*, 111 Mich. 1, 69 N. W. 87; *Weirs v.*

show that the corporation had neither the funds required to make the repairs or remove obstructions, nor the means of obtaining them.¹²³

§ 2515. **Defects—Contributory negligence.**—While there is, as we have said, much conflict upon the question as to who has the burden of proving contributory negligence, there is little upon the question of the effect of contributory negligence when it is proved.¹²³ The weight of authority is overwhelmingly in favor of the doctrine that contributory negligence will effectually defeat a recovery. It is, therefore, competent in all cases for the corporation to introduce evidence tending to show that the fault of the plaintiff proximately contributed to his injury. It is not enough, however, to show fault; it must also be shown that it proximately contributed to the injury.¹²⁴ Circumstances¹²⁵ indicative of a want of ordinary care are admissible in evidence when material to the issue joined. It is competent to show that the street was so well lighted that it was carelessness on the part of the plaintiff not to have observed the defect or obstruction,¹²⁶ and the absence of lights, although there is no duty resting on the municipality to light its streets, may tend to prove that the plaintiff was not guilty of contributory negligence.¹²⁷ Knowledge of the existence of the defect or obstruction is an important factor in cases where the fault of the plaintiff is an essential element of the case.¹²⁸ An unnecessary deviation from the traveled way may sometimes constitute such contributory negligence as will bar a recovery, but this is by no means always true, and the question whether the traveler in deviating from

¹²³ *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350; *Elliott Roads & Streets* (2d ed.), § 612.

¹²⁴ See *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418.

¹²⁵ *Nave v. Flack*, 90 Ind. 205; Judge Cooley says: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." *Cooley Torts* (1st ed.) 679; see also, *Beach Contributory Negligence*, Ch. II.

¹²⁶ As in the case of negligence on the part of the defendant, so in cases of negligence on the part of the plaintiff, circumstances without direct evidence may warrant the in-

ference that the plaintiff was guilty of negligence.

¹²⁷ *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387; *King v. Thompson*, 87 Pa. St. 365. But the mere fact that it was light enough to see does not of itself authorize an instruction that the plaintiff was guilty of contributory negligence. *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Reed v. Spokane*, 21 Wash. St. 218, 57 Pac. 803.

¹²⁸ *Elliott Roads & Streets* (2d ed.), § 623.

¹²⁹ *Elliott Roads & Streets* (2d ed.), § 636; *Kelly v. Doody*, 116 N. Y. 575, 22 N. E. 1084; see also, *Beach Contributory Negligence*, 257.

the way was guilty of negligence must, in almost every instance, be a question of fact for the jury,¹²⁹ for there are many things that will excuse one who leaves the traveled way. If the street is so laid out, improved or maintained as to mislead the traveler, then the fault is that of the corporation and not of the traveler. It is true, as a general rule, that as the corporation is responsible only for the condition of the public way, and not for the condition of adjoining land, it is the fault of the traveler if he quits the way;¹³⁰ but, there are many exceptions to the rule.¹³¹ It is safe to affirm that where a traveler leaves the usually traveled way and is not misled by the wrong of the corporation he is bound to show a sufficient excuse or suffer defeat; but, generally, what is a sufficient excuse is a question for the jury. Contributory negligence may often be inferred from the fact that a traveler leaves a safe part of the way and attempts to traverse a dangerous part, where there is no reasonable excuse or cause for doing so.¹³²

¹²⁹ *Ramsey v. Rushville &c. Co.*, 81 Ind. 394.

¹³⁰ *Scranton v. Hill*, 102 Pa. St. 378, 48 Am. R. 211; *Zettler v. Atlanta*, 66 Ga. 195; *Larrabee v. Peabody*, 128 Mass. 561; *Arey v. Newton*, 148 Mass. 598, 20 N. E. 327; *Leslie v. Lewiston*, 62 Me. 468; *Drew v. Sutton*, 55 Vt. 586, 45 Am. R. 644.

¹³¹ *Erie v. Schwingle*, 22 Pa. St. 384; *Briggs v. Guilford*, 8 Vt. 264.

¹³² *Carolus v. New York*, 6 Bosw. (N. Y.) 15; *Quincy v. Barker*, 81 Ill. 300; *Parkhill v. Brighton*, 61 Iowa 103; *Momence v. Kendall*, 14 Ill. App. 229; *Erie v. Magill*, 101 Pa. St. 616; *Fleming v. Lockhaven*, (Pa.) 6 W. N. Cas. 216; *Lovenguth v. Bloomington*, 71 Ill. 238; *Chicago v. Bixby*, 84 Ill. 82; *Vicksburg v. Hennessy*, 54 Miss. 391; *Monmouth v. Sullivan*, 8 Ill. App. 50; *McLaury v. McGregor*, 54 Iowa 717, 7 N. W. 91; *Oliver v. Denver*, 13 Colo. App. 345, 57 Pac. 729; *Alline v. Le Mars*, 71 Iowa 654, 33 N. W. 160; *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; see also, upon the general subject,

Griffin v. New York, 9 N. Y. 456; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Bruker v. Covington*, 69 Ind. 33. Among the circumstances which may be given in evidence upon the question of the plaintiff's contributory negligence is that of his own intoxication; *Alger v. Lowell*, 3 Allen (Mass.) 402. This is, however, a mere circumstance to be considered, for negligence cannot be inferred from the mere fact that the plaintiff was intoxicated; *Healy v. New York*, 3 Hun (N. Y.) 708; *Sylvester v. Casey*, 110 Iowa 256, 81 N. W. 455. Nor is a drunken man beyond the protection of the law. *Cincinnati &c. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340. The plaintiff's intoxication is no excuse for his own negligence. *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408. Connected with other circumstances the plaintiff's intoxication may exert a controlling influence. *Wood v. Andes*, 11 Hun (N. Y.) 543. If his intoxication was such as to deprive him of the power of exercising due care, and the injury

§ 2516. **Defects—Other accidents—Subsequent repairs.**—We have heretofore considered the question of the competency of evidence that other persons have received injury at the same place where the plaintiff was injured and from the same defect, and it is not necessary to do more at this place than suggest that, while the weight of authority sustains the doctrine that such evidence is admissible, still, it is generally and properly held that it is only admissible upon the question of notice, or the like rather than upon the question of the dangerous nature of the defect.¹³³ And the same is true as to evidence of subsequent repairs. But while evidence of additional precautions or subsequent repairs is not competent for the purpose of proving antecedent negligence, it may in some cases be competent for other purposes. Thus, it may be competent for the purpose of showing that the place where the injury was received was under control of the defendant,¹³⁴ and, it may be competent in cases where the defense is a want of funds. So, too, it may be competent where the question is whether the place where the accident occurred has been changed since the occur-

is attributable to that fact, it is plain enough that there can be no recovery. *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa 315; *Monk v. New Utrecht*, 104 N. Y. 552, 561, 11 N. E. 268. We can see no reason why it may not be inferred, in a case where there is evidence tending to show that a sober man might have safely used the public way, that the injury was caused by the inability of a man shown to be drunk to use due care.

¹³³ *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256, 257; *Goble v. Kansas City*, 148 Mo. 470, 50 S. W. 84; *Dubois v. Kingston*, 102 N. Y. 210, 6 N. E. 273. It was said in the case cited that: "The fact that other persons had been injured by falling over the stone does not, of itself, establish that it was improperly placed in the location occupied, or that it was necessarily of such a dangerous character as to require

the interposition of the city authorities to remove it. Such an accident might well take place in reference to any necessary structure connected with a sidewalk or a building thereon which might possibly interfere with persons using the same;" but see *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808, and ante, § 2506.

¹³⁴ *Lafayette v. Weaver*, 92 Ind. 477. In this case it was said of the evidence: "This was not admissible to prove negligence on the part of the city; that question was to be determined by what was known before, and at the time of the accident." *Rusher v. Aurora*, 71 Mo. App. 418; *Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N. E. 183 (holding it admissible to show notice or to show recognition of the highway as under the control of the city, but not to show antecedent negligence); see also *Sheridan v. Salem*, 14 Ore. 328, 12 Pac. 925; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481.

from showing that he was under no obligation to keep the street in a safe condition and was free from fault.¹⁴⁸ The omission to give such notice does not affect the right of action, but simply imposes upon the city the burden of again litigating the matter and establishing the actionable facts.¹⁴⁹ In the absence of any statutory provision upon the subject, formal notice in writing is not necessary,¹⁵⁰ and notice may even be implied from the party's knowledge of the pendency of the action and participating in its defense.¹⁵¹ If, after notice and request to defend, the person who wrongfully created the obstruction which caused the injury fails to make any defense to the action against the city, and the city defends it for him, it may if guilty of no misfeasance itself, recover from him not only the amount of the judgment recovered from it, but also all reasonable and necessary expense incurred in defending the action, including reasonable attorney fees.¹⁵²

§ 2519. Master and servant—Plaintiff's evidence.—"In actions by servants against masters to recover damages for personal injuries received while in the master's employment, either from unsuitable or defective machinery or appliances, or from not being provided with safe and suitable place in which to work, to entitle him to recover, he must affirmatively establish: (1) That the machine or appliance was unsuitable or defective, or that the place was unsafe or dangerous. (2) That the master had knowledge or notice, actual or presumptive, or

65; see also, *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544; *Western &c. R. Co. v. Atlanta*, 74 Ga. 774; *Brookville v. Arthurs*, 130 Pa. St. 501, 18 Atl. 1076; *Reading v. Reiner*, 167 Pa. St. 41, 31 Atl. 357; see also, *Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443; but compare *Schaefer v. Fond du Lac*, 99 Wis. 333, 74 N. W. 810.

¹⁴⁸ *Chicago v. Robins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657; see also, *Keokuk v. Independent Dist. &c.*, 53 Iowa 352, 36 Am. R. 226; *St. Louis v. Connecticut &c. Ins. Co.*, 107 Mo. 92, 17 S. W. 637; *Boston v. Coon*, 175 Mass. 283, 56 N. E. 287; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. 626.

¹⁴⁹ *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324; *Binsse v. Wood*, 37 N. Y. 528, 530.

¹⁵⁰ *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Barney v. Dewey*, 13 Johns. (N. Y.) 225; *Beers v. Pinney*, 12 Wend. (N. Y.) 309.

¹⁵¹ *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Morgan v. Muldoon*, 82 Ind. 347.

¹⁵² *Westfield v. Mayo*, 122 Mass. 100, 23 Am. R. 292; *Vearie v. Penobscot R. Co.*, 49 Me. 119; *Chesapeake &c. Canal Co. v. Coms.*, 57 Md. 201, 40 Am. R. 430; contra, *Littleton v. Richardson*, 32 N. H. 59. These sections on highways have been taken largely from *Elliott on Roads and Streets*.

ought to have known such fact, i. e., that the danger was one which was known to, or might have been apprehended by, the defendant. (3) That the servant did not know and had not equal means with the master of knowing such fact. (4) An injury resulting therefrom as the proximate cause.¹⁵³ (5) In those courts in which the burden of proof is on the plaintiff to show freedom from contributory negligence; that he was himself free from fault and in the exercise of ordinary care. When the action is brought by servants who are deficient in understanding, either from age, training or experience, proof should be made that the danger was one which, by the exercise of the faculties and understanding of the servant, when directed to the thing he was commanded to do, was not open to his observation and apprehension,¹⁵⁴ and that the master did not give adequate warning and instruction to such servant.¹⁵⁵ This is a fair statement of the law in most jurisdictions. The master is generally presumed, in the absence

¹⁵³ *Reardon v. New York Consolidated Card Co.*, 19 Jones & S. (N. Y.) 134; *Chicago & C. R. Co. v. Montgomery*, 15 Ill. App. 205; *Atlas Engine Works v. Randall*, 100 Ind. 293, 297; *Chicago & C. R. Co. v. Scanlon*, 170 Ill. 106, 48 N. E. 826; see *Columbus & C. R. Co. v. Troesch*, 68 Ill. 545; 2 *Thompson Negligence* 1053, § 48, 1054, note 4; see also, *Chicago & C. R. Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76, 1121; *Indianapolis & C. Co. v. Foreman*, 162 Ind. 85; *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95; *Louisville & C. R. Co. v. Davis*, 91 Ala. 487, 8 So. 552; *Crouse v. Chicago & C. R. Co.*, 102 Wis. 196, 78 N. W. 446, 778; but compare, as to the burden of showing servant's knowledge or means of knowledge, *Connolly v. Waltham*, 156 Mass. 368, 31 N. E. 302; *Alexander v. Central Lumber Co.*, 104 Cal. 532, 38 Pac. 410; *Gulf & C. R. Co. v. Royall*, 18 Tex. Civ. App. 86, 43 S. W. 815.

¹⁵⁴ *Atlas Engine Works v. Randall*, 100 Ind. 293, 297. In an action by a servant against his master to recover damages for personal injuries

where the plaintiff claims that the injury was caused by an incompetent fellow servant, whom the master had negligently employed, the plaintiff, in order that he may recover, must show by affirmative testimony: (1) That the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetency was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, or that the defendant had knowledge of the incompetency during the employment and before the accident. *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228, 33 Atl. 1104; see also, as to the evidence on the question of duty to warn, *Texas & C. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *McCarthy v. Mulgrew*, 107 Iowa 76, 77 N. W. 527; *Verdelli v. Gray's & C.*, 115 Cal. 517, 47 Pac. 364.

¹⁵⁵ *Black Law & Pr. in Acc. Cas.*, § 176.

of anything to the contrary, to have performed his duty in regard to furnishing and maintaining a safe place to work,¹⁵⁶ and suitable appliances and machinery.¹⁵⁷ The burden of proof is upon the plaintiff to prove the alleged negligence of the master as a proximate cause of the injury.¹⁵⁸ The mere fact of the happening of an accident or of injury received by the servant raises no presumption of negligence on the part of the master.¹⁵⁹ The injury alone does not necessarily prove its connection as the effect of the master's negligence;¹⁶⁰ and *res ipsa loquitur* is seldom, if ever, true or applicable in actions by a servant against his master.¹⁶¹

§ 2520. Master and servant—Evidence in particular cases. Questions as to the admissibility of evidence of custom, practice,

¹⁵⁶ Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. 245; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Campbell v. Pennsylvania R. Co., (Pa.) 2 Atl. 489.

¹⁵⁷ Kincaid v. Oregon Short Line &c. R. Co., 22 Ore. 35, 29 Pac. 3; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Illinois Cent. R. Co. v. Barslow, 55 Ill. App. 203.

¹⁵⁸ Fenderson v. Atlantic City R. Co., 56 N. J. L. 708, 31 Atl. 767; Brownfield v. Chicago &c. R. Co., 107 Iowa 254, 77 N. W. 1038; St. Louis &c. R. Co. v. Harper, 44 Ark. 524; Louisville &c. R. Co. v. Orr, 84 Ind. 50; Chicago &c. R. Co. v. Geary, 110 Ill. 383; Texas &c. R. Co. v. Thompson, 17 C. C. A. 524, 70 Fed. 944. "A recovery in these cases must rest upon affirmative evidence of some violation or neglect of duty. The burden is upon the plaintiff to negative the presumption in favor of his employer, and it is not enough that he show an injury sustained, but he must go further and show some specific act of negligence." Soderman v. Kemp, 145 N. Y. 427, 434, 40 N. E. 212; Crown v. Orr, 140 N. Y. 450, 453, 35 N. E. 648; Wojciechow-

ski v. Spreckels Sugar Refining Co., 177 Pa. St. 57, 35 Atl. 596.

¹⁵⁹ Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301, 13 Atl. 286; Baldwin v. St. Louis &c. R. Co., 68 Iowa 37, 25 N. W. 918; Joliet Steel Co. v. Shields, 146 Ill. 603, 34 N. E. 1108; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; Chicago &c. R. Co. v. Kellog, 55 Neb. 748, 76 N. W. 462.

¹⁶⁰ Gulf &c. R. Co. v. Kizziah, 86 Tex. 81, 23 S. W. 578; see also, Texas &c. R. Co. v. Thompson, 17 C. C. A. 524, 70 Fed. 944.

¹⁶¹ Oglesby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623; Rickaly v. O'Brien Boiler &c. Co., (Mo. App.) 82 S. W. 963; Greeley v. Foster, (Colo.) 75 Pac. 351; Neeley v. Southwestern &c. Co., 13 Okla. 356, 64 L. R. A. 145; Patton v. Texas &c. R. Co., 179 U. S. 658, 21 Sup. Ct. 275; Mountain Copper Co. v. Van Buren, 59 C. C. A. 279, 123 Fed. 61; Moore Lime Co. v. Johnston, Adm., (Va.) 48 S. E. 557; but compare Palmer Brick Co. v. Chenall, (Ga.) 47 S. E. 329; Sack v. Dolese, 137 Ill. 129, 27 N. E. 62.

habits and the like, and as to the admissibility of opinion evidence and of declarations, have already been sufficiently considered in this chapter and many of the authorities cited were actions by a servant to recover on account of the negligence of his master. It may be advisable, however, to call attention to a few of the decisions in particular cases. In an action against the master where it was claimed that he was negligent in regard to the construction of a place to work and that he knew it was unsafe, it was held that he might testify that he had no knowledge or information of its defective or unsafe condition.¹⁶² Evidence of the general notoriety of the unsafe condition of the place has been held admissible to charge the master with knowledge,¹⁶³ and evidence of other accidents has been held admissible for the same purpose.¹⁶⁴ So, evidence of custom or practice has been admitted, in some instances, upon the question of negligence or contributory negligence,¹⁶⁵ but, as elsewhere shown a negligent custom or practice will not, ordinarily, justify or excuse negligence in the particular instance.

§ 2521. Master and servant—Contributory negligence and other defenses.—As already shown, the rule as to the burden of proof upon the question of contributory negligence varies in different jurisdictions. So does the rule as to the burden of showing an assumption of the risk.¹⁶⁶ Both questions, however, are affected somewhat by statutes

¹⁶² *Boyle v. Mowry*, 122 Mass. 251.

¹⁶³ *Louisville &c. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. 84; *Taylor &c. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918, 23 Am. St. 316; as to evidence to show knowledge, see generally, *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175; *Elledge v. National City &c. R. Co.*, 100 Cal. 282, 34 Pac. 721, 38 Am. St. 290.

¹⁶⁴ *Louisville &c. R. Co. v. Wright*, 115 Ind. 378, 15 N. E. 145, 7 Am. St. 432; *Malone v. Hawley*, 46 Cal. 409; *Galveston &c. R. Co. v. Ford*, (Tex. Civ. App.) 46 S. W. 77; see also, *Worden v. Humeston &c. R. Co.*, 76 Iowa 310, 41 N. W. 26; and see as to inadmissibility of evidence that no other accidents had happened, *Bryce v. Chicago &c. R. Co.*, 103 Iowa 665, 72 N. W. 780.

¹⁶⁵ *Doyle v. St. Paul &c. R. Co.*, 42 Minn. 79, 43 N. W. 787; *Atchison &c. R. Co. v. Alsdurf*, 47 Ill. App. 200; *Georgia &c. R. Co. v. Probst*, 83 Ala. 518, 3 So. 764; *Bellville Stone Co. v. Comben*, 61 N. J. L. 353, 39 Atl. 641; *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175; *Reese v. Hershey*, 163 Pa. St. 253, 29 Atl. 907, 43 Am. St. 795.

¹⁶⁶ Held to be on the plaintiff to show non-assumption in the following cases: *Chicago &c. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Clark &c. Co. v. Wright*, 16 Ind. App. 630, 45 N. E. 817; *Louisville &c. R. Co. v. Quinn*, 14 Ind. App. 554, 43 N. E. 240; *Lloyd v. Hanes*, 126 N. Car. 359, 35 S. E. 611; see also, 3 *Elliott Railroads*, § 1311; held to be on the defendant to show that the plaintiff assumed the risk in the fol-

in certain cases in some jurisdictions, and a few of these statutes in actions based upon them do away almost entirely with the doctrine of assumption of risks and even with that of contributory negligence; but most of the employer's liability acts do not go to that extent. The nature of the employment may be material upon the question of contributory negligence;¹⁶⁷ but it is generally, although not always held incompetent to show that the plaintiff when injured was doing the work in the same way that others did it in the same employment.¹⁶⁸ It has been held, however, that the plaintiff may show in a proper case that he was put to work outside the scope of his ordinary employment and protested and went only under threat of discharge,¹⁶⁹ that he was engrossed in his duties,¹⁷⁰ or that he was suddenly called to act in an emergency.¹⁷¹ Evidence is generally admissible on behalf of the defendant to show that the plaintiff had been warned or had knowledge of the danger,¹⁷² and that he failed to take precautions;¹⁷³ but evidence that he was negligent on other occasions is usually incompetent.¹⁷⁴ Of course, there are many other facts and circumstances, in-

lowing cases: *Pennsylvania R. Co. v. Jones*, 59 C. C. A. 87, 123 Fed. 753; *Shebek v. National Cracker Co.*, 120 Iowa 414, 94 N. W. 930; *Nadan v. White & Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. 29; *Thompson v. Great & C. R. Co.*, 70 Minn. 219, 72 N. W. 962; *Walker v. McNeill*, 17 Wash. St. 582, 50 Pac. 518; see also, *Louisville & C. R. Co. v. Orr*, 84 Ind. 50. The nature of the risk in question or the manner in which the question is presented may, perhaps, determine the question of the burden of proof upon this issue in some instances.

¹⁶⁷ *Pennsylvania R. Co. v. Conlan*, 101 Ill. 93.

¹⁶⁸ *Southern Kans. R. Co. v. Robins*, 43 Kans. 145, 23 Pac. 113; *Chicago & C. R. Co. v. Harrington*, 77 Ill. App. 499; *Thompson v. Boston & C. R. Co.*, 153 Mass. 391, 26 N. E. 1070; see also, Vol. I, § 186; but compare, *Western R. Co. v. Arnett*, 137 Ala. 414, 34 So. 997; *De Cair v. Manistee & C. R. Co.*, (Mich.) 95 N. W. 726.

¹⁶⁹ *Doyle v. Missouri & C. Co.*, 140 Mo. 1, 41 S. W. 255; *Williams v. Clark*, 204 Pa. St. 416, 54 Atl. 315. Or that there had been a promise to warn him and protect him or the like. *Gulf & C. R. Co. v. Duvall*, 12 Tex. Civ. App. 348; *Gulf & C. R. Co. v. Garren*, (Tex. Civ. App.) 72 S. W. 1028.

¹⁷⁰ *Texas & C. R. Co. v. Volk*, 151 U. S. 78, 14 Sup. Ct. 239.

¹⁷¹ *Delude v. St. Paul City R. Co.*, 55 Minn. 63, 56 N. W. 461; see also, for other illustrative cases: *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6; *Bonner v. Bean*, 80 Tex. 152, 15 S. W. 798.

¹⁷² *Cincinnati & C. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171; *Quinn v. New York & C. R. Co.*, 56 Conn. 44, 12 Atl. 97, 7 Am. St. 284.

¹⁷³ *Murphy v. Wabash R. Co.*, 115 Mo. 111, 21 S. W. 862. Or disobeyed rules. *Nordquist v. Great Northern R. Co.*, 89 Minn. 485, 95 N. W. 322.

¹⁷⁴ *Atlanta & C. R. Co. v. Johnson*, 66 Ga. 259; *Kaillen v. Northwestern Bedding Co.*, 46 Minn. 187, 48 N. W.

cluding the surroundings and *res gestae* at the time of the injury, that may be relevant upon the question of contributory negligence, but there is nothing peculiar that seems to demand further consideration in this connection.

§ 2522. **Railroad crossings—Plaintiff's evidence.**—In an action by a traveler upon the highway to recover damages for injuries received at a railroad crossing by reason of the negligence of the company, the burden is upon the plaintiff to show that the negligence complained of was a proximate cause of the injury,¹⁷⁵ and, in some jurisdictions, he must also show that he himself was free from contributory negligence. Evidence of a city ordinance, properly pleaded, and the violation thereof, of the speed of the train, of the failure to give signals, and other circumstances of the surroundings bearing upon the question is admissible, in a proper case, showing or tending to show negligence.¹⁷⁶ But, as just stated, it must appear to have been a proximate cause of the injury, although there are a few jurisdictions in which it is held that if statutory signals are omitted, the burden is upon the defendant to show that their omission was not a proximate cause of the injury, or to show some good reason for omitting them.¹⁷⁷ In one case a witness familiar with the locality was permitted to testify as to narrow escapes of his own at the crossing as tending to show its nature and dangers,¹⁷⁸ but this seems somewhat questionable and contrary to the general rule, and the plaintiff cannot show negligence of the defendant in failing to give signals or the like by evi-

779; *Missouri &c. R. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568; see also, *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243; *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

¹⁷⁵ *Baltimore &c. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Lake Erie &c. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *Wabash &c. R. Co. v. Hicks*, 13 Ill. App. 407; *Chicago &c. R. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286; *Chicago &c. R. Co. v. Roberts*, (Neb.) 91 N. W. 707; *Siracusa v. Atlantic City R. Co.*, 68 N. J. L. 446, 53 Atl. 547; see also, *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. 233; *Atchison &c. R. Co. v. Morgan*, 31 Kans. 77, 1 Pac. 298; *Chicago &c. R. Co. v. Houston*, 95 U. S. 697. There are cases in which it may be necessary

for the plaintiff to show that the place was a public crossing or the like, or other facts showing a duty to the plaintiff.

¹⁷⁶ See *McGrath v. New York &c. R. Co.*, 63 N. Y. 527; *Heddles v. Chicago &c. R. Co.*, 77 Wis. 228, 46 N. W. 115; *Seifred v. Pennsylvania R. Co.*, 206 Pa. St. 399, 55 Atl. 1061; *Lake Shore &c. R. Co. v. Johnston*, 25 Ohio C. C. 41; *Cohen v. Chicago &c. R. Co.*, 104 Ill. App. 314.

¹⁷⁷ *Huckshold v. St. Louis &c. R. Co.*, 90 Mo. 548; *Wakefield v. Connecticut &c. R. Co.*, 37 Vt. 330; *South &c. R. Co. v. Thompson*, 62 Ala. 494.

¹⁷⁸ *Chicago &c. R. Co. v. Netolicky*, 14 C. C. A. 615, 67 Fed. 665; but see Vol. I, § 185.

dence of such failure on other occasions,¹⁷⁹ yet there are exceptional cases in which evidence of the speed of the same train on other occasions has been held competent.¹⁸⁰

§ 2523. **Railroad crossing—Contributory negligence.**—In some jurisdictions the burden of proving freedom from contributory negligence in such cases is upon the plaintiff, and in others the burden of showing contributory negligence is upon the defendant. In some, the presumption is that the plaintiff was guilty of contributory negligence, in others the presumption is that he was not, and in others there is no presumption either way. All agree, however, that, if there was contributory negligence it constitutes a defence, unless, under the operation of the doctrine of the "last clear chance," the negligence of the defendant thereafter was really the proximate cause of the injury. So, too, it does not matter whether contributory negligence is shown by the defendant or by the plaintiff in attempting to make his case. Contributory negligence, in ordinary cases, is usually, although not always, a question of fact or a mixed question of law and fact for the jury under proper instructions, but in cases of the character under consideration a doctrine prevails in many jurisdictions that frequently makes it a question of law, and results in the case being taken from the jury, at least where there is no conflict in the evidence as to the physical facts. This rule is that in such cases the quantum of care required of the traveler to a certain extent at least is prescribed by the law, and that he must at least look and listen, or, if the failure to do so proximately contributed to his injury he will be deemed guilty of contributory negligence as a matter of law. And, in addition to this, it is conclusively presumed that he saw or heard what he might and would have seen or heard if he had looked and listened, but did not heed, or that he did not look and listen as the law requires, and he can not recover when the physical facts show that he might and would have seen or heard the approaching engine or cars in time to have avoided injury if he had so looked and listened.¹⁸¹ The

¹⁷⁹ *Stewart v. Galveston &c. R. Co.*, (Tex. Civ. App.) 78 S. W. 979. It has, however, been held competent for witnesses to testify that if signals had been given they would have heard them; *Cleveland &c. R. Co. v. Beard*, 106 Ill. App. 486, although this seems much in the nature of an opinion or a mere conclusion.

¹⁸⁰ *Stone v. Boston &c. R. Co.*, 72 N. H. 206, 55 Atl. 359; see *Chicago &c. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280; *Savannah &c. R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471; *State v. Manchester &c. R. Co.*, 52 N. H. 528.

¹⁸¹ *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270; *Cleveland &c. R. Co. v. Miller*, 149 Ind. 490, 505, 49

question of contributory negligence depends largely upon the circumstances of the particular case, and evidence of the surroundings and what was done is usually competent upon this question as well as upon the question of the negligence of the defendant. But in some cases no direct evidence upon the subject can be obtained or it is so conflicting that other evidence has been resorted to, and, of course, circumstantial as well as direct evidence may be competent. In a recent case, where the evidence was conflicting, it was held that evidence that the plaintiff, a boy, was in the habit of jumping on moving trains in the vicinity was admissible,¹⁸² and in another case, which was an action by the widow of the person killed at the crossing, it was held competent for her to testify that, in passing the crossing on previous occasions, the deceased had remarked on its dangerous character and taken precautions against injury.¹⁸³ But, ordinarily, at least where there are eye-witnesses, the better rule would seem to be that evidence that the plaintiff had or had not been negligent on other occasions is inadmissible.¹⁸⁴

- N. E. 445; *Pittsburg &c. R. Co. v. Fraze*, 150 Ind. 576, 50 N. E. 576; *Cleveland &c. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 233; *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405, 411, 412, 42 N. E. 736; *Lake Erie &c. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Cincinnati &c. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Pittsburgh &c. R. Co. v. West*, (Ind. App.) 69 N. E. 1017; *Conkling v. Erie R. Co.*, 63 N. J. L. 338, 43 Atl. 666, 668; *Southern R. Co. v. Smith*, 30 C. C. A. 58; 86 Fed. 292, 296; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562, 38 S. W. 308; *Artz v. Railroad Co.*, 34 Iowa 153; *Myers v. Baltimore &c. R. Co.*, 150 Pa. St. 386; 24 Atl. 747; *Haetsch v. Chicago &c. R. Co.*, 87 Wis. 304, 58 N. W. 393, 395; *Dolfini v. Erie R. Co.*, 178 N. Y. 1, 70 N. E. 68; *Medcalf v. St. Paul City R. Co.*, 82 Minn. 18, 84 N. W. 633; 3 Elliott Railroads, § 1165; 4 Elliott Railroads, § 1703; see also, *Dunworth v. Grand Trunk &c. R. Co.*, 127 Fed. 307; *Tucker v. New York &c. R. Co.*, 124 N. Y. 308, 26 N. E. 916; *Moore v. Keokuk &c. R. Co.*, 89 Iowa 223, 56 N. W. 430; *Groesbeck v. Chicago &c. R. Co.*, 93 Wis. 505, 67 N. W. 1120; *Burns v. Louisville &c. R. Co.*, 136 Ala. 522, 33 So. 891.
- ¹⁸² *Pittsburgh &c. R. Co. v. McNeil*, (Ind. App.) 66 N. E. 777.
- ¹⁸³ *Stone v. Boston &c. R. Co.*, 72 N. H. 206, 55 Atl. 359.
- ¹⁸⁴ *International &c. R. Co. v. Ives*, (Tex. Civ. App.) 71 S. W. 772; *Missouri &c. R. Co. v. Johnson*, 92 Tex. 380, 48 S. W. 568; *Glass v. Memphis &c. R. Co.*, 94 Ala. 581; 10 So. 215; *Chase v. Maine Cent. R. Co.*, 77 Me. 62; *Louisville &c. R. Co. v. McClish*, 53 C. C. A. 60, 115 Fed. 268; see also, *Delaware &c. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Tenny v. Tuttle*, 1 Allen (Mass.) 185; *Towle v. Pacific Improvement Co.*, 98 Cal. 342, 33 Pac. 207; *Carr v. West End St. R. Co.*, 163 Mass. 360, 40 N. E. 185; Vol. I, § 186.

icism, will, with the explanation already given, suffice for the purpose here, as we have to do with evidence or rules of evidence in nuisance cases rather than with substantive law. Private nuisances alone will be considered in this chapter except in so far as public nuisances may cause special or peculiar injury or damage to a private individual or individuals, and thus become, in a sense, private as well as public nuisances.

§ 2525. **Elements—Test—Use of property.**—The maxim is *sic utere tuo ut alienum non laedas*, but it is not every use of one's property that works an injury to another or to the property of another that creates a nuisance. "Injury and damage are essential elements of a nuisance, but they may both exist as the result of an act or thing, and yet the act or thing producing them may not be a nuisance." Every one has a right to the reasonable enjoyment of his property, and this right is generally very extrinsic, so long as the use to which the owner devotes it violates no rights of another. In such a case, however much damage others may sustain therefrom, the use being lawful, it is *damnum absque injuria*.⁶

§ 2526. **Public and private—Nuisance per se.**—A public nuisance may also be a private nuisance.⁷ A private nuisance is said to be one that affects a single individual or a certain number of persons in the enjoyment of some private right not common to the public,⁸ although, as elsewhere shown, a public nuisance may also be, in a sense, a private nuisance where a single individual or a certain number of individuals are specially effected or injured thereby in a dif-

107 Wis. 267, 83 N. W. 308, 81 Am. St. 840, 841.

¹ Wood Nuisance (3rd ed.), § 2; see also, *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 12 Am. St. 560; *Thurston v. Hancock*, 12 Mass. 222; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 767, note in; *Bohan v. Port Jervis Gas Co.*, 122 N. Y. 18, 9 L. R. A. 711.

⁷ *Soltan v. DeHeld*, 2 Sim. N. S. 133, 21 L. J. Ch. 153, 9 Eng. L. & Eq. 104; *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626; *Morton v. Moore*, 15 Gray (Mass.) 573;

Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123, and note; *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Hayden v. Tucker*, 37 Mo. 214; *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. St. 673, and note; *South Carolina S. B. Co. v. S. Car. R. Co.*, 30 S. Car. 539, 4 L. R. A. 211.

⁸ *Gunter v. Geary*, 1 Cal. 462; *Burlington v. Stockwell*, 5 Kans. App. 569; see also, dissenting opinion in, *Bohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 33, 25 N. E. 246.

ferent way from the general public. A nuisance per se is said to be one which is in itself a nuisance and which cannot be so conducted or maintained as to be lawfully carried on, such as a disorderly house, or an obstruction to a highway or navigable stream or the like.⁹ It has sometimes been said that a lawful business may be a nuisance per se, but, while it may be prima facie, a nuisance under certain circumstances, the better rule seems to be that it is not a nuisance per se but may be a nuisance because of its locality and surroundings or because of the manner in which it is conducted.¹⁰

§ 2527. **Legislative or municipal declaration of nuisance.**—The Legislature may, within constitutional limits, declare that to be a nuisance which was not known as a nuisance at common law. It is said that a large discretion is vested in the Legislature in the exercise of the police power, but that it has no right to arbitrarily declare that to be a nuisance which is not and can not be a nuisance.¹¹ So, power is generally given to municipalities to declare what shall constitute a nuisance within their limits, but, while this power is often a very comprehensive one and its exercise may be conclusive where a thing may or may not be a nuisance according to the circumstances, yet they cannot arbitrarily declare and abate that as a nuisance which is clearly not a nuisance.¹²

§ 2528. **Questions of law or fact.**—There is some apparent conflict among the authorities as to whether the question of nuisance in any

⁹ *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 420, 47 N. E. 2, 62 Am. St. 532; *McKee*, 73 Conn. 18, 46 Atl. 409; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. R. 694.

¹⁰ *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. St. 673; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 420, 421, 47 N. E. 2, 62 Am. St. 532; *Kinney v. Koopman*, 116 Ala. 310, 22 So. 593, 67 Am. St. 119; *State v. Close*, 35 Iowa 570; *Bacon v. Walker*, 77 Ga. 336; *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89, 90, 91; see also, as to distinction between a nuisance prima facie and a nuisance per se, *Vickers v. Durham*, 132 N. Car. 880, 44 S. E. 685.

¹¹ *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499; see also, *State v.*

¹² *Lacey*, Ex parte, 108 Cal. 326, 49 Am. St. 93, note, and others in the same series of reports therein referred to; *Evansville v. Miller*, 146 Ind. 613, 45 N. E. 1054; *Baumgartner v. Hasty*, 100 Ind. 575; *St. Louis v. Heltzeberg Packing & Co.*, 141 Mo. 375, 42 S. W. 954, 64 Am. St. 516; *Cleveland v. Malm*, 7 Ohio Dec. 124; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. R. 788; *Hong Wah*, In re, 82 Fed. 623; ordinance held inadmissible in, *Danker v. Goodwin Mfg. Co.*, 102 Mo. App. 723, 77 S. W. 338.

particular case is one of law or one of fact or of mixed law and fact. In a number of cases it has been held to be a question of law.¹³ But the weight of authority is to the effect that the question in most cases is one of fact or of mixed law and fact for the jury, that is, the court should instruct the jury as to what constitutes or is necessary to constitute a nuisance in law, and it is for the jury to determine whether or not the particular thing, act, omission, or use of property complained of, exists and is in fact a nuisance under the circumstances of the particular case.¹⁴ There are doubtless instances, as, for example in the case of a nuisance per se, in which upon the undisputed facts no jury would be permitted to say that there was no nuisance, and others, perhaps, in which the act complained of or shown by the evidence could not be a nuisance under the law. In such cases the question would become one of law for the court, but, ordinarily, much would depend upon the circumstances of the particular case and the question would have to be left to the jury under proper instructions. When this distinction is borne in mind it will be found that much of the conflict among the authorities is merely apparent rather than real.

§ 2529. **Motive immaterial.**—In determining whether the act in question constitutes a nuisance, the intention or motive of the person doing the act is generally immaterial. Thus, it may be no less a nui-

¹³ *Soltau v. De Held*, 2 Sim. N. S. 133, 21 L. J. Ch. 153, 9 Eng. L. & Eq. 104; *Smith v. McConathy*, 11 Mo. 517; see also, *Frost v. Berkeley Phosphate Co.*, 42 S. Car. 402, 20 S. E. 280, 46 Am. St. 736; *Susquehanna &c. Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. 595.

¹⁴ *Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677, 5 Am. St. 524; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Lounsbury v. Foss*, 80 Hun (N. Y.) 296; *Commonwealth v. Yost*, 11 Pa. Super. Ct. 323; *State v. Woodward*, 23 Vt. 92; *Rex v. Morris*, 1 B. & Ad. 441, 20 E. C. L. 421; *Burnham v. Hotchkiss*, 14 Conn. 311; *Stowe*

v. Miles, 39 Conn. 426; *Thebaut v. Canova*, 11 Fla. 143; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. R. 522; *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Hart v. Albany*, 3 Paige (N. Y.) 381; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; *Teinen v. Lally*, (N. Dak.) 86 N. W. 356; *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794; 4 Am. St. 601; *Frost v. Berkeley Phosphate Co.*, 42 S. Car. 402, 46 Am. St. 736; *Barnes v. Hathorn*, 54 Me. 124; *State v. Mott*, 61 Md. 297, 48 Am. R. 105. Whether sickness complained of was caused by nuisance is for the jury. *Savannah &c. R. Co. v. Parrish*, 117 Ga. 893, 45 S. E. 280.

sance although committed without any improper motive.¹⁵ And, on the other hand, an act or use lawful in itself is not made a nuisance so as to give rise to civil liability therefor, merely by reason of the fact that it is inspired by malice or improper motives.¹⁶ But particular statutes may change this rule and in one or two jurisdictions it is not applied in the case of what are called spite fences.¹⁷

§ 2530. Abatement and injunction.—In some instances a private individual may abate a nuisance without legal proceedings, or he may, in other cases institute legal proceedings to have it abated.¹⁸ But, ordinarily, his remedy is by obtaining an injunction or by an action at law for damages.¹⁹ A court of equity has jurisdiction in a

¹⁵ *Columbus &c. Co. v. Tucker*, 48 Wis. 267, 83 N. W. 308, 81 Am. St. Ohio St. 41, 26 N. E. 630, 29 Am. St. 528; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *People v. Burtleson*, 14 Utah 258, 47 Pac. 87; *Reg. v. Stephen*, L. R. 1 Q. B. 702.

¹⁶ *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218, 74 Am. St. 600; *Bonnell v. Smith*, 53 Iowa 281, 5 N. W. 128; *Kuzniak v. Kozminski*, 107 Mich. 444, 65 N. W. 275, 61 Am. St. 344; *Olmsted v. Rich*, 6 N. Y. S. 826; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Hahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461; but see, *Carlington v. Taylor*, 11 East 571; *Chesley v. King*, 74 Me. 164; *Medford v. Levy*, 31 W. Va. 649, 8 S. E. 302, 13 Am. St. 887.

¹⁷ *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 21 Am. St. 510; *Harbison v. White*, 46 Conn. 106 (by statute). As said by the Supreme Court of Wisconsin, however, in disapproving the Michigan decisions on spite fences: "The general rule is that whatever a man may lawfully do on his own property under any circumstances he may do regardless of the motive for his conduct." *Metzger v. Hochrein*, 107

Wis. 267, 83 N. W. 308, 81 Am. St. 841, 842; see also, *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, and numerous authorities cited.

¹⁸ As to abatement generally, see notes in *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. 557; *Bowden v. Lewis*, 13 R. I. 189, 43 Am. R. 24; *Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 443; and the recent case of, *Priewe v. Fitzsimons &c. Co.*, 117 Wis. 497, 94 N. W. 317; *Savannah &c. R. Co. v. Gill*, 118 Ga. 737, 45 S. E. 623; *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 Fed. 184.

¹⁹ See as to remedies generally, notes in, *S. Car. S. B. Co. v. S. Car. R. Co.*, 30 S. Car. 539, 4 L. R. A. 209; *Swanson v. Mississippi & R. B. Co.*, 42 Minn. 532, 7 L. R. A. 675; *Charlotte v. Pembroke Iron Co.*, 82 Me. 391, 8 L. R. A. 831; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. 554; *Steamboat Co. v. Wilmington R. R. Co.*, 46 S. Car. 327, 57 Am. St. 695; *Ryan v. Copes*, 11 Rich. L. (S. Car.) 217, 73 Am. Dec. 113; *Chicago & Eastern R. Co. v. Loeb*, 118 Ill. 203, 59 Am. R. 351.

proper case to enjoin the creation or maintenance of either a public or a private nuisance, or a purpresture.²⁰ As a general rule a private individual must show that the thing threatened or complained of is a nuisance per se or is reasonably certain to become a nuisance,²¹ that the danger is imminent,²² and that it will result in substantial and, in a sense, irreparable injury to the plaintiff for which he has no adequate remedy at law.²³ "A business which is a nuisance per se, and also one that has been so conducted as to have become an actual nuisance, will be enjoined. But a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable; and, since the remedy is so severe, resulting often in wholly depriving an owner of the use of his property, the court will proceed with the utmost caution in restraining such threatened and possible injuries."²⁴ And it has been held that if the bill seeks to enjoin the erection of a building upon the ground that

²⁰ *Ogletree v. McQuaggs*, 67 Ala. (Ala.) 238, 31 Am. Dec. 712; *Roberson v. Pittinger*, 2 N. J. Eq. 57, 32 Am. Dec. 412; *Drake v. Hudson River Co.*, 7 Barb. (N. Y.) 508; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91; *Fletcher v. Bealey*, 28 Ch. Div. 688.

²¹ *Rouse v. Martin*, 75 Ala. 510, 51 Am. R. 463; *Green v. Lake*, 54 Miss. 540, 28 Am. R. 378; *Chicago Gen. R. Co. v. Chicago &c. R. Co.*, 181 Ill. 605, 54 N. E. 1026; *Att'y-Gen. v. Metropolitan &c. Co.*, 125 Mass. 515, 28 Am. R. 264; *Mohawk Bridge Co. v. Utica &c. Co.*, 6 Paige (N. Y.) 554; *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. 123, 46 N. W. 128; *Works v. Junction R. Co.*, 5 McLean (U. S.) 425; *Att'y-Gen. v. Cambridge Consumers' Gas Co.*, L. R. 4 Ch. 71; *Dent v. Austion Mart Co.*, L. R. 2 Eq. 238.

²² *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282, 8 Am. Dec. 511; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Butt v. Imperial Gas Co.*, L. R. 2 Ch. 158; *Anonymous*, 3 Atk. 750; *Waltz v. Foster*, 12 Ore. 247; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. R. 505.

²³ *Rosser v. Randolph*, 7 Port. 116.

²⁴ *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 418, 47 N. W. 2; to same effect: *Dalton v. Cleveland &c. R. Co.*, 144 Ind. 121, 43 N. E. 130; *Duncan v. Hayes*, 22 N. J. Eq. 25; *McCutchen v. Blanton*, 59 Miss.

its use will be a nuisance, it must be alleged in the bill and proved upon the trial that the building itself will be a nuisance, and that it can be put to no use except such as will be productive of such results.²⁵

§ 2531. **Action for damages.**—An action on the case is a proper remedy to recover damages for a private nuisance.²⁶ In order to recover at least nominal damages in such an action it is not necessary to prove any special damages,²⁷ but the plaintiff, in order to recover special damages, must prove them. A private individual may have an action for damages arising from a common or public nuisance; but he must show that he has sustained a particular injury different in kind or beyond that suffered by the public at large,²⁸ and, according to the better rule, as shown by most of the authorities cited, not merely different in degree. It is said by Judge Cooley, that, “when the complaint is that the plaintiff has been injured in respect to his right to enjoy in common with all others some public easement or privilege, it becomes necessary for him to show; first, that the public easement or privilege exists; and second, that he has been hindered or obstructed

²⁵ 1 Wood Nuisance, § 997; *Cleveland v. Citizens' &c. Co.*, 20 N. J. Eq. 201; *Dalton v. Cleveland &c. R. Co.*, 144 Ind. 121, 124, 43 N. E. 130.

²⁶ *Harvey v. DeWoody*, 18 Ark. 252; *Crommelin v. Coxe*, 30 Ala. 318, 68 Am. Dec. 120; *Heiskell v. Gross*, 3 Brews. (Pa.) 430; *Holsman v. Bolling Spring Bleaching Co.*, 14 N. J. Eq. 335.

²⁷ *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S. E. 193; *Cory v. Silcox*, 6 Ind. 39; *Vau Fossen v. Clark*, (Iowa) 84 N. W. 989, 52 L. R. A. 279; *Blodgett v. Stone*, 60 N. H. 167; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. 710.

²⁸ *Crommelin v. Coxe*, 30 Ala. 318, 68 Am. Dec. 120; *Coburn v. Ames*, 52 Cal. 385, 28 Am. R. 634; *Hogan v. Cent. Pac. R. Co.*, 71 Cal. 83, 11 Pac. 876; *Marini v. Graham*, 67 Cal. 130, 7 Pac. 442; *Walley v. Platte &c. Ditch Co.*, 15 Colo. 579,

26 Pac. 129; *Whitsett v. Union Depot &c. R. Co.*, 10 Colo. 243; *Burrows v. Pixley*, 1 Root (Conn.) 362, 1 Am. Dec. 56, note; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. R. 795, 10 N. E. 395; *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. St. 673; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 101, 90 Am. Dec. 181; *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; *Smith v. Boston*, 7 Cush. (Mass.) 254; *Thelan v. Farmer*, 36 Minn. 225, 30 N. W. 670; *Green v. Lake*, 54 Miss. 540, 28 Am. R. 378; *Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531; *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84; *Clark v. Chicago &c. R. Co.*, 70 Wis. 593, 36 N. W. 326, 5 Am. St. 187; *Elliot Roads & Streets* (2nd ed.), §§ 655, 669; cited in *Jones v. Bright*, (Ala.) 37 So. 79, 80.

in the common right to enjoy it. To show both is necessary to his action, because the public wrong must be redressed at the suit of the State and not of an individual, and the fact that a public wrong is suffered, creates no presumption of individual injury."²⁹ Indeed, as already stated, the better rule seems to be that some particular injury, different in kind from that suffered by the general public, must generally be shown.

§ 2532. Action for damages—What plaintiff must prove.—It is said by Professor Greenleaf that "in an action upon the case for a nuisance, the plaintiff must prove: (1) His possession of the house or land, or his reversionary interests therein, if the action is for an injury to this species of interest; or, his title to the incorporeal right alleged to have been injured; (2) the injurious act alleged to have been done by the defendant; and (3) the damage thence resulting."³⁰ The burden of proof is generally upon the plaintiff to show that the defendant committed the act complained of or is otherwise responsible therefor and that it wrongfully injured and damaged the plaintiff in person or estate.³¹

§ 2533. Evidence as to nuisance.—As a general rule, evidence of the character and situation of the alleged nuisance and its effect upon the plaintiff's property, or upon his health and that of his family, and the like, is competent in showing the existence of the nuisance as alleged. So, generally, evidence of the surroundings, and all such pertinent and material circumstances, is competent and admissible.³² It has also been held that evidence of the injurious effects and character of an alleged nuisance subsequent to the bringing of the action is

²⁹ Cooley Torts (1st ed.), 615; citing, *Brown v. Perkins*, 12 Gray (Mass.) 89; *Fort v. Groves*, 29 Md. 188; *Houck v. Wachter*, 34 Md. 265; *Gerrish v. Brown*, 51 Me. 256.

³⁰ 2 Greenleaf Ev., § 470.

³¹ *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. 643; *Gavigan v. Atlantic Refining Co.*, 186 Pa. St. 604, 40 Atl. 834; but see, *Frost v. Berkley Phosphate Co.*, 42 S. Car. 402, 26 L. R. A. 693, 46 Am. St. 736.

³² *Eller v. Kohler*, 68 Ohio St. 51,

67 N. E. 89; *Kissel v. Lewis*, 156 Ind. 233, 245, 59 N. E. 478; *Stowe v. Miles*, 39 Conn. 426; *McMorran v. Fitzgerald*, 106 Mich. 649, 64 N. W. 569, 58 Am. St. 511; *Phillips v. Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. 230; *Shirely v. Cedar Rapids & Co. Co.*, 74 Iowa 169, 37 N. W. 133, 7 Am. St. 471; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. 51; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 90 Am. Dec. 181; *Pruner v. Pendleton*, 75 Va. 516, 40 Am. R. 738.

admissible for the purpose of showing the nature of the nuisance.⁸³ It has been held in some jurisdictions that the alleged nuisance cannot be shown by evidence as to how it affected people or property not in controversy, although in the same neighborhood.⁸⁴ But in Illinois the rule is well settled that evidence of the effect of the nuisance upon other property in the same neighborhood is admissible as aiding to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the nuisance objected to was capable of inflicting the injury complained of.⁸⁵ So, in many other jurisdictions it is held that such evidence of the presence or absence of certain effects under similar circumstances, by or upon other property, is admissible in a proper case.⁸⁶ In Massachusetts it seems that it is not competent for the plaintiff to show, ordinarily, at least, that the property of other persons was injuriously affected by the cause of which he complains, but it has been held that he may show the exist-

⁸³ *Polly v. McCall*, 37 Ala. 20; *Randall*, 59 Ill. 317; *Belvidere Gas-Light & Co. v. Jackson*, 81 Ill. 424. *Gavigan v. Atlantic Refining Co.*, 186 Pa. St. 604, 40 Atl. 834, at least where it has remained the same. In a recent case it is also held that where a plaintiff filed an amended petition just before the trial was actually commenced, setting forth the injury and damage sustained, including that occurring down to the time of such filing, it was not error to permit proof of damages subsequent to the filing of the original petition to the date of the trial. *Bowman v. Humphrey*, (Iowa) 100 N. W. 854. It has also been held that an architect may testify as to the value and depreciation in value of a building resulting from a nuisance. *Gauntlett v. Whitworth*, 2 C. & K. 720.

⁸⁴ *Harley v. Merrill Brick Co.*, 83 Iowa 73, 48 N. W. 1000; *Hughes v. General Electric Light & Co.*, (Ky.) 54 S. W. 723; see also, *Louisville Water Co. v. Weiss*, (Ky.) 76 S. W. 356; *Concord R. Co. v. Greely*, 23 N. H. 237.

⁸⁵ *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. St. 673; *Cooper v.*

Tennant v. Hamilton, 7 Cl. & F. 122; *Hoadley v. Seward & Co.*, 71 Conn. 640, 42 Atl. 997; *Hine v. Railroad Co.*, 149 N. Y. 154, 43 N. E. 414; *Doyle v. Railroad Co.*, 128 N. Y. 488, 28 N. E. 495; *Metropolitan & C. R. Co. v. Dickinson*, 161 Ill. 22, 43 N. E. 706; see also, *Rex v. Fairlie*, 8 E. & B. 486; *Metropolitan Asylum Dist. v. Hill*, 47 L. T. R. N. S. 29; *Broder v. Saillard*, 2 Ch. Div. 692; *Bradley v. Iowa Cent. R. Co.*, 111 Iowa 562, 82 N. W. 996; *Evans v. Gas Co.*, 148 N. Y. 112, 42 N. E. 513. For the purpose of proving that odors were capable of producing discomfort and sickness, it has been competent to permit persons other than the plaintiff to testify that they were severally nauseated and made sick by such odors, the court instructing the jury the plaintiff was not entitled to recover for any discomfort or sickness caused to others by such odors. *N. K. Fairbank Co. v. Bahre*, 112 Ill. App. 290.

ence of the cause by the testimony of persons who have observed it from positions not peculiarly exposed to its influence.³⁷ It was also held in a recent case, which was a suit by the proprietor of a store to enjoin and abate an alleged nuisance caused by tenants of an adjoining room, that evidence that offensive odors were the subject of remarks by customers was admissible.³⁸

§ 2534. Evidence as to defendant's liability.—In order to prove that the injury was caused by the defendant it is generally sufficient to show that it was done by his authority, or that, having acquired the title to the land after the nuisance was erected, he continued it,³⁹ although in some cases it must also be shown that he had knowledge of its existence, and even that he was notified and requested to remove or abate it. The plan of this work does not permit a consideration of the question as to the various parties that may be held liable for the maintenance or continuance of a nuisance, nor under just what circumstances liability attaches to grantees and others for the continuance of a nuisance, nor as to the relative rights and liabilities of parties occupying particular relations, but the authorities are collected and reviewed in the reference given below.⁴⁰

§ 2535. Evidence as to damages.—The general rule as to proof of damages has been laid down in substance as follows:⁴¹ "It is generally sufficient for the plaintiff to show that, by reason of the injurious act or omission of the defendant, he cannot enjoy his right in as full and ample a manner as before, or that his property is substantially impaired in value. If the injury is a direct infringement of his absolute right, abridging his power and means of exercising it, such as diverting or polluting a water course flowing through his land, or obstructing

³⁷ *Fay v. Whitman*, 100 Mass. 76; *N. Y.* 535, 21 N. E. 700, 10 Am. St. compare, *Eldt v. Cutter*, 127 Mass. 506; *Plumer v. Harper*, 3 N. H. 88, 522; *Lincoln v. Mfg. Co.*, 9 Allen 14 Am. Dec. 333; *Hyde Park &c. Co. v. Porter*, 167 Ill. 276, 47 N. E. 206; (Mass.) 181.

³⁸ *Shroyer v. Campbell*, 31 Ind. App. 83, 67 N. E. 193.

³⁹ 2 Greenleaf Ev., § 472; *Penn-ruddock's Case*, 5 Co. 100; *Dawson v. Moore*, 7 Car. & P. 25; see also, *Thompson v. Gibson*, 7 M. & W. 456; *Houston &c. R. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768; *Cohen v. New York*, 113

N. Y. 535, 21 N. E. 700, 10 Am. St. 506; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Hyde Park &c. Co. v. Porter*, 167 Ill. 276, 47 N. E. 206; *Gulf &c. R. Co. v. Chenault*, (Tex. Civ. App.) 72 S. W. 868.

⁴⁰ *Lahan v. Cochran*, 178 Mass. 566, 86 Am. St. 509-523, notes; *Chicago & Eastern R. Co. v. Loeb*, 118 Ill. 203, 59 Am. R. 351-369; *Sloggy v. Dillworth*, 38 Minn. 179, 26 Cent. L. J. 440, 442.

⁴¹ 2 Greenleaf Ev., § 474.

his private way or projecting a roof so as to overhang his grounds, or the like, no evidence of special damage will be necessary in order to entitle him to recover; but where the damages are consequential or affect his relative rights, some actual damage must generally be proved.⁴³ Questions as to the measure of damages, and the evidence on that subject, however, are sufficiently considered in the chapter on damages,⁴³ although it may be well to state in this connection that in certain cases, as where the nuisance is permanent and cannot be abated, the better rule is that damages, future as well as past, are recovered once for all, and a recovery is usually a bar to a subsequent action for the same cause.⁴⁴

§ 2536. Defenses—Generally.—The defense to an action for damages for an alleged nuisance, aside from defect of proof on the part of the plaintiff, generally consists either in a license from the plaintiff to do the act complained of, or in a denial that it is a nuisance or

⁴³ *Cotterel v. Griffiths*, 4 Esp. 69; 176, notes; *Spellman v. Richmond* Allen v. Ormond, 8 East 4; *Fay v. R. Co.*, 35 S. Car. 475, 28 Am. St. Prentice, 9 Jur. 877, 1 M. G. & S. 880; *Aldworth v. Lynn*, 153 Mass. 53, 828; *Rose v. Groves*, 5 M. & G. 613, 25 Am. St. 608.

6 Sc. N. R. 645; *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 599.

⁴⁴ We refer, however, to the following authorities and notes on the subject of damages in nuisance cases. As to measure and elements: *Robb v. Carnegie*, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. 694; *Farley v. Gate City & Co.*, 105 Ga. 323, 31 S. E. 193; *Sullens v. Chicago & R. Co.*, 74 Iowa 659, 38 N. W. 545, 7 Am. St. 501; *Jackson v. Kiel*, 13 Colo. 378, 22 Pac. 504, 16 Am. St. 207, *Fairbank Co. v. Nicolai*, 167 Ill. 242, 47 N. E. 360; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; as to evidence: *Hoffman v. Edison & Co.*, 84 N. Y. S. 437; *Bates v. Holbrook*, 85 N. Y. S. 673; *Savannah & R. Co. v. Parrish*, 117 Ga. 893, 45 S. E. 280; *Vogt v. Grinnell*, 123 Iowa 332, 98 N. W. 782; *St. Louis & R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 20 Am. St.

⁴⁴ *Highland Ave. R. Co. v. Matthews*, (Ala.) 34 Cent. L. J. 158, and note; *Sloggy v. Dilworth*, 38 Minn. 179, 26 Cent. L. J. 440; 26 Am. L. Reg. (N. S.) 281, 345. The authorities, many of them conflicting, are reviewed in these notes and articles, and the question is considered at length, with a review of many authorities, in the following comparatively recent cases: *North Vernon v. Voegler*, 103 Ind. 314, 3 N. E. 821, on the one side and *Uline v. New York Cent. & R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. R. 661; on the other: *Joseph Schlitz Brew Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 43 Am. St. 92; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. R. 123, and note; *Blizer v. Ottumwa & Co.*, 70 Iowa 145, 30 N. W. 172, and note; *Guinn v. Ohio River & Co.*, 46 W. Va. 151, 76 Am. St. 806.

of its injurious consequences, or that the defendant is the party liable, "or," says Professor Greenleaf,⁴⁵ "where the plaintiff claims a prescriptive right, in opposing it by another and adverse enjoyment, of sufficiently long duration. Thus, if the evidence of title to a right of way, or to the use of lights, is derived from an enjoyment of twenty years' duration, it may be rebutted by evidence that, during the whole or a part of that period, the premises were in the occupation of the defendant's tenant, for by his laches the defendant was not concluded;⁴⁶ or, that the enjoyment of the right by the plaintiff was under the express leave or favor of the defendant, or by mistake, and not adverse to the defendant's title."⁴⁷ So, the plaintiff's claim to the natural flow of water across or by his land, without diminution or alteration, may be rebutted by evidence of an adverse right, founded on more than twenty years' enjoyment, to divert or use it for lawful purposes.⁴⁸ If the act complained of was done by the parol license of the plaintiff, at the defendant's expense, this is a good defense, though if the license were executory it might have been void by the Statute of Frauds; for even a parol license, when executed, is not countermandable."⁴⁹ The defendant may, of course, introduce proper evidence to show that there was no nuisance or that the act or thing complained of was not the cause of the alleged injury and damage. And it has even been held that, after the plaintiff, in an action to recover damages for the pollution of his well, has introduced evidence that other wells in the neighborhood were likewise affected, the defendant should be allowed to show that other wells a great distance

⁴⁵ 2 Greenleaf Ev., § 475.

⁴⁶ Daniel v. North, 11 East 372; Barker v. Richardson, 4 B. & Ald. 578.

⁴⁷ Campbell v. Wilson, 3 East 294; Brown v. Gay, 3 Greenl. (Me.) 126; Gates v. Butler, 3 Humph. (Tenn.) 447; Cooper v. Barber, 3 Taunt. 99.

⁴⁸ Bealey v. Shaw, 6 East 214, per Ld. Ellenborough; Balston v. Bensted, 1 Campb. 463; see further as to prescriptive rights as a defense to private nuisance, Bucklin v. Truell, 54 N. H. 122; Borden v. Vincent, 24 Pick. (Mass.) 301; Dana v. Valentine, 5 Metc. (Mass.) 8; Wright v. Moore, 38 Ala. 593, 82

Am. Dec. 731; that there is no prescriptive right to violate the law, see, Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478.

⁴⁹ Winter v. Rockwell, 8 East 308; see also, Elwick v. Butler, 1 Hayw. (N. Car.) 28; Liggins v. Inge, 7 Bing. 690; Webb v. Paternoster, Palm. 71; Bridges v. Blanchard, 1 Ad. & El. 536; see further as to license as a defense, Woodward v. Seeley, 11 Ill. 157, 50 Am. Dec. 445; White v. Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Burkham v. Ohio &c. R. Co., 122 Ind. 344, 23 N. E. 799.

away were similarly polluted, as this would tend to show that the cause in both cases was a general one, affecting the whole region, and not the act of defendant; but such evidence, however, it is said in the same case, should be confined within reasonable limits to avoid the danger of introducing collateral issues into the trial.⁵⁰ It was also suggested that, while evidence that the injury could have been avoided by digging another well would not constitute a defense, it would be proper in mitigation of damages. So, in an action against a city to recover damages alleged to have been caused by a sewer which was permitted to empty its contents on the plaintiff's premises it was held that the city should have been permitted to show that there was a filthy stream, made so by others, within sixteen feet from the plaintiff's premises, which apparently caused part of the injury and damages.⁵¹

§ 2537. Defenses—Lawful business—Care—Legislative authority.—Where a nuisance is shown to exist it is no defense to show that it was necessary to the operation of the business or that reasonable care was taken to prevent it, as, for instance, that the business from which it arose was conducted according to the most approved methods.⁵² And this is true, in general, even though the business is a use-

⁵⁰ *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925, 43 Am. St. 711; see also, *Shain Packing Co. v. Burrus*, (Tex. Civ. App.) 75 S. W. 838.

⁵¹ *Loughran v. Des Moines*, 72 Iowa 382, 34 N. W. 172; see also, *Shain Packing Co. v. Burrus*, (Tex. Civ. App.) 75 S. W. 838; but see, *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. 55, as to contributing act of third person not exonerating defendant; also, *Frost v. Berkley & Co.*, 42 S. Car. 402, 20 S. E. 280, 46 Am. St. 746, holding that upon a showing that property has been injured by the alleged nuisance, the burden is on the defendant to show that the injury was from some other cause.

⁵² *Laffin & Co. Powder Co. v. Tearney*, 181 Ill. 322, 23 N. E. 389, 19

Am. St. 34, and note; *Susquehanna & Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. 533; *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, 32 Am. St. 420, and note; *Moses v. State*, 58 Ind. 185; *Shireley v. Cedar Rapids & Co. R. Co.*, 74 Iowa 169, 7 Am. St. 471; *McAndrews v. Colterd*, 42 N. J. L. 189, 36 Am. R. 508; *Powell v. Brookfield & Co. Mfg. Co.*, 104 Mo. App. 713, 78 S. W. 646; *Bohan v. Port Jervis Gas & Co.*, 122 N. Y. 18, 25 N. E. 246; *Columbus & Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. 538; *Rodenhausen v. Craven*, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. 306; *Chicago & Co. R. Co. v. First M. E. Church*, 42 C. C. A. 178, 102 Fed. 85; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Rapier v. London Trans. & Co.*, 2 Ch. 588.

ful one and lawful in itself.⁵³ It is frequently said that what has been authorized by the state cannot be a nuisance, and this rule is sometimes invoked as a defense;⁵⁴ but the true rule is stated as follows by the Supreme Court of the United States: "The acts that a legislature may authorize which, without such authorization would constitute nuisance, are those which affect public highways or public streams, or matters in which the public have an interest, and over which the public have control. The legislative authority exempts only from liability to suits, civil or criminal, at the instance of the state. It does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."⁵⁵

§ 2538. Defenses—Other nuisances—Plaintiff coming to nuisance. It is no defense that similar nuisances exist and are tolerated in the

⁵³ *Chicago &c. R. Co. v. First M. E. Church*, 42 C. C. A. 178, 102 Fed. 85, 50 L. R. A. 488; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Pennsylvania Lead Co., Appeal of*, 96 Pa. St. 116, 42 Am. R. 534, and note; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. R. 1; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Owen v. Phillips*, 73 Ind. 284; *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; *Dorsey v. Allen*, 85 N. Car. 358, 39 Am. R. 704; *Crawford v. Rambo*, 44 Ohio St. 279; *Columbus &c. Coal Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. 170; *Ducktown Sulphur &c. Co. v. Barnes*, (Tenn.) 60 S. W. 593; *Walter v. Selfe*, 4 De Gex. & S. 315; *Bamford v. Turnley*, 3 Best & S. 62; *Aldred's Case*, 9 Coke 58; see also, *Shirely v. Cedar Rapids &c. R. Co.*, 74 Iowa 169, 7 Am. St. 471.

⁵⁴ *Murtha v. Lovewell*, 166 Mass. 391, 44 N. E. 346, 55 Am. St. 410; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. R. 27; *Randle v. Railroad Co.*, 65 Mo. 325; *Chicago &c. R. Co. v.*

Loeb, 118 Ill. 203, 59 Am. R. 341, 345; *North Vernon v. Voegler*, 103 Ind. 314, 327, 2 N. E. 821; *Perry v. New Orleans &c. R. Co.*, 55 Ala. 413, 28 Am. R. 740; *Cooley Torts*, § 615.

⁵⁵ *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719; to the same effect: *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. R. 1; *Chicago &c. R. Co. v. First M. E. Church*, 42 C. C. A. 178, 102 Fed. 85, 50 L. R. A. 488; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. 51; *Bohan v. Port Jervis &c. Co.*, 122 N. Y. 29, 25 N. E. 246, 9 L. R. A. 711, and note; *Louisville &c. Co. v. Jacobs*, 109 Tenn. 727, 61 L. R. A. 188; *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997; *Kissel v. Lewis*, -156 Ind. 233, 59 N. E. 478; in *Sadlier v. New York*, 81 N. Y. S. 308, many authorities are cited, especially from New York, and the rule in this country is stated as above, and cases in England, where parliament has more power, are distinguished.

same neighborhood or locality,⁵⁶ or in other parts of the country,⁵⁷ and this has been held to be so although they are maintained by the plaintiff himself.⁵⁸ So, it makes no difference, as a rule, in contemplation of law, whether the plaintiff came to the nuisance or the nuisance came to him, for it is not a good defense to show that the establishment or business giving rise to the nuisance was first established in a secluded or proper locality, or was not a nuisance in its origin, and that the injury complained of is the result of the subsequent voluntary location in the neighborhood by the plaintiff.⁵⁹ But, as elsewhere shown, the locality and surroundings may be important in determining whether that which is complained of is or is not an actionable nuisance.

§ 2539. **Defenses—Contributory negligence.**—It is intimated by Professor Greenleaf that contributory negligence is always a good defense in actions to recover damages for a nuisance, and he says that the result of the authorities seems to be that the burden of proof is on the plaintiff to show that, notwithstanding any neglect or fault on his part, the injury is in no respect attributable to himself, but is wholly attributable to the misconduct on the part of the defendant, as the proximate cause.⁶⁰ It is doubtless true that in many instances,

⁵⁶ *Rex v. Neil*, 2 Car. & P. 483, 12 E. C. L. 226; *Att'y-Gen. v. Colney Hatch*, L. R. 4 Ch. 146; *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. 17; *Dennis v. State*, 91 Ind. 291; *Burlington v. Stockwell*, 5 Kans. App. 569; *Euler v. Sullivan*, 75 Md. 616, 32 Am. St. 420; *Robinson v. Baugh*, 31 Mich. 290; *Meigs v. Lister*, 23 N. J. Eq. 199.

⁵⁷ *Att'y-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 332; *Commonwealth v. Perry*, 139 Mass. 198, 29 N. E. 656; *Stephens v. Gardner Creamery Co.*, 9 Kans. App. 883, 57 Pac. 1058; *People v. Mallory*, 4 Thomp. & C. (N. Y.) 567.

⁵⁸ *Robinson v. Baugh*, 31 Mich. 290; *Lafin & Co. Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 19 Am. St. 34; *Austin v. Austin City Cemetery Asso.*, (Tex. Civ. App.) 28 S. W. 1023; *McKeon v. See*, 51 N. Y. 300, 10 Am. R. 659.

⁵⁹ *Hurlbut v. McKone*, 55 Conn. 31, 3 Am. St. 17; *Lafin & Co. Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 19 Am. St. 34; *Bushnell v. Roberson*, 62 Iowa 540; *Ashbrook v. Commonwealth*, 1 Bush. (Ky.) 139, 89 Am. Dec. 616; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. 595; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485; *King v. Morris & Co. R. Co.*, 18 N. J. Eq. 397; *Angel v. Pennsylvania R. Co.*, 38 N. J. Eq. 58; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. R. 567; *Sherman v. Langham*, (Tex.) 13 S. W. 1042.

⁶⁰ 2 Greenleaf Ev., § 473; citing, *Walters v. Pfell*, 1 M. & Malk. 362; *Dodd v. Holme*, 2 Ad. & El. 493, 3 N. & M. 739; *Bradley v. Waterhouse*, 3 C. & P. 318; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628; *Ilott v. Wilkes*, 3 B. & Ald. 304;

in actions for damages caused by a nuisance, at least where negligence is relied on, contributory negligence on the part of the plaintiff will defeat a recovery.⁶¹ But, as already shown, the coming to a nuisance by the plaintiff will not defeat a recovery, and it seems to us that where the complaint is based merely on the theory of a nuisance and a positive and aggressive wrong and not on negligence, so-called contributory negligence is not necessarily such a defense as will defeat a recovery.⁶²

Flower v. Adam, 2 Taunt. 314; by *Greenleaf*, *supra*. Numerous
Hawkins v. Cooper, 8 Car. & P. 473. other cases might be cited where

⁶¹ See, *President &c. of Mt. Vernon v. Dusouchett*, 2 Ind. 586, 588; the act complained of was merely negligent.

Ft. Wayne v. Coombs, 107 Ind. 75, ⁶² See, *Lebanon v. Twiford*, 13 Ind.
77, 7 N. E. 743; *Smith v. Smith*, 2 App. 384, 41 N. E. 844.
Pick. (Mass.) 621; and cases cited

CHAPTER CXVII.

PARTNERS AND PARTNERSHIP.

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§ 2540. Partnership—Definition.—Partnership has been defined as "a legal entity formed by the association of two or more persons for

the purpose of carrying on business together and dividing its profits between them.”¹ A more recent contributor to the legal literature on this subject defines it thus: “Partnership is the relation existing between persons who have so contracted that the profits of some business enterprise conducted by any or all of them for them all enure to all as co-owners, and are shared, accordingly.”² The Supreme Court of the United States stated it thus: “The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a communitive interest in the profits.”³ As defined by Story: “Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there should be a community of profits thereof between them.”⁴ Mr. Lindley’s definition is as follows: “In order that persons may be partners in the legal acceptance of the word it is requisite that they shall share something by virtue of an agreement to that effect, and that, that which they have agreed to share shall be the profit arising from some pre-determined business engaged in for their common benefit. An agreement that something shall be admitted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term.”⁵ These definitions are given for the purpose of making more intelligent and comprehensible the rules of proof in establishing the rights and liabilities of the persons composing the partnership among themselves or as between such partnership and third persons.

§ 2541. Burden of proof.—In an action on a contract purporting to have been executed in a firm’s name, or in an action against alleged partners on an account or on an implied agreement, the burden of proof is upon the plaintiff to show that the persons sued as partners were in fact such; and the proof must establish that such persons were partners at the time the contract was executed or the ac-

¹ Parsons Partnership, § 1.

⁴ Story Partnership, § 2.

² George Partnership, § 1.

⁵ 1 Lindley Partnership, p. 1, and

³ Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972; Ward v. Thompson, 22 How. (U. S.) 330. notes, pp. 2, 3; Causler v. Wharton, 62 Ala. 358; Gibb’s Estate, 157 Pa. St. 59, 27 Atl. 383.

count made.* So, where the plaintiff declared against a defendant individually but sought to charge him as a partner the burden was held to be upon the plaintiff to show the partnership; but it has been held that when the evidence *prima facie* establishes the partnership, or when it is such that a partnership may reasonably be inferred, the burden is cast upon the defendant to show an incorporation where it was sought to avoid individual liability on the ground that the company was incorporated. A *prima facie* case of partnership was held to be made out where the proof shows that the defendant, sought to be charged, represented that the company was composed of himself and two others, and that it was solvent, but without any admission or intimation that it was a corporation.⁷ A check executed in the firm's name, admitted without proof of execution, was held sufficient evidence of partnership, as the rule is that the existence of partnership may be inferred from indirect evidence.⁸ So, the rule is that a firm's liability is presumed where the note or contract is executed in the partnership name and the burden is not on the plaintiff or holder to show affirmatively that it was given as a partnership transaction.⁹ But where the execution of such note or contract is denied under oath, the burden is on the plaintiff to prove not only the execution of the instrument but the authority to execute it as a partnership instrument.¹⁰ Where one partner seeks to recover against another it has been

* *Guice v. Thornton*, 76 Ala. 466; *Smith v. Moynihan*, 44 Cal. 53; *Davidson v. Wilson*, 3 Del. Ch. 307; *De St. Aubin v. Laskin*, 74 Ill. App. 455; *Graham v. Henderson*, 35 Ind. 195; *Hall v. Claggett*, 48 Md. 223; *Howe v. Thayer*, 17 Pick. (Mass.) 91; *Oglesby v. Thompson*, 59 Ohio St. 60, 51 N. E. 878; *Ashley v. Williams*, 17 Ore. 441, 21 Pac. 556; *Henshaw v. Root*, 60 Ind. 220; *Hallstead v. Coleman*, 143 Pa. St. 352, 22 Atl. 977; *Campbell v. Sherman*, 49 Mich. 534, 14 N. W. 484; *Smith v. Knight*, 71 Ill. 148; *Maupin v. Daniel*, 3 Tenn. Ch. 223; *Watgamood v. Randolph*, 22 Neb. 493, 35 N. W. 217; *State v. Penman*, 2 Desaus. (S. C.) 1; *Slater v. Arnett*, 81 Va. 432; *Rick v. Neltzy*, 1 Mackey (D. C.) 21.

⁷ *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Cook v. Martin*, 5 Sm. & M. (Miss.) 379.

⁸ *Henshaw v. Root*, 60 Ind. 220; *Byington v. Woodward*, 9 Iowa 360. ⁹ *Knapp v. McBride*, 7 Ala. 19; *Byington v. Woodward*, 9 Iowa 360; *McMullan v. McKenzie*, 2 Greene (Iowa) 368; *Waldo Bank v. Greely*, 16 Me. 419; *Barrett v. Swann*, 17 Me. 180; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Whitaker v. Brown*, 16 Wend. (N. Y.) 507; *Doty v. Bates*, 11 Johns. (N. Y.) 544; *Ensminger v. Marvin*, 5 Blackf. (Ind.) 210.

¹⁰ *Hobson v. Porter*, 2 Colo. 28; *De St. Aubin v. Laskin*, 74 Ill. App. 455; *Byington v. Woodward*, 9 Iowa 60.

held that the existence of the partnership must be proved with legal certainty.¹¹ Where partners are sued in their individual name the fact of the partnership and not of the firm's name is the material allegation to be proved; and it was held sufficient to prove the partnership whether the firm name was proved or not.¹²

§ 2542. **Proof of partnership—Generally.**—Courts and law writers recognize the fact that no absolute rule can be given either as to the quantum or kind of proof sufficient to establish the relation of partnership among the persons sought to be charged. It is apparent that the proof must be sufficient to bring the parties within the comprehension of the definitions previously given. That is, the evidence must be sufficient to show some arrangement or agreement between the persons sought to be charged as partners to contribute money, goods, skill or labor to some business enterprise or venture, to the end that the profits derived therefrom may be divided between them; or generally an agreement to the effect that they share in the profits and losses. But it may be sufficient, as will be seen, to prove that one of the persons sought to be charged shall have permitted the others to use his credit or to hold him out as jointly answerable with themselves. The question as to what constitutes a partnership is one of law, but whether or not it exists is a question of fact to be determined from the evidence. To establish the fact of partnership as between themselves much stricter proof is required than in cases between partners and third persons. One reason for this is that it is within the power of the partners to give stronger evidence on the subject of the partnership than a third person could ordinarily produce.¹³ The rule has been stated thus: "The fact of the existence or non-existence of a partnership as between themselves must be gathered from the intention of the parties, and the court in arriving at the intention must form its conclusions from deductions drawn by analogy from principles of law applied to the facts and circumstances developed in the case."¹⁴ Partnership is a fact which may be proved as any other fact by persons having knowledge thereof.¹⁵

¹¹ *Maunsell v. Willett*, 36 La. Ann. 322. Ill. 196; *McGregor v. Cleveland*, 5 Wend. (N. Y.) 475.

¹² *Stickney v. Smith*, 5 Minn. 486.

¹⁴ *Bull v. Schuberth*, 2 Md. 38, 55;

¹³ *Chisholm v. Cowles*, 42 Ala. 179; *Robinson v. Green*, 5 Harr. (Del.) 115; *Walker v. Matthews*, 58

Heise v. Barth, 40 Md. 259; *Gray v. Gibson*, 6 Mich. 300.

¹⁵ *McGrew v. Walker*, 17 Ala. 824;

§ 2543. **Proof of partnership agreement.**—The fact of partnership necessarily implies the consent of the persons joining in the enterprise or undertaking. As between the persons themselves no one can be charged as a partner against his consent, and in order to establish a liability against a party as a partner for or on account of the acts of others the proof must show that the partnership was formed by express agreement; or that the party, sought to be charged, has been guilty of some act by which he is estopped from setting up that he is not in fact a partner.¹⁶ It is not essential, however, either to produce or prove a written article of agreement; nor is it required to prove a particular form; it is sufficient to prove mutual consent of two or more competent minds, or as hereafter shown, it may be implied from conduct and circumstances, if sufficiently significant and expressive to convince the mind.¹⁷ But the proof must show that the contract is complete and assented to by all persons sought to be charged.¹⁸ It has been held that a person cannot be made a partner so as to bind him, in the absence of proof of his consent, admissions, or acts.¹⁹ And it has been held that "A partnership is never created between parties by implication or operation of law, apart from an expressed or implied intention and agreement to constitute the relation."²⁰

Central R. &c. Co. v. Smith, 76 Ala. 572; St. Louis &c. Co. v. McPeters, 124 Ala. 451, 27 So. 518; Lockridge v. Wilson, 7 Mo. 560; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

¹⁶ Haycock v. Williams, 54 Ark. 384, 16 S. W. 3; Phillips v. Phillips, 49 Ill. 437; Lincoln Park &c. v. Swatek, 204 Ill. 228, 68 N. E. 429; Bishop v. Georgeson, 60 Ill. 484; Pickerell v. Fisk, 11 La. Ann. 277; Halliday v. Bridewell, 36 La. Ann. 238; Leonard v. Sparks, 109 La. Ann. 543, 33 So. 594; Gray v. Gibson, 6 Mich. 300; Freeman v. Bloomfield, 43 Mo. 391; Lucas v. Cole, 57 Mo. 143; Sargent v. Collins, 3 Nev. 260; Groves v. Tallman, 8 Nev. 178; Hallenback v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40; Dawson v. Pogue, 18 Ore. 94, 22 Pac. 637; Willis v. Crawford, 38 Ore. 522, 63

Pac. 985, 64 Pac. 866; Hedge's Appeal, 63 Pa. St. 273; Setzer v. Beale, 19 W. Va. 274; Farmer's Bank v. Smith, 26 W. Va. 541; Woods v. Ward, 48 W. Va. 652, 37 S. E. 520; Miller v. Stone, 69 Wis. 617, 34 N. W. 907; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918; Baldwin v. Burrows, 47 N. Y. 199; Central City &c. Bank v. Walker, 66 N. Y. 424.

¹⁷ Causler v. Wharton, 62 Ala. 358.

¹⁸ Metcalf v. Redmond, 43 Ill. 264; Morrill v. Spurr, 143 Mass. 257, 9 N. E. 580; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163; Cantara v. Blackwell, 14 Wash. 294, 44 Pac. 657.

¹⁹ Bishop v. Georgeson, 60 Ill. 484.

²⁰ 1 Bates on Partnership, § 3; Bushnell v. Consolidated Ice &c. Co., 138 Ill. 67, 27 N. E. 596; Wilson v. Cobb, 28 N. J. Eq. 177; Hal-

§ 2544. **Agreement—Proof by assent and ratification.**—The rule requiring proof of an agreement among persons in order to bind them does not require that it be shown that the persons seeking to be charged as partners actually signed a written agreement; nor is it carried to the extent of holding that the proof must show that the parties met and simultaneously and mutually agreed to certain definite propositions. The law does not require such strict proof. It is sufficient to show that the parties assented to or acquiesced in a general arrangement or to the introduction of a new member in the firm. Thus, where one partner without the consent of his co-partners introduced a stranger into the firm, and it appeared that the other partners were made acquainted with the facts but made no objection, and the business was conducted with the new member as a part of the firm, it was held that the consent of the other persons could be implied from the acquiescence and acts of the parties.²¹ So, while an agent for a certain purpose has no power to form a partnership between his principal and a third person, yet it was held that where an agent did form such a partnership in the name of the principal with his knowledge, and it further appeared that the principal acted as partner in the firm thus formed without objection it was held to be a ratification of the partnership agreement and the principal was liable as a partner.²² And where partnership articles provided that at the death of one partner his children should succeed to the share of the father, and upon the death of the father as such partner the children who were of lawful age continued to draw the same amount monthly from the firm as the father had drawn, it was held that this was an acceptance of the successorship to the rights and liabilities of the deceased partner, and that the children were liable.²³ But the mere receipt of money coming from the supposed partnership business, without the knowledge of the person sought to be charged with it, is not a sufficient ratification to charge the person receiving the money.²⁴

lenbeck v. Rogers, 57 N. J. Eq. 199, 40 Atl. 576; Hedge's Appeal, 63 Pa. St. 273; Gibb's Estate, 157 Pa. St. 59, 27 Atl. 383; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

²¹ Meaher v. Cox, 37 Ala. 201; Rosenskiel v. Gray, 112 Ill. 282; Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; Mason v. Connell, 1

Whart. (Pa.) 381; Tabb v. Gist, 1 Brock. (U. S.) 33.

²² Williams v. Butler, 35 Ill. 544; Wright v. Boynton, 37 N. H. 9.

²³ Nave v. Sturges, 5 Mo. App. 557.

²⁴ Love v. Payne, 73 Ind. 80; Central City &c. Bank v. Walker, 66 N. Y. 424.

§ 2545. **Proof by certificate.**—Some statutes require that a mercantile or trading partnership shall record in some of the public records either the articles of partnership or a statement of the names of the persons composing the firm. Such statutes further provide that on the recording of the instrument or the names of the members of the firm the officer having custody of the record shall issue under his name and the seal of his office a certificate to the effect that such persons are partners and that they are authorized to conduct their business in such firm name. Where the statute requires this record and certificate it has been held that in actions by or against such partners the official certificate is competent evidence and sufficient proof of such partnership and that the persons named therein are the partners in the firm.²⁵ But in states having such statutes and providing that the official certificates shall be prima facie evidence, it has been held that such a certificate is not the only method of proving the partnership, but that it may be proved in the absence of such certificate and as if there were no such statutory requirement, or as any other fact is proved.²⁶

§ 2546. **Parol proof to establish partnership.**—In an action by a third person against alleged partners according to rules elsewhere stated it is sufficient to establish their liability to show the admissions of such fact by the alleged partners, or that they have held themselves out to the public as such. The rule is that such proof may be made by parol. It is generally held that in actions by third persons against persons who are alleged to be partners, such partnership may be established by parol evidence even where it appears from the evidence on the trial of the case that there is a written agreement between the parties as to the partnership. The plaintiff will not be required to produce the written articles in order to establish partnership.²⁷ And

²⁵ *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814; *Milligan v. Butcher*, 23 Neb. 683, 37 N. W. 596; Mr. George in his work on Partnership at page 499, et seq., has a collection of the states requiring such certificates, as well as the general duties and rights of partners under such statutes.

²⁶ *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. 388.

²⁷ *Griffin v. Stoddard*, 12 Ala. 783; *Crawford v. Stove Pipe Works*, 83

Cal. 629, 24 Pac. 836; *Villa v. Jonte*, 17 La. Ann. 9; *Daugherty v. Heckard*, 89 Ill. App. 544; *Bryer v. Weston*, 16 Me. 261; *Bishop v. Austin*, 66 Mich. 515, 33 N. W. 525; *McEvoy v. Bock*, 37 Minn. 402, 34 N. W. 740; *Brem v. Allison*, 68 N. Car. 412; *Edwards v. Tracy*, 62 Pa. St. 374; *Widdifield v. Widdifield*, 2 Bin. (Pa.) 245; *Reed v. Kremer*, 111 Pa. St. 482, 5 Atl. 237; *Cutler v. Thomas*, 25 Vt. 73; *Henshaw v. Root*, 60 Ind. 220; *Plano Mfg. &c.*

in actions by partners against third persons it has been held proper to prove such fact by parol evidence, although a written article of agreement exists which contains the partnership agreement; but when it is made to appear that the terms of the partnership are material, then the articles themselves must be produced.²⁸

§ 2547. **Proof of acts and conduct to show partnership.**—Partnership may be established by proof of acts and conduct. No rule can be given as to what particular acts or conduct must be proved in order to establish the relation; nor can the nature and character of the acts be designated. It is only essential that the proof be sufficient to establish such acts and conduct from which the partnership may be reasonably inferred. As tending to establish the relation of partnership proof may be made of the acts and conduct such as advertisements in newspapers that were taken and read by the party sought to be charged as a partner; or advertisements by cards, letterheads, placards or signs; personal supervision of the business and receipt of goods in the firm name; the fact that the party sought to be charged was introduced as a member of the partnership, and any representations, conduct or circumstances are proper and competent which are naturally calculated or likely to beget the belief that the parties were partners.²⁹ The fact of the existence of a partnership may be proved by the habit and course of dealing, and by the conduct and declarations of the partners.³⁰ Proof of the intimacy of two persons has been held competent in connection with other facts as a circumstance tending to prove partnership.³¹ Whatever may be the quantum or degree of proof required, it is held that the existence of a partnership may be established by circumstantial evidence as well as by direct proof.³²

Co. v. Frawley, 68 Wis. 577, 32 N. W. 768; Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 783; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Furber v. Carter, 11 Humph. (Tenn.) 271.

²⁸ Field v. Tenney, 47 N. H. 513.

²⁹ Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887; Chaffee &c. v. Rentfroe, 32 Ga. 477; Peninsular &c. Bank v. Currie, 123 Mich. 666; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Atwood v. Peregoy, 22 Neb. 238, 34 N. W. 378; Sargent v. Collins, 3

Nev. 260; Princeton &c. Co. v. Gullick, 16 N. J. L. 161; Dobson v. Chambers, 78 N. Car. 334; Davis v. Bingham, (Tex. Civ. App.) 46 S. W. 840; Lowenstein v. Keller, (Tex. Civ. App.) 46 S. W. 878; Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458. See § 2550.

³⁰ Bryer v. Weston, 16 Me. 261.

³¹ McGrew v. Walker, 17 Ala. 824.

³² Loucks v. Paden, 63 Ill. App. 545; Rogers v. Murray, 110 N. Y. 658, 18 N. E. 261.

§ 2548. **Admissions and declarations.**—In actions by third persons against others to hold them as partners, the declarations or admissions made by one in the absence of the others, tending to establish the existence of such partnership, are only admissible in the first instance against the party making them. But if the existence of the alleged partnership be prima facie established by evidence other than such declarations, then the acts, declarations and admissions of each may be proved to strengthen such prima facie case.³³ But it seems to be the rule that declarations of a partner when made in the prosecution of the partnership business are admissible. On this subject the Supreme Court of Indiana said: "The declarations of one partner are admissible in proper cases against the firm, on the ground that in such cases the law implies an agency on the part of the one to bind the firm in transactions relating to its business. In order that such declarations may be admitted, they must have been made in the course of the partnership business, and with respect to a transaction pertaining to its business."³⁴ And declarations made by the partners themselves while engaged in the partnership business have been held competent in their favor to establish the partnership.³⁵

§ 2549. **Admissions by judgment.**—Partnership may be proved by a judgment against the firm as an admission. But the effect of an admission cannot be given a judgment rendered on a controverted or contested liability. In order for a judgment to have the effect of such an admission it must have been rendered on default after personal service or the like; such a judgment is admissible in a subsequent action by a stranger against the same defendants to charge them as partners.³⁶ But such a judgment used as an admission has only the effect of an admission and is not conclusive; it is competent for the

³³ *Campbell v. Hastings*, 29 Ark. 512; *Conlan v. Mead*, 172 Ill. 13, 49 N. E. 720; *Daugherty v. Heckard*, 189 Ill. 239, 59 N. E. 569; *Dixon v. Hood*, 7 Mo. 414; *Edwards v. Tracy*, 62 Pa. St. 374; *Lea v. Guice*, 13 Sm. & M. (Miss.) 656; *Currier v. Sillo-way*, 1 Allen (Mass.) 19.

³⁴ *Boor v. Lowrey*, 108 Ind. 468, 3 N. E. 451; *Britton v. Britton*, 19 Ind. App. 638, 49 N. E. 1076.

³⁵ *Gilbert v. Whidden*, 20 Me. 367.

³⁶ *Central &c. Banking Co. v. Smith*, 76 Ala. 572; *Collier v. Cross*, 20 Ga. 1; *Fleshman v. Collier*, 47 Ga. 253; *Ellis v. Jameson*, 17 Me. 235; *Cragin v. Carleton*, 21 Me. 492; *Prentiss v. Kelley*, 41 Me. 436; *Parks v. Mosher*, 71 Me. 304; *Dutton v. Woodman*, 9 Cush. (Mass.) 265; *Latham v. Kenniston*, 13 N. H. 203; *City Bank &c. v. Dearborn*, 20 N. Y. 244; *Marks v. Sigler*, 3 Ohio St. 358.

defendants to show all the facts and circumstances under which such an admission was made.³⁷

§ 2550. **Proof of firm name as prima facie evidence of partnership.**—It is not absolutely essential to the existence of a partnership that the persons either agree upon or use a firm name. But it is almost the universal custom for persons to adopt and use what is known and styled as a firm name, and in such name they transact their business. Each partner as the agent of each other and of the firm is authorized to execute the contracts and do the business of the partnership in such firm name. From this general, if not universal custom of employing the firm name for the conduct of the business, the rule has arisen that proof of the firm name is prima facie evidence of partnership.³⁸ Proof of the fact that the business was conducted in the firm name coupled with further proof of the fact that the persons alleged to have constituted the partnership each gave his personal attention to the business, raises a strong presumption that they were in fact partners.³⁹ Proof of the fact that goods came to the place of business of the partners in the firm name, with the knowledge of the alleged partners, was held sufficient prima facie proof of the alleged partnership.⁴⁰ So, the proof of the execution of a note in the firm name by one of the partners is an admission of the existence of such firm and is prima facie the debt of the firm.⁴¹ It seems to be the rule that the use of the words "and company" is prima facie evidence that the firm is composed of more persons than those whose names appear in the firm name. This is especially true where the statute requires that such words shall represent an actual partner.⁴² An instrument executed by one of the partners in the firm name, but in nowise connected with the transaction in question was held competent evidence as an admission of

³⁷ Parks v. Mosher, 71 Me. 304.

30 S. W. 22; Parker v. Oakley,

³⁸ Charman v. Henshaw, 15 Gray (Mass.) 293; Schultze v. Steele, 69 Mo. App. 614; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Schroth v. Gedney, 30 Misc. (N. Y.) 308; Reed v. Reed, 6 Ky. L. R. 521.

(Tenn.) 57 S. W. 426.

³⁹ Chaffee &c. v. Rentfroe, 32 Ga. 477.

⁴⁰ Griener v. Luerey, 20 Iowa 267; Barrett v. Swann, 17 Me. 180; Holmes v. Porter, 39 Me. 157; Etheridge v. Binney, 9 Pick. (Mass.) 272; Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427.

⁴¹ Haug v. Haug, 90 Ill. App. 604; Glass v. Walker, 17 Ky. L. R. 189,

⁴² Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427.

partnership.⁴³ In an action on a note executed by one partner in the firm name in order to hold the other partners the proof must show that the note was executed in the partnership business and for the purpose of the partnership.⁴⁴ And in an action on a note executed in the name of the firm where the execution was denied, it was held proper and competent to show that in other transactions with other parties, prior to the execution of the note in suit the party denying the execution of the note had acquiesced in the use of his name by the other partner.⁴⁵ So, where it appeared that printed cards containing the name or the style of the firm, were distributed in the vicinity of the place of the business of the firm, and one of them was shown to be fastened on the inside of the door of the storeroom in which the firm did business, this was held sufficient proof of the firm name.⁴⁶

§ 2551. *Profit sharing as proof of partnership.*—The rule adopted and followed by the early authorities and adjudications was that proof of an agreement to share in the profits of a business was regarded as sufficiently decisive to charge a party thus sharing with the liability as a partner as to third persons. But the exceptions to this rule have become so numerous and pronounced that it scarcely remains as a rule of proof in partnership matters. There are now so many instances in which the compensation of servants and agents is determinable by the profits of the business that the mere proof of profit sharing is no longer decisive of the question of the liability of the person so sharing the profits as a partner. The recent and modified rule on this subject is thus stated: "The general rule remains beyond dispute, that participation in the profits of the business is *prima facie* strong evidence of a partnership in it." Many adjudicated cases hold that proof of an agreement to share in the profits of a business or undertaking engaged in by two or more, is sufficient to establish the fact of partnership in the absence of any other proof.⁴⁷ Some cases hold that if the proof

⁴³ *Crowell v. Western & Co. Bank*, 3 Ohio St. 406.

⁴⁴ *Ditts v. Lonsdale*, 49 Ind. 521; *Graves v. Kellenberger*, 51 Ind. 66; *Bays v. Conner*, 105 Ind. 415.

⁴⁵ *Ditts v. Lonsdale*, 49 Ind. 521.

⁴⁶ *Michael v. Workman*, 5 W. Va. 391. See § 2547.

⁴⁷ *Parker v. Canfield*, 37 Conn. 250; *Citizens' Bank v. Hine*, 49

Conn. 236; *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Dalton City Co. v. Hawes*, 37 Ga. 115; *Irvin v. Nashville & Co. R. Co.*, 92 Ill. 103; *Craig v. Alverson*, 6 J. J. Marsh. (Ky.) 609; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Saufley v. Howard*, 7 Dana (Ky.) 367; *Hallet v. Desban*, 14 La. Ann. 529; *Sager v. Tupper*, 38 Mich. 258; *Strader v.*

shows that a person shares in the profits as principal, and not as a mere agent, factor or servant, it is sufficient to establish the fact of partnership.⁴⁸ Some exceptions have apparently been made to this general rule but such exceptions are found to rest in a real distinction. A familiar illustration of the apparent exception is found in the case where joint owners of a ship became partners by using it in a joint enterprise under an agreement to share in the profits and losses for the particular venture. It was held that the joint owners were partners in the use of earnings, although as to the vessel itself they were joint owners. The holding is in effect that there was partnership without community of interest.⁴⁹ Of this rule the Supreme Court of Pennsylvania say: "Participation in the profits is not conclusive proof of the existence of the partnership relation, but both in England and in

White, 2 Neb. 348; *Lomme v. Kintzing*, 1 Mont. 290; *Brundred v. Muzzy*, 25 N. J. L. 268; *Brown v. Cook*, 3 N. H. 64; *Bromley v. Elliot*, 38 N. H. 287; *Eastman v. Clark*, 53 N. H. 276; *Manhattan & Co. v. Sears*, 45 N. Y. 797; *Leggett v. Hyde*, 58 N. Y. 272; *Mason v. Partridge*, 66 N. Y. 633; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Magovern v. Robertson*, 116 N. Y. 61, 22 N. E. 398; *Wolf v. Lawrence*, 33 Misc. (N. Y.) 481, 62 N. Y. S. 900; *Cox v. Delano*, 14 N. Car. 89; *Holt v. Kernodle*, 23 N. Car. 199; *Wood v. Vallette*, 7 Ohio St. 172; *Irwin v. Bidwell*, 72 Pa. St. 244; *Hart v. Kelley*, 83 Pa. St. 286; *Wessels v. Weiss*, 166 Pa. St. 490, 31 Atl. 247; *Merrall v. Dobbins*, 169 Pa. St. 480, 32 Atl. 578; *Dow v. Dempsey*, 21 Wash. St. 86, 57 Pac. 355; *Appleton v. Smith*, 24 Wis. 331; *Rosenfield v. Haight*, 53 Wis. 260; *Kuhn v. Newman*, 49 Iowa 424; *Illinois & Co. v. Reed*, 102 Iowa 538, 71 N. W. 423; *Marks v. Stein*, 11 La. Ann. 509; *Cooley v. Broad*, 29 La. Ann. 345; *Pettee v. Appleton*, 114 Mass. 114; *Brownlee v. Allen*, 21 Mo. 123; *Holbrook v. Oberne*, 56 Iowa 324, 9 N. W. 291; *Holden v. French*, 68 Me.

241; *Chaffraix v. Price*, 29 La. Ann. 176; *Canton & Co. v. Eaton Rapids*, 107 Mich. 613, 616, 65 N. W. 761; *Scholtz v. Freud*, 128 Mich. 72; *Falkner v. Hunt*, 73 N. Car. 571; *Choteau v. Riatt*, 20 Ohio St. 132; *Jones v. Call*, 93 N. Car. 170; *Aultman v. Fuller*, 53 Iowa 60, 4 N. W. 409; *Bohrer v. Drake*, 33 Minn. 408, 23 N. W. 840; *Kifer v. Smyers*, (Pa.) 15 Atl. 904; *Chapman v. Lipscomb*, 18 S. Car. 222; *Morris v. Wood*, (Tenn. Ch.) 35 S. W. 1013; *Buchanan v. Edwards*, (Tex. Civ. App.) 51 S. W. 33; *Edwards v. Buchanan*, 14 Tex. Civ. App. 268, 36 S. W. 1022; *Stratton v. O'Connor*, (Tex. Civ. App.) 34 S. W. 158; *Duryea v. Whitcomb*, 31 Vt. 395; *Sprout v. Crowley*, 30 Wis. 187; *Upton v. Johnston*, 84 Wis. 8, 54 N. W. 266.

⁴⁸ *Hallet v. Desban*, 14 La. Ann. 529.

⁴⁹ *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74; *Merritt v. Walsh*, 32 N. Y. 685; *Williams v. Lawrence*, 47 N. Y. 462; *Howe v. Howe*, 99 Mass. 71; *Bigelow v. Elliot*, 1 Cliff. (U. S.) 28.

this country it is cogent evidence upon the question. It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason, such as compensation for services rendered by him as agent, broker, salesman or otherwise, the *prima facies* is overcome."⁵⁰

§ 2552. Proof of sharing in profits and losses.—The existence of an actual partnership as held by one class of cases may be conclusively established by proof of an actual community of interest accompanied by an agreement to participate in the profits and to share in the losses of the business or venture. And proof of an actual sharing in profits and losses is sufficient without direct proof of an agreement. The establishment of these facts is conclusive evidence of partnership.⁵¹ The general rule is that either proof of an agreement to share, or proof of an actual sharing, in profits and losses is sufficient proof of a partnership. The reason of this is that the sharing, or the agreement to share, in profits and losses constitutes a partnership.⁵²

§ 2553. Proof of sharing in profits and losses—Not conclusive. There is another class of cases that holds that even proof of sharing or an agreement to share in the profits and losses is not conclusive evidence of the fact of partnership. This rule applies generally in cases involving controversies between the parties themselves or with a third person who had actual knowledge of the partnership agreement, knew its terms and was familiar with the dealings of the partners among themselves.⁵³ In this class of cases the intention of the parties

⁵⁰ *Gibb's Estate*, 157 Pa. 59, 27 Atl. 383; *Edwards v. Tracy*, 62 Pa. St. 374.

⁵¹ *Brown v. Higginbotham*, 5 Leigh (Va.) 583.

⁵² *Stafford v. Sibley*, 113 Ala. 447, 21 So. 459; *Harris v. Hillegass*, 54 Cal. 463; *Fisher v. Sweet*, 67 Cal. 228, 7 Pac. 657; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754; *Bucknam v. Barnum*, 15 Conn. 67, 72; *Gray v. Blasingame*, 110 Ga. 343, 35 S. E. 653; *Pierce v. Shippee*, 90 Ill. 371; *Morse v. Richmond*, 97 Ill. 303; *Mudd v. Bates*, 73 Ill. App. 576; *Uhl v. Harvey*, 78

Ind. 26, 38; *Hart v. Hiatt*, 2 Ind. Ter. 245, 48 S. W. 1038; *Staples v. Sprague*, 75 Me. 458; *Getchell v. Foster*, 106 Mass. 42; *Funck v. Haskell*, 132 Mass. 580; *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74; *Baldwin v. Eddy*, 64 Minn. 425, 67 N. W. 349.

⁵³ *Couch v. Woodruff*, 63 Ala. 466; *Lee v. Cravens*, 9 Colo. App. 272, 48 Pac. 159; *Fawcett v. Osborn*, 32 Ill. 411; *Snell v. De Land*, 43 Ill. 323; *Natl. &c. Co. v. Townsend &c. Co.*,

§ 2560. **Proof by reputation.**—The authorities are practically unanimous in holding that proof of general reputation is not, ordinarily, admissible for the purpose of establishing partnership.⁸¹ Nor is proof of such general reputation sufficient to shift the burden of proof.⁸² It seems to have been held that such reputation is admissible where it is made to appear by the proof that the debt sued for was contracted because of the notoriety acquired by the firm and that the contract or debt related to the particular business.⁸³ And it has been held admissible in corroboration or to show knowledge.⁸⁴ So it has been held admissible if it appears to arise from the acts of the partners sought to be charged.⁸⁵ It was also held admissible in connection with evidence that such report or reputation was known to the parties sought to be charged.⁸⁶ So, evidence of persons residing near the place where the partnership business was transacted as to their understanding as to the persons who composed the firm has been held admissible.⁸⁷

§ 2561. **Partnership in individual name.**—The business of a partnership is sometimes conducted in the name of a single individual. In such case the same rules of proof apply in order to bind the other partner as in cases to prove the members of a partnership generally. Evidence of participation in profits, management of the business, dealings in other instances, declarations or admissions, together with cir-

⁸¹ *Carter v. Douglass*, 2 Ala. 499; 333; *Inglebright v. Hammond*, 19 *Marble v. Lypes*, 82 Ala. 322, 2 So. Ohio St. 337; *Buzzard v. Jolly*, 701; *Campbell v. Hastings*, 29 Ark. (Tex.) 6 S. W. 422; *Emberson v. McKenna*, (Tex. App.) 16 S. W. 419; 512; *Sinclair v. Wood*, 3 Cal. 98; *Brown v. Crandall*, 11 Conn. 92; *Holman v. Herscher*, (Tex.) 16 S. W. 984; *Hicks v. Cram*, 17 Vt. 449; *Butte &c. Co. v. Wallace*, 59 Conn. 336, 22 Atl. 330; *Joseph v. Fisher*, 4 Ill. 137; *Bowen v. Rutherford*, 60 Ill. 41; *Macy v. Combs*, 15 Ind. 469; *Southwick v. McGovern*, 28 Iowa 533; *Brown v. Rains*, 53 Iowa 81, 4 N. W. 867; *Scott v. Blood*, 16 Me. 192; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Sager v. Tupper*, 38 Mich. 258; *Lockridge v. Wilson*, 7 Mo. 560; *Grafton Bank v. Moore*, 13 N. H. 99; *Hersom v. Henderson*, 23 N. H. 498; *Adams v. Morrison*, 113 N. Y. 152, 20 N. E. 829; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; *Smith v. Griffith*, 3 Hill (N. Y.)

⁸² *Taylor v. Webster*, 39 N. J. L. 102.

⁸³ *Tanner &c. Co. v. Hall*, 86 Ala. 305.

⁸⁴ *Turner v. McIlhany*, 6 Cal. 237; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Gay v. Fretwell*, 9 Wis. 167.

⁸⁵ *Gilpin v. Temple*, 4 Harr. (Del.) 190.

⁸⁶ *Gaffney v. Hoyt*, 2 Idaho 184.

⁸⁷ *Parshall v. Fisher*, 43 Mich. 529, 5 N. W. 1049.

cumstances which would reasonably raise the inference of partnership is sufficient.⁸⁸ And where the particular business is carried on in the name of an individual partner, and a note is given in such name for borrowed money, it is held that in order to recover against the partners the plaintiff must prove that the money for which the note was given was borrowed on the credit of the partnership, or that it was used in the business or for the benefit of the partnership. The presumption in such case is that the debt is the debt of the individual who executed the note.⁸⁹

§ 2562. Partnership books and papers as evidence—Between partners.—In actions between partners the general rule is that the partnership books and accounts are admissible in evidence. The reason of this is that it is the duty of each partner to avail himself of the opportunity of inspection and to see that the books are correctly kept. Hence as a corollary of this duty the entries in such books are *prima facie* correct and the presumption is that they were made with the consent of all the partners.⁹⁰ Entries in the partnership books are evidence for or against each of the partners.⁹¹ And it has been held that entries on the firm books as to the sharing of profits and losses, when acquiesced in, are as conclusive on the rights of the partners as if incorporated in the articles of partnership.⁹² Where the accounts of a new firm were kept in the same book as those of the old firm it was held that in the absence of proof of the knowledge of prior entries by

⁸⁸ *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Bank &c. v. Monteath*, 1 Den. (N. Y.) 402; *Burnley v. Rice*, 18 Tex. 481.

⁸⁹ *Fosdick v. Van Horn*, 40 Ohio St. 459; *Snead v. Barringer*, 1 Stew. (Ala.) 134; *Horton v. Miller*, 84 Ala. 537, 4 So. 370; *Hermann v. Louisiana &c. Ins. Co.*, 8 La. 285.

⁹⁰ *Megular v. Helm*, 91 Ky. 19, 14 S. W. 949; *Simms v. Kirtley*, 1 T. B. Mon. (Ky.) 79, 82; *Carpenter v. Camp*, 39 La. Ann. 1024, 3 So. 269; *Cody v. First Natl. Bank*, 103 Ga. 789, 30 S. E. 281; *Champlin v. Tilley*, 3 Day (Conn.) 303; *Hale v. Brennan*, 23 Cal. 511; *Moore v. Trieber*, 31 Ark. 113; *Glover v. Hem-*

bree, 82 Ala. 324, 8 So. 251; *Topliff v. Jackson*, 12 Gray (Mass.) 565; *Howard v. Patrick*, 38 Mich. 795; 2 *Bates Partnership*, §§ 978, 981; *Safe Deposit &c. Co. v. Turner*, 98 Md. 22, 55 Atl. 1023; *Taylor v. Her-ring*, 10 Bosw. (N. Y.) 447; *Cheever v. Lamar*, 19 Hun (N. Y.) 130; *Budeke v. Ratterman*, 2 Tenn. Ch. 459; *Frick v. Barbour*, 64 Pa. St. 120; *Willamette &c. Co. v. McGoldrick*, 10 Wash. St. 229, 38 Pac. 1021; *Lambert v. Griffith*, 44 Mich. 65, 6 N. W. 106.

⁹¹ *Haller v. Willamowicz*, 23 Ark. 566.

⁹² *Safe Deposit &c. Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

the new member, the new member could only be charged with entries made after the new firm had begun business.⁹³

§ 2563. **Presumption of access to books—Denying correctness.** The presumption is that all the partners have access to the firm books and that they are familiar with the contents; but this presumption may be overcome by proof of any facts or circumstances which tend to rebut it.⁹⁴ But a partner may be estopped from denying to the prejudice of his co-partner, any of the entries in the firm's books unless he charged and proved errors in such entries.⁹⁵ Yet where it appeared that the firm's business had been conducted almost exclusively and the books kept by one member, in an action between the partners, it was held competent for the other to introduce evidence showing the incorrectness of the entry, and also to show that other entries not made should have been made.⁹⁶ So the rule that the firm's books are evidence for or against a partner does not apply where one partner has been denied access to them.⁹⁷ So it may be shown that the books do not contain a full statement of the partnership business.⁹⁸

§ 2564. **Partnership books and papers as evidence—Against partners.**—As it is the duty of the partners to avail themselves of the opportunity of inspecting the books, and as they are presumed to know the contents and the entries in their books, it is the established rule that their books of accounts and papers are admissible against them in the nature of admissions against interest. And the rule is that the books of the firm are prima facie evidence against the partners as to all matters entered therein at the time of or prior to the transaction in question.⁹⁹ The entries are admissible against the partner making them, and if proved to have been made during the existence of the

⁹³ *Kohler v. Lindenmeyr*, 129 N. Y. 498, 29 N. E. 957, 58 Hun (N. Y.) 513.

⁹⁴ *United States Bank v. Binney*, 5 Mason (U. S.) 176; *Shoemaker & Co. v. Bernard*, 2 Lea (Tenn.) 359.

⁹⁵ *Murrell v. Murrell*, 33 La. Ann. 1233. See *Safe Deposit, etc., Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

⁹⁶ *Carpenter v. Camp*, 39 La. Ann. 1024.

⁹⁷ *Haller v. Willamowicz*, 23 Ark. 566.

⁹⁸ *Glover v. Hembree*, 82 Ala. 324, 8 So. 251.

⁹⁹ *Eden v. Lingenfelter*, 39 Ind. 19; *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403; *Perry v. Butt*, 14 Ga. 699; *Kiltner v. Whitlock*, 88 Ill. 513; *Tucker v. Peaslee*, 36 N. H. 167; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481.

partnership they are admissible in evidence against all the partners.¹⁰⁰ And the firm books are admissible in evidence to show the credits on the plaintiff's account.¹⁰¹ Where payments upon the private debts of one of the partners was entered in the firm book, the books were held to be admissible in evidence to prove knowledge of the other partner of such payments.¹⁰²

§ 2565. Partnership books and papers as evidence—Against third persons.—The admissibility of books of accounts of a firm in actions against third persons is governed principally by the rules controlling the admissibility of books and accounts generally. In some jurisdictions they are admitted on the theory that they are part of the *res gestae*. The rule as established by many cases is that in an action by the partners on an account for goods sold by the firm to third persons the firm books are admissible as original entries where the books and entries are properly identified by a witness who assumes to know of his own knowledge, or who can testify to the handwriting as that of a member of the firm.¹⁰³ In some jurisdictions it is held that in order to make the entries admissible proof must be given that they were made contemporaneously with the facts narrated, and in the usual routine of business by a person whose duty it was to make them, who was himself personally acquainted with the facts, was disinterested and has since died.¹⁰⁴ But it has been held that the books of account of the firm are not admissible as against a person having no knowledge of such books.¹⁰⁵ Such an entry was held proper to show that an agreement of the firm had been performed.¹⁰⁶

§ 2566. Partnership books and papers as evidence—In favor of third persons.—In an action by a third person to hold another liable as a member of the firm as a general rule the books and papers of the

¹⁰⁰ Kahn v. Boltz, 39 Ala. 66.

250; Graff v. Callahan, 158 Pa. 380,

¹⁰¹ Grant v. Masterton, 55 Mich. 161.

27 Atl. 1009; Hartley v. Weideman, 175 Pa. 309, 34 Atl. 625. See Vol. I,

¹⁰² Foster v. Fifield, 29 Me. 136.

§ 480, et seq.

¹⁰³ Mitchell v. Belknap, 23 Me. 475;

¹⁰⁴ Romer v. Jaecksch, 39 Md. 585.

Dwinel v. Pottle, 31 Me. 167; Towle

¹⁰⁵ First Natl. Bank v. Conway, 67 Wis. 210, 30 N. W. 215.

v. Blake, 38 Me. 95; Silver v.

¹⁰⁶ Griesheimer v. Tanenbaum, 8

Worcester, 72 Me. 322; White v.

N. Y. S. 582; Moore v. Knott, 14

Tucker, 9 Iowa 100; Strong v.

Ore. 35. See generally vol. 1, §§ 250, 491.

Baker, 25 Minn. 442; Webb v. Mi-

chener, 32 Minn. 48, 19 N. W. 82;

Harwood v. Mulry, 8 Gray (Mass.)

alleged firm are not admissible. They are not usually competent for the purpose of proving that the defendant, sought to be charged as a partner, was in fact a partner. But when there is some proof offered showing or tending to show that such person was in fact a member of the firm or when a *prima facie* case of partnership is made then the books and papers of the firm are properly admitted.¹⁰⁷ This rule will be strengthened where it is made to appear that the person sought to be charged had access to the books during the period covered by the transaction, and that he did in fact examine the books and caused balance sheets to be taken and rendered to him.¹⁰⁸ Where the evidence shows or fairly tends to show that the person sought to be charged as a partner had knowledge of the entries and that he assented either expressly or impliedly to the entries in the books, it is a sufficient showing to render the entries in the books competent evidence.¹⁰⁹ So where it was shown that the entries were made in the books of the firm in the presence of the defendant sought to be charged as a partner, it was held sufficient to render such entries competent evidence.¹¹⁰ Where one member of a partnership testifies that another person was a partner, and that the defendant sought to be charged had stated that he had as much interest in the books as the other partner, it was held a sufficient proof of partnership to admit the books in evidence.¹¹¹

§ 2567. Authority of partner—Presumption.—A partnership business is conducted on the theory of principal and agent; that the firm is the principal and each partner is the agent. The law therefore implies authority on the part of each partner to bind the firm, or his co-partners by the use of the firm name in any and all transactions falling properly within the scope of the partnership. The rule as stated by one writer is: "In the absence of any express contract provision upon the subject, it will be presumed that it was intended

¹⁰⁷ *McNeill v. Reynolds*, 9 Ala. 313; *Hale v. Brennan*, 23 Cal. 512; *Bryce v. Joynt*, 63 Cal. 375; *Cleland v. Applegate*, 8 Ind. App. 499, 35 N. E. 1108; *Robins v. Warde*, 111 Mass. 244; *Abbott v. Pearson*, 130 Mass. 191; *Rosenbaum v. Howard*, 69 Minn. 41, 71 N. W. 821; *Chidsey v. Porter*, 21 Pa. St. 390, 393; *Ganzer v. Fricke*, 57 Pa. St. 316; *Lindsay v. Guy*, 57 Wis. 200, 15 N. W. 181; *New Haven & Co. v. Goodwin*, 42 Conn. 230.

¹⁰⁸ *Bryce v. Joynt*, 63 Cal. 375.

¹⁰⁹ *Rosenbaum v. Howard*, 69 Minn. 41, 71 N. W. 821.

¹¹⁰ *Howard v. Patrick*, 38 Mich. 795.

¹¹¹ *Frick v. Barbour*, 64 Pa. St. 120.

that a partner should have authority to bind the firm by all acts necessary for carrying on the business in the way such a business is usually conducted, and a partner has actual and rightful authority to that extent."¹¹² Another writer states the rule as follows: "Prima facie, a partner has implied authority to bind the firm by any act necessary for carrying on the business in the ordinary manner. Unless limited by agreement between the partners, this implied authority is actual; when it is so limited, such authority is only apparent. A partner has power to bind the firm by any act within his express or implied authority, either actual or only apparent, provided the person with whom he deals acts bona fide, and without notice of the limitation of his authority."¹¹³ Where the partnership agreement limits the authority of any partner he has no right to exceed the power therein given; but, if acting within the scope of the business he deals with a person who has no notice of the limitation, the firm is bound on the theory of the apparent authority.¹¹⁴ Three classes of cases are sometimes enumerated in which each partner may bind the firm: (1) In case of express authority; (2) as to matters necessary in order to carry on the business of the partnership; (3) where it is the usage or custom incident to partnerships of like nature. But in each case the burden is usually on the plaintiff to prove facts sufficient to establish the authority or from which it may be implied.¹¹⁵

¹¹² Shumaker Partnership, p. 279.

¹¹³ George Partnership, §§ 92, 93; Eastman v. Cooper, 15 Pick. (Mass.) 276; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Mercein v. Andrus, 10 Wend. (N. Y.) 461; Beardsley v. Tuttle, 11 Wis. 74; Banner &c. Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Taylor v. Webster, 39 N. J. L. 102; Ellison v. Stuart, 2 Pen. (Del.) 179; Edwards v. Tracy, 62 Pa. St. 374; Hoskinson v. Elliot, 62 Pa. St. 393; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Pooley v. Whitmore, 10 Helsk. (Tenn.) 629; Smith v. Sloan, 37 Wis. 285; Garland v. Hickey, 75 Wis. 178, 43 N. W. 832; Bank &c. v. Alden, 129 U. S. 372; Winship v.

Bank &c., 5 Pet. (U. S.) 528, 529; Kimbro v. Bullitt, 22 How. (U. S.) 256; Wheeler v. Sage, 1 Wall. (U. S.) 518; National &c. Bank v. White, 30 Fed. 412; Western Stage Co. v. Walker, 2 Iowa 504; First Nat. Bank v. Carpenter, 41 Iowa 518; Story Partnership, § 111, et seq.; Bates Partnership, Ch. 6; Parsons Partnership, § 114, et seq.

¹¹⁴ Irwin v. Williar, 110 U. S. 499; Morse v. Richmond, 97 Ill. 303; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Wagnon v. Clay, 1 A. K. Marsh. (Ky.) 257; Hotchin v. Kent, 8 Mich. 526; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Brooke v. Washington, 8 Gratt. (Va.) 248.

¹¹⁵ Woodruff v. Scaife, 83 Ala. 152, 3 So. 311.

§ 2568. **Liability of nominal partners—First rule.**—A nominal partner is defined as one who simply permits the use of his name in connection with the name of the firm for the purpose of giving the partnership additional credit or who by reason of his reputation and standing in the community adds strength and stability to the character of the firm and thereby attracts customers. A nominal partner really derives no benefit from the association but does incur the liabilities of the firm. The courts and law writers are not agreed on the liability of a nominal partner. The first rule, as established by some writers and many adjudicated cases, is that such nominal partner is liable to any and all persons or creditors dealing with the firm in the same manner and to the same extent as if he enjoyed all the advantages and privileges of the firm. The Supreme Court of New York has given the fullest expression to this rule, and held, in common with other courts, that a nominal partner is liable to subsequent creditors, even though the creditor was ignorant of the arrangement, or it appears that the firm name did not represent such a nominal partner or that credit was not given on the faith of his being a member of the firm.¹¹⁶

§ 2569. **Liability of nominal partners—Second rule.**—Other courts and law writers adopt the rule that a nominal partner occupies the same relation to creditors as a person who with his consent is held out as a partner by the other members of the firm. One writer states this rule thus: "It follows, therefore, that if a person suffers himself to be regarded as a partner by any customer of the firm, to him he is liable as if he were one, although he is in fact no partner and not generally supposed to be."¹¹⁷ The rule as stated by Mr. George is as follows: "In no case can liability attach to the nominal partner in favor of any one who has not given credit in full faith in his being a member of the firm, for it is there that the element of estoppel comes in, which is the vital element in the situation."¹¹⁸ Under this rule proof is sufficient to render a nominal partner liable when it shows that such party represented himself to be a partner in the firm and his

¹¹⁶ *Poillon v. Secor*, 61 N. Y. 456; 396; *Brown v. Higginbotham*, 5 Young v. Smith, 25 Mo. 341; *Rimel v. Hayes*, 83 Mo. 200; *Nichols v. James*, 130 Mass. 589; *Rice v. Barrett*, 116 Mass. 312; *Chicago &c. Bank v. Kinnare*, 174 Ill. 358, 51 N. E. 607; *Fisher v. Bowles*, 20 Ill.

Leigh (Va.) 583, 585; 1 *Bates Partnership*, § 109.

¹¹⁷ 1 *Parsons Partnership*, § 29.

¹¹⁸ *George Partnership*, § 26, p. 84; *Alderson v. Pope*, 1 Campb. 404, n.

liability is fixed if the credit was given the firm under the expectation or belief that such nominal partner was a member at the time the credit was given.¹¹⁹

§ 2570. **Liability of dormant partner.**—A dormant partner has been defined as one who combines in himself the characters of both the secret and silent partner while he is not published as a partner either through the firm name or otherwise, and does not transact any of the business, he is nevertheless a partner and maintains the relation of principal to the agent or the active partners who transact the firm business; in this respect he is distinguished from the person who shares profits of the business not as agent of the other partners but on their own account as principals.¹²⁰ A dormant partner is generally liable for the debts of the firm to the same extent as an active or ostensible partner. To render him thus liable it is only necessary that the proof disclose the fact that he is a partner and he is liable as such to persons dealing with the firm though they have no knowledge of the fact that he was a member. The reason of this liability is the fact that such dormant partner shares in the benefits of the business whatever that may be.¹²¹ Judge Clifford states the rule as to the liability

¹¹⁹ *George Partnership*, § 26; *Hicks v. Cram*, 17 Vt. 449; *Waugh v. Carver*, 2 H. Bl. 235, 1 Smith Lead. Cas. 1337; *Watson*, Ex parte, 19 Ves. 461.

¹²⁰ *George Partnership*, p. 95; *Parsons Partnership*, § 31; *North v. Bloss*, 30 N. Y. 374; *National Bank &c. v. Thomas*, 47 N. Y. 15; *Winship v. Bank of U. S.*, 5 Pet. (U. S.) 528, 573; *Bank &c. v. St. John*, 25 Ala. 566; *Elmira &c. R. Co. v. Harris*, 124 N. Y. 280; *Clark v. Fletcher*, 96 Pa. St. 416; *Podrasnik v. Martin Co.*, 25 Ill. App. 300; *Harris v. Cray*, 67 Tex. 383, 3 S. W. 316.

¹²¹ *Phillips v. Nash*, 47 Ga. 218; *Lindsey v. Edmiston*, 25 Ill. 317 (359); *Gilmore v. Merritt*, 62 Ind. 525; *Strecker v. Conn*, 90 Ind. 469; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Scott v. Colmesnil*, 7 J. Marsh. (Ky.) 416; *Boudreaux v.*

Martinez, 25 La. Ann. 167; *Pitts v. Waugh*, 4 Mass. 424; *Lea v. Guice*, 13 Sm. & M. (Miss.) 656; *Bromley v. Elliot*, 38 N. H. 287; *Elliot v. Stevens*, 38 N. H. 311; *Eastman v. Clark*, 53 N. H. 276; *North v. Bloss*, 30 N. Y. 374; *Fosdick v. Van Horn*, 40 Ohio St. 459; *Johnston v. Warden*, 3 Watts (Pa.) 101; *Richardson v. Farmer*, 36 Mo. 35; *Reab v. Pool*, 30 S. Car. 140; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Boardman v. Keeler*, 2 Vt. 65; *Griffith v. Buffum*, 22 Vt. 181; *Meehan v. Valentine*, 145 U. S. 611; *Winship v. United States Bank*, 5 Pet. (U. S.) 529; *Coope v. Eyre*, 1 H. Bl. 37; *Grace v. Smith*, 1 H. Bl. 48; *Loyd v. Ashby*, 2 Car. & P. 138; *Etheridge v. Binney*, 9 Pick. (Mass.) 272; *Robinson v. Wilkinson*, 3 Price 538; *Lloyd v. Archbottle*, 2 Taunt. 324; *Parsons Partnership*, § 81.

of a dormant partner as follows: "Persons who jointly participate in the profits of trade or business, ostensibly carried on by another for his sole use and benefit within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without knowledge of the same, or of the actual relation between the parties at the time the credit was given, and that liability exists, notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. Secrecy on the part of the dormant partner and want of knowledge of the circumstances of the case, and of the actual relations of the parties, on the part of the creditor, are therefore essential elements of the liability."¹²²

§ 2571. **Liability of dormant partner—Limitation.**—This liability of a dormant partner does not continue after his retirement from the firm; and it is not necessary for him to give notice of such retirement in order to relieve him of such liability. The reason of this is that credit is not given the firm on account of his name and the liability is on the basis that he is either an undisclosed principal or that he received part of the profits, and when he ceases to be a principal or to receive the profits his liability ceases.¹²³ So, in an action on a note or contract executed in the partnership name, in order to establish the liability of a dormant partner, the plaintiff must prove that the money was borrowed or the contract executed on the credit of the firm, or that the money was used in the business or for the benefit of the partnership; but the fact that it was borrowed on the credit of the firm or used in its business may be proved by the statements and representations of the partner executing the note or contract at the time of the transaction, or it may be proved by circumstances.¹²⁴ But the dor-

¹²² *Bigelow v. Elliot*, 1 Cliff. (U. S.) 28, 38; *First Nat. Bank v. Newton*, 10 Colo. 161; *Fosdick v. Van Horn*, 40 Ohio St. 459.

¹²³ *Phillips v. Nash*, 47 Ga. 218; *Austin v. Appling*, 88 Ga. 54; *Kennedy v. Bohannon*, 11 B. Mon. (Ky.) 118; *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838; *Grosvenor v. Lloyd*, 1 Metc. (Mass.) 19; *Elmira &c. Co. v.*

Harris, 124 N. Y. 280, 26 N. E. 541; *Cook v. Penrhyn &c. Co.*, 36 Ohio St. 135; *Clark v. Fletcher*, 96 Pa. St. 416; *Gavin v. Walker*, 14 Lea (Tenn.) 643; *Griffith v. Buffum*, 22 Vt. 181; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812; *Benjamin v. Covert*, 47 Wis. 375, 2 N. W. 625.

¹²⁴ *Fosdick v. Van Horn*, 40 Ohio St. 459; *Manufacturers' &c. Bank v.*

mant partner is only liable for the debts of the firm contracted within the scope of the partnership business.¹²⁵ So where the ostensible partner had executed notes in the firm name as the evidence of a debt, and the note was afterward reduced to judgment, it was held that a dormant partner when discovered was not liable on the note.¹²⁶

§ 2572. **Authority of partner after dissolution.**—The presumption that each member of a firm has the authority to bind his partners ceases on the dissolution of the firm. There is no longer either the community of interest or relation of principal and agent that authorizes one partner to act for the other. And if one member of the firm continues in the business he has no power to execute contracts in the firm name after the dissolution where the person with whom he dealt had notice of such dissolution.¹²⁷ Nor has one partner the power to renew a note in the firm name after dissolution.¹²⁸ But after dissolution in the absence of any agreement to the contrary each partner has been held authorized to collect and receipt for debts due the firm,¹²⁹ and it has been held that all the partners are liable for money collected by one of them after the dissolution of the firm where the firm had engaged to collect the money.¹³⁰ Where there is no agreement as to the method of winding up partnership business after dissolution each partner has the same authority to adjust its affairs by collecting its debts and disposing of its property as before the dissolution; in other words the partnership continues for the purposes of settlement and liquidation.¹³¹ But where the partners on dissolu-

Winship, 5 Pick. (Mass.) 11; Etheridge v. Binney, 9 Pick. (Mass.) 272; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; National Bank &c. v. Ingraham, 58 Barb. (N. Y.) 290; United States Bank v. Binney, 5 Mason (U. S.) 176; Yorkshire &c. Co. v. Beatson, L. R. 5 C. P. 109.

¹²⁵ Bromley v. Elliot, 38 N. H. 287; Bank &c. v. Hadfeg, 3 Yeates (Pa.) 560; Munn, Ex parte, 3 Biss. (U. S.) 442.

¹²⁶ Moale v. Hollins, 11 Gill & J. (Md.) 11.

¹²⁷ Hayden v. Cretcher, 75 Ind. 108; Floyd v. Miller, 61 Ind. 224.

¹²⁸ Lange v. Kennedy, 20 Wis. 294.

¹²⁹ Major v. Hawkes, 12 Ill. 298; Heartt v. Walsh, 75 Ill. 200.

¹³⁰ Smyth v. Harvie, 31 Ill. 62.

¹³¹ Robbins v. Fuller, 24 N. Y. 570; Gray v. Green, 142 N. Y. 316, 37 N. E. 124; Murray v. Mumford, 6 Cow. (N. Y.) 441; Miller v. Florer, 15 Ohio St. 148; Riddle v. Etting, 32 Pa. St. 412; Bass v. Taylor, 34 Miss. 342; Gordon v. Albert, 168 Mass. 150, 46 N. E. 423; Milliken v. Loring, 37 Me. 408; Hogendobler v. Lyon, 12 Kans. 276; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; 2 Bates Partnership, § 679, et seq.; Parsons Partnership, § 287, et seq.

tion appoint an agent to settle their affairs it has been held that a person with notice of such fact deals with one of the former partners at his peril.¹⁸³

§ 2573. **Admissions after dissolution.**—As the community of interest as well as the agency of the partner terminates on the dissolution and the authority of each to bind the firm ceases, it follows as a rule that one of the partners after dissolution cannot bind the others by an admission of liability.¹⁸³ And it has been held that a partner after dissolution cannot take a case out of the operation of the statute of limitation by an admission of liability, new promise, or partial payment.¹⁸⁴ The rule on this subject is stated as follows: "After dissolution, a partner's authority to bind his co-partner is limited to acts necessary or proper for the winding up of the partnership affair."¹⁸⁵

§ 2574. **Dissolution—Release from liability.**—The mere dissolution of a firm will not of itself absolve the individual partners from future liability, especially where the business is continued in the same name. In order to avoid liability the persons retiring from the firm must give notice of the dissolution and that they are no longer members of the firm. Where the business is continued the former members are liable to persons who have previously dealt with the firm and who have received no notice of the dissolution.¹⁸⁶ A notice generally is not of itself sufficient to relieve from liability in such cases; the

¹⁸³ *Hilton v. Vanderbilt*, 82 N. Y. 591.

¹⁸⁴ *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31; *Hackley v. Patrick*, 3 Johns. (N. Y.) 536; *Smith v. Ludlow*, 6 Johns. (N. Y.) 267; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Hart v. Woodruff*, 24 Hun (N. Y.) 510; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17; *Myers v. Standart*, 11 Ohio St. 29; *Feigley v. Whitaker*, 22 Ohio St. 606.

¹⁸⁴ *Tate v. Clements*, 16 Fla. 339; *Van Keuren v. Parmelee*, 2 N. Y. 523; *Levy v. Cadet*, 17 S. & R. (Pa.)

126; *Reppert v. Colvin*, 48 Pa. St. 248; *Bush v. Stowell*, 71 Pa. St. 208; *Jack v. McLanahan*, 191 Pa. 631, 43 Atl. 356; *Davis v. Poland*, 92 Va. 225, 23 S. E. 292; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Forbes v. Garfield*, 32 Hun (N. Y.) 389; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17.

¹⁸⁵ *Shumaker Partnership*, § 148.

¹⁸⁶ *Duff v. Baker*, 78 Iowa 642, 43 N. W. 463; *Stimson v. Whitney*, 130 Mass. 591; *Hixon v. Pixley*, 15 Nev. 475; *Palmer v. Dodge*, 4 Ohio St. 21; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17.

proof must show that the notice was brought home to all persons who had formerly dealt with the firm. This rule was carried to the extent of holding that the old firm was liable to a creditor that had not previously dealt with the firm; but generally speaking there must be actual notice to those who have dealt with the firm in order to protect a partner after dissolution.¹³⁷ In such cases it is sufficient to prove that the creditor had knowledge of the dissolution of the firm or withdrawal of the partner.¹³⁸ But receipt of a notice must be proved and it has been held insufficient to prove that a written notice was mailed to the creditor.¹³⁹ Notice given to the agent with whom the contract was made was held sufficient.¹⁴⁰ And a general notice by publication to the world of the dissolution or retirement of the partner has been held sufficient to all persons except former customers.¹⁴¹

§ 2575. **Accounting—Burden of proof.**—In an action for an accounting where a partner claims a balance due him from the firm, and where no entries have been made of the account at the time of the alleged settlement, the burden is upon the plaintiff to prove the indebtedness.¹⁴² In such an action it is held that the plaintiff must produce the evidence necessary to fix the rights of the partners, or there can be no recovery.¹⁴³ So where the partnership affairs have been adjusted and the settlement of the account signed by the partners, the

¹³⁷ *Nicholson v. Moog*, 65 Ala. 471; *Joseph v. Southwark & Co.*, (Ala.) 10 So. 327; *Richards v. Hunt*, 65 Ga. 342; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Strecker v. Conn*, 90 Ind. 469; *Iddings v. Pierson*, 100 Ind. 418; *Rose v. Coffield*, 53 Md. 18; *Sibley v. Parsons*, 93 Mich. 538, 53 N. W. 786; *Martin v. Fewell*, 79 Mo. 401; *Stoddard Mfg. Co. v. Krause*, 27 Neb. 82, 42 N. W. 913; *National Shoe & Co. v. Herz*, 89 N. Y. 629; *Speer v. Bishop*, 24 Ohio St. 598; *Long v. Garnett*, 59 Tex. 229; *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

¹³⁸ *Uhl v. Bingham*, 78 Ind. 365; *Backus v. Taylor*, 84 Ind. 503; *Kehoe v. Carville*, 84 Iowa 415, 51 N. W. 166; *Martin v. Walton*, 1 Mc-

Cord (S. Car.) 16; *Prentiss v. Sinclair*, 5 Vt. 149.

¹³⁹ *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495.

¹⁴⁰ *Hunt v. Colorado & Co.*, 1 Colo. App. 120.

¹⁴¹ *Joseph v. Southwark & Co.*, (Ala.) 10 So. 327; *Rocky Mountain & Co. Bank v. McCaskill*, 16 Colo. 408; *Richardson v. Snider*, 72 Ind. 425; *Rose v. Coffield*, 53 Md. 18; *Polk v. Oliver*, 56 Miss. 566; *Stoddard Mfg. Co. v. Krause*, 27 Neb. 83, 42 N. W. 913.

¹⁴² *McCabe v. Franks*, 44 Iowa 208; *Camblat v. Tupery*, 2 La. Ann. 10; *McMichael v. Raoul*, 14 La. Ann. 307; *Maupin v. Daniel*, 3 Tenn. Ch. 223.

¹⁴³ *Camblat v. Tupery*, 2 La. Ann. 10.

burden is on the partner complaining to show an error in the settlement or that the firm is indebted to him.¹⁴⁴ This rule as to the burden has been carried to the extent of holding that the evidence must be most satisfactory for the ascertainment of the true balance between the partners.¹⁴⁵ And in an action for a settlement and an accounting the burden has been held to be on the plaintiff to prove a dissolution of the firm.¹⁴⁶ In an action for an accounting where a partner fails to produce the books of accounts in his possession, an account may be stated by presuming everything against him;¹⁴⁷ but the absence of the firm books may prevent the stating of an account where the bill and answer are conflicting.¹⁴⁸

¹⁴⁴ *Bry v. Cook*, 15 La. Ann. 493.

¹⁴⁷ *Walmsley v. Walmsley*, 3 Jones

¹⁴⁵ *Davidson v. Wilson*, 3 Del. Ch. 307. & La T. 556.

¹⁴⁶ *Davidson v. Wilson*, 3 Del. Ch.

¹⁴⁸ *Gossett v. Weatherly*, 5 Jones 307.
Eq. (N. Car.) 46.

CHAPTER CXVIII.

PAYMENT.

Sec.	Sec.
2576. Burden of proof—Kinds of evidence.	2583. Collateral evidence as to payment.
2577. Presumptions.	2584. Collateral evidence of payment—Financial condition of parties.
2578. Questions of law or fact.	2585. Admissions and declarations.
2579. Time, place and manner—Parol evidence.	2586. Application of payments.
2580. Notes and checks.	2587. Tender.
2581. Receipts.	
2582. Account books and other documents.	

§ 2576. Burden of proof—Kinds of evidence.—It is generally held that the burden of proving payment is on the party pleading it.¹ So, the burden of proving the acceptance of something else than money in payment, when such acceptance is required to be proved, is upon the party alleging it.² Payment may be proved by circumstantial as well as direct evidence,³ and by parol as well as written evidence.⁴ It has

¹ Shulman v. Brantley, 50 Ala. 81; Snodgrass v. Caldwell, 90 Ala. 319, 7 So. 834; Adams v. Field, 25 Mich. 16; Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Baldwin v. Clock, 68 Mich. 201, 35 N. W. 904; Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566; Hutchins v. Gernon, 18 La. Ann. 288; Godfrey v. Crisler, 121 Ind. 203, 22 N. E. 999; Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; Winter v. Simonton, 3 Cranch (U. S.) 104; Yarnell v. Anderson, 14 Mo. 619; Buzzell v. Snell, 25 N. H. 474; Smith v. Burnet, 17 N. J. Eq. 40; Lovelock v. Gregg, 14 Colo. 53, 23 Pac. 86; Gutterman v. Schroeder, 40 Kans. 507, 20 Pac. 30; Rogers v. Priest, 74 Wis. 538, 43 N. W. 510; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585; Pecks v. Elliott, 24 C. C. A. 425, 79 Fed. 10.

² Bradley v. Harwi, 43 Kans. 314, 23 Pac. 566; Powell v. Blow, 34 Mo. 485; Collins v. Busch, 191 Pa. St. 549, 43 Atl. 378; Willow River Lumber Co. v. Luger Furn. Co., 102 Wis. 636, 78 N. W. 762; Baker v. Baker, 2 S. Dak. 261, 39 Am. St. 776; Parker, In re, 11 Fed. 397; Chase v. Brundage, 58 Ohio St. 517, 51 N. E. 31.

³ Estes v. Fry, 22 Mo. App. 53; Murphy v. Brick, 33 Pa. St. 235; Walls v. Walls, 170 Pa. St. 48, 32 Atl. 649; Hughes v. Walker, 14 Ore. 481, 13 Pac. 450; Lindsay v. McCormick, 82 Va. 479, 5 S. E. 534; Waydele v. Velle, 1 Bradf. (N. Y.) 277; Cuthbert v. Newell, 7 Ala. 457; Wolcott v. Ensign, 53 Ind. 70; Braden v. Lemmon, 127 Ind. 9, 26 N. E. 476.

⁴ Greenfield v. Wright, 16 Ark.

also been held that under a plea of payment in full proof of payment in part may be made.⁵ If the payment was made to a third person on behalf of the creditor, or was made in property the burden is upon him of showing that such payment discharged the debt.⁶ Thus where payment was made to the bank at which the creditor had his account, it was held that it must be shown that he authorized the bank to receive the money, or that with knowledge of such payment he assented to it.⁷ And it has been held that where payment to the president of a corporation of a debt due the corporation is relied on, circumstances which made the payment to such officer amount to payment to the corporation itself must be proved.⁸ So, generally, the authority of another to whom the money was paid to receive it for the creditor must usually be affirmatively shown.⁹ If the giving of other notes of the debtor is relied on as payment, the defendant must prove that such notes were accepted by the creditor in full payment of the debt,¹⁰ unless in some jurisdictions the notes are negotiable. As elsewhere shown, the giving and acceptance of paper executed by the debtor

186; *Davis v. Hare*, 32 Ark. 386; *Smith v. Boruff*, 75 Ind. 412; *Ketcham v. Hill*, 42 Ind. 64; *Wolf v. Foster*, 13 Kans. 116, 118; *Fisher v. George S. Jones Co.*, 93 Ga. 717, 21 S. E. 152; *Denham v. Walker*, 93 Ga. 497, 21 S. E. 102; *Holden v. Parker*, 110 Mass. 324; *Riley v. Pettis County*, 96 Mo. 318, 9 S. W. 906; *Shaffer v. McCrackin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. 465; *Whiteside v. Hoskins*, 20 Mont. 361, 51 Pac. 739; *Keene v. Mead*, 3 Pet. (U. S.) 1; see Vol. I, § 261.

⁵ *Ballard v. Turner*, 58 Ind. 127; *Lord v. Ferrand*, 1 Dowl. & L. 630. But see *Longworth v. Higham*, 89 Ind. 352.

⁶ *Maynard v. Black*, 41 Ind. 310; *Olvey v. Jackson*, 106 Ind. 286, 290, 4 N. E. 149; *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518; *Bedford Belt R. Co. v. Burke*, 13 Ind. App. 35, 41 N. E. 70; *Wipperman v. Hardy*, 17 Ind. App. 142, 150, 46 N. E. 537; *Tulley v. Citizens' State Bank*, 18 Ind. App. 240, 47 N. E. 850. See

also, *Security Co. v. Greybeal*, 85 Iowa 543, 39 Am. St. 311.

⁷ *Bedford Belt R. Co. v. Burke*, 13 Ind. App. 35, 41 N. E. 70. See also, *Rochester & C. R. Co. v. Babcock*, 110 N. Y. 119, 17 N. E. 678; *Coburn v. Hough*, 32 Ill. 344.

⁸ *Tulley v. Citizens' State Bank*, 18 Ind. App. 240, 47 N. E. 850; *Rush v. Flister*, 23, Ill. App. 348; *Eaton v. Knowles*, 61 Mich. 625, 28 N. W. 740; *Seymour v. Smith*, 114 N. Y. 481, 11 Am. St. 683.

⁹ *Maynard v. Black*, 41 Ind. 310. But it need not be express, and there may be a ratification, *Barrett v. Deere, M. & M.* 200, *Rosc. N. P.* 657; *Bronson v. Chappell*, 12 Wall. (U. S.) 681; *Abbott's Tr. Ev.* (2d ed.) 1016.

¹⁰ *Tilford v. Miller*, 84 Ind. 185; *Olvey v. Jackson*, 106 Ind. 286, 291, 4 N. E. 149; *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537; *Orner v. Sattley & Co.*, 18 Ind. App. 122, 47 N. E. 644; *Combs v. Bays*, 19 Ind. App. 263, 49 N. E. 358.

that is negotiable by the law merchant for a prior debt is presumed in many jurisdictions to be a payment and satisfaction of the debt,¹¹ while the giving and acceptance of notes not governed by the law merchant is presumed not to constitute a payment;¹² but parol evidence is admissible to control and overcome either presumption.¹³ Thus, evidence that the note was taken as collateral security will rebut the presumption that it was accepted as a full satisfaction of the debt.¹⁴ If the giving of a note of a third person is relied on as the satisfaction of a debt, the defendant who sets up such defense generally has the burden of proving that the note was received by the creditor upon the agreement that it should be in full satisfaction of the previous debt.¹⁵ So, where payment by check is relied on, the burden rests on the debtor either to show that the check was duly paid¹⁶ or that it was received in absolute payment of the debt.¹⁷

§ 2577. **Presumptions.**—After twenty years, in the absence of anything to the contrary a presumption of payment arises as to every instrument, whether under seal or otherwise,¹⁸ and a jury may infer

¹¹ *Mason v. Douglas*, 6 Ind. App. 558, 33 N. E. 1009; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 899; *Davis & Co. v. Vice*, 15 Ind. App. 117, 43 N. E. 899; *Abbott Trial Ev.* (2d ed.) 1020, § 11; 2 *Greenleaf Ev.* (16th ed.), § 520.

¹² *Weston v. Wiley*, 78 Ind. 54; *Travelers' Ins. Co. v. Chappelow*, 83 Ind. 429, 435; 2 *Greenleaf Ev.* (16th ed.), § 521.

¹³ *Alford v. Baker*, 53 Ind. 279; *Weston v. Wiley*, 78 Ind. 54; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 899.

¹⁴ *Bradway v. Groenendyke*, 153 Ind. 508, 512, 55 N. E. 434.

¹⁵ *Wipperman v. Hardy*, 17 Ind. App. 142, 150, 46 N. E. 537; *Jewett v. Pleak*, 43 Ind. 368; *Abbott Tr. Ev.* (2d ed.), 1021, § 12; 2 *Greenleaf Ev.* (16th ed.), § 521.

¹⁶ *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518; *Cox v. Hays*, 18 Ind. App. 220, 47 N. E. 844; *Steinhart v. Nat. Bank*, 94 Cal. 362, 28 Am. St.

132, and note; *Taylor v. Wilson*, 11 Metc. (Mass.) 44, 45 Am. Dec. 180, and note; *Nat. Bank of Commerce v. Chicago & C. R. Co.*, 44 Minn. 224, 20 Am. St. 566.

¹⁷ *Cox v. Hays*, 18 Ind. App. 220, 47 N. E. 844; *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. 860. See also, even where the check is certified, *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Born v. Indianapolis First Nat. Bank*, 123 Ind. 78, 24 N. E. 173, 18 Am. St. 312; *Cincinnati & Co. v. Nat. & C. Bank*, 51 Ohio St. 106, 46 Am. St. 560; *Bickford v. Chicago First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436.

¹⁸ Vol. I, § 119; *Colsell v. Budd*, 1 Campb. 2; *Dunlop v. Ball*, 2 Cranch (U. S.) 180; *Higginson v. Mein*, 4 Cranch (U. S.) 420; *Kingsland v. Roberts*, 2 Paige (N. Y.) 193; *Jackson v. Hotchkiss*, 6 Cow. (N. Y.) 401; *Tilghtman v. Fisher*, 9 Watts (Pa.) 441; *Cope v. Humphreys*, 14 S. & R. (Pa.) 15; *Lash v. Von*

payment from circumstances, though the lapse of time be shorter.¹⁹ A bill of exchange, promissory note, or order for the payment of money, found after circulation, in the hands of the drawee or maker, is presumptive evidence of its payment,²⁰ and in many other instances a presumption or inference may arise from circumstances.²¹ The presumption, however, aside from the statute of limitations, may be rebutted or overcome by showing the facts and circumstances,²² and the creditor's possession of the evidence of indebtedness may give rise to the presumption that it has been paid.²³ But it has been held that the presumption of payment prevails over that of continuance.²⁴ The

Nelda, 109 Pa. St. 207; *Sarter v. Beaty*, 25 S. Car. 293; *McKinley v. Gaddy*, 26 S. Car. 573, 2 S. E. 497; *Moore v. Pogue*, 1 Duv. (Ky.) 327; *Davenport v. Labauve*, 5 La. Ann. 140; *Wooten v. Harrison*, 9 La. Ann. 234; *O'Brien v. Coulter*, 2 Blackf. (Ind.) 421; *Fleming v. Emory*, 5 Harr. (Del.) 46; *Clark v. Clement*, 33 N. H. 563; *Milledge v. Gardner*, 33 Ga. 397; *Barned v. Barned*, 21 N. J. Eq. 245; *Atkinson v. Dance*, 9 Yerg. (Tenn.) 424.

¹⁹ *Rector v. Morehouse*, 17 Ark. 131; *Hughes v. Hughes*, 54 Pa. St. 240; *Walls v. Walls*, 170 Pa. St. 48, 32 Atl. 649; *Brubaker v. Taylor*, 76 Pa. St. 83; *Hess v. Frankenfield*, 106 Pa. St. 440; *Long v. Straus*, 124 Ind. 84, 24 N. E. 664; *Garnier v. Renner*, 51 Ind. 372; *Bander v. Snyder*, 5 Barb. (N. Y.) 63; *Baker v. Stonebraker*, 36 Mo. 338; *Perkins v. Kent*, 1 Root (Conn.) 312; *Milledge v. Gardner*, 33 Ga. 397; *Mathews v. Smith*, 2 Dev. & B. (N. Car.) 287; *Smithpeter v. Ison*, 4 Rich. (S. Car.) 203; Vol. I, § 119.

²⁰ *Hill v. Gayle*, 1 Ala. 275; *Hollenberg v. Lane*, 47 Ark. 394, 1 S. W. 687; *Fedens v. Schumers*, 112 Ill. 263; *Connolly v. McKean*, 64 Pa. St. 113; *Callahan v. First Nat. Bank*, 78 Ky. 604, 39 Am. R. 262; *Levy v. Merrill*, 52 How. Pr. (N. Y.) 360;

Skannel v. Taylor, 12 La. Ann. 773; *Penny, Succession of*, 14 La. Ann. 190; *Chandler v. Davis*, 47 N. H. 462; *Blount v. Starkey*, 1 Tayl. (N. Car.) 110; *Close v. Fields*, 2 Tex. 232; *Hillyard v. Crabtree*, 11 Tex. 264; *Hays v. Samuels*, 55 Tex. 560; *Egg v. Barnett*, 3 Esp. 196; Vol. I, § 119.

²¹ Vol. I, § 119, and numerous authorities there cited.

²² *Gregory v. Commonwealth*, 121 Pa. St. 611, 15 Atl. 452, 6 Am. Ann. 804; *Daggett v. Tallman*, 8 Conn. 168; *Herndon v. Bartlett*, 7 T. B. Mon. (Ky.) 449; *Knight v. Macomber*, 55 Me. 132; *Abbott v. Godfrey*, 1 Mich. 178; *Lewis v. Schwenn*, 93 Mo. 26; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Cole v. Patterson*, 25 Wend. (N. Y.) 457; *Jackson v. Hotchkiss*, 6 Cow. (N. Y.) 401; *McKinder v. Littlejohn*, 1 Ired. L. (N. Car.) 66; *Grantham v. Canaan*, 38 N. H. 268; *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *Coe v. Anderson*, 92 Iowa 515, 61 N. W. 177; *Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188; Vol. I, § 119. By payment of interest; *Dickson v. Gourdin*, 29 S. Car. 343, 1 L. R. A. 628, and note.

²³ See *Potter v. Titcomb*, 7 Me. 302.

²⁴ *Hauxhurst v. Ritch*, 119 N. Y. 621, 23 N. E. 176; *Somervail v. Gilles*, 31 Wis. 152; *Mulhall v. Berg*,

mere delivery of money by one party to another, unexplained, has been held to be presumptive evidence of payment of an antecedent debt, rather than of a loan.²⁵ And in some jurisdictions the giving and acceptance of negotiable paper for an antecedent debt is presumed to be a payment or satisfaction thereof.²⁶ In the absence of anything to the contrary, however, the law generally presumes that payment shall be made in money.²⁷

§ 2578. Questions of law or fact.—The question of payment is generally one of intent and is therefore a question of fact, or a mixed question of law and fact, for the jury.²⁸ Thus, whether a note, bill or check was taken as an absolute and unconditional payment or not is a question for the jury to determine.²⁹ So, it is for the jury to determine on which of two bills or debts a payment was intended to be made, where evidence upon the subject is conflicting.³⁰ So, whether a payment was made by a surety for the benefit of an individual or for the benefit of the firm of which the latter was a member has been held a question of fact for the jury,³¹ and the character

95 Iowa 60, 63 N. W. 573; *Perry v. Gray*, 106 Mass. 206; *Johnson v. Gooch*, 116 N. Car. 64, 21 S. E. 39. But this may also be rebutted, *Brown v. White*, (Md.) 27 Atl. 315; *Humeeler v. Hickman*, 13 Ill. App. 537.

²⁵ *Sayles v. Olmstead*, 66 Barb. (N. Y.) 590; *Duguid v. Oglivie*, 3 E. D. Smith (N. Y.) 527; *Poucher v. Scott*, 98 N. Y. 422; *Hansen v. Kirtley*, 11 Iowa 565; *Rohrbracker v. Schilling*, 12 La. Ann. 17; *Fletcher v. Manning*, 12 Mees. & W. 571, 13 L. J. Exch. 150.

²⁶ See Vol. I, § 119, for authorities upon both sides of this question.

²⁷ *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429, 55 Atl. 236.

²⁸ *Hess v. Frankenfield*, 106 Pa. St. 440; *Germania Ins. Co. v. Davenport*, (Pa.) 9 Atl. 517; *Briggs v. Holmes*, 118 Pa. St. 283, 4 Am. St. R. 597; *Barnes v. Brown*, 69 N. Car. 489; *Benton v. Toler*, 109 N. Car. 238, 13 S. E. 763; *Smith's Appeal*,

52 Mich. 415, 18 N. W. 195; *Lyon v. Guild*, 5 Heisk. (Tenn.) 175; *Waters v. Waters*, 1 Metc. (Ky.) 519; *Grantam v. Canaan*, 38 N. H. 268; *Ewing v. Peck*, 26 Ala. 413; *Dean v. Toppin*, 130 Mass. 517; *Wood v. Guarantee & Co.*, 128 U. S. 416, 9 Sup. Ct. 131; *Wear Bros. v. Schmelzer*, 92 Mo. App. 314; *Rosenstock v. Dessar*, 83 N. Y. S. 334; *Braden v. Lemmon*, 127 Ind. 9, 26 N. E. 476.

²⁹ *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. 644; *Lyman v. Bank*, 12 How. (U. S.) 225, 243, 244; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; *Sellers v. Jones*, 22 Pa. St. 423; *Schilling v. Durst*, 42 Pa. St. 126; *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687. See also, *Quinby v. Durgin*, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514.

³⁰ *Yerkes v. Norris*, 90 Mich. 234, 51 N. W. 366; *Phillips v. McGuire*, 73 Ga. 517; *Blair v. Lynch*, 105 N. Y. 636, 11 N. E. 947.

³¹ *Welch v. Zerger*, 29 Ill. App.

in which one to whom money is paid receives it has also been held to be a question of fact.³² The rules in regard to accord and satisfaction, so far at least as the question of intent is concerned, are substantially the same.³³

§ 2579. **Time, place and manner—Parol evidence.**—The time, place and mode or manner, of payment are usually fixed by the contract, but it has been held that, when goods are sold it is to be presumed, in the absence of any express agreement as to the time of payment, that they are to be paid for on delivery.³⁴ So, where no place is fixed, law³⁵ or custom may determine it, or, if not, it may sometimes be determined by the circumstances of the particular case. And the same is true as to the person to whom³⁶ or manner in which payment should be made. "As to the mode of payment," says Professor Greenleaf,³⁷ "it may be any lawful method agreed upon between the parties, and fully executed."³⁸ The meaning and intention of the parties, where it can be distinctly known, is to have effect, unless that intention contravene some well-established principle of law. This intention is to be ascertained, in ordinary cases, by the jury; but it is sometimes legally presumed by the Court."³⁹ The question has fre-

348. See also, *McCloskey v. McCloskey*, (Pa.) 16 Atl. 30; *Huntington Co. L. & S. Asso. v. Cast*, 160 Ind. 701, 67 N. E. 921.

³² *Dore v. Billings*, 26 Maine 56, 1 Thompson Tr. Ev., § 1256.

³³ *Frick v. Algeler*, 87 Ind. 255; *Stone v. Miller*, 16 Pa. St. 450; *Hardman v. Bellhouse*, 9 Mees. & W. 596; *Hall v. Flockton*, 16 Ad. & El. (N. S.) 1039. See also, *Keerl v. Bridges*, 10 Sm. & M. (Miss.) 612; *Willard v. Germer*, 1 Sandf. (N. Y.) 50; *Wilson v. Hanson*, 20 N. H. 375.

³⁴ *Roberts v. Wilcoxson*, 36 Ark.

355. See also, *Robinson v. Marney*, 5 Blackf. (Ind.) 329; *Hall v. Stevens*, 116 N. Y. 201, 22 N. E. 374; *Lockwood v. Tunbridge Wells Local Board*, 1 Cab. & El. 289. Where no time is fixed in a money contract it is usually payable immediately, or on demand, or at least within a

reasonable time. *Devol v. McIntosh*, 23 Ind. 529; *Columbia Bank v. Hagner*, 1 Pet. (U. S.) 455; *Agens v. Agens*, 50 N. J. Eq. 566, 25 Atl. 707; *Bradford & Co. v. New York & Co.*, 123 N. Y. 316, 25 N. E. 499; *Niemeyer v. Brooks*, 44 Ill. 77.

³⁵ As a general rule, in the absence of anything to the contrary the debtor is bound to seek the creditor.

³⁶ But see *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557; *Conyers v. Ford*, 111 Ga. 754, 36 S. E. 947.

³⁷ 2 Greenleaf Ev., § 519.

³⁸ *Mason v. Warner*, 43 Mich. 439, 5 N. W. 429; *Besley v. Dumas*, 6 Ill. App. 291.

³⁹ *Millikin v. Brown*, 1 Rawle (Pa.) 397, 398; *Watkins v. Hill*, 8 Pick. (Mass.) 522, 523; *Thatcher v. Dinsmore*, 5 Mass. 299; *Johnson v. Weed*, 9 Johns. (N. Y.) 310.

quently arisen, in the case of written contracts, as to whether parol or extrinsic evidence is admissible to show the time, place and manner when, where and in which payment should be made. Such evidence has frequently been held inadmissible especially in the case of bills and notes, and such is the general rule where the instrument is a complete and unambiguous contract and the admission of such parol evidence would contradict or vary its terms.⁴⁰ But it is otherwise where the instrument leaves this open to be determined by parol evidence and such evidence would not contradict or vary its terms.⁴¹

§ 2580. Notes and checks.—Mere paper is not payment, and does not prevent the creditor from enforcing the original indebtedness, unless it is accepted or agreed to be accepted as such. But, in some jurisdictions, the acceptance of negotiable paper such as a negotiable promissory note is *prima facie* evidence of payment; but it is not conclusive, in the absence of any agreement, even though a receipt in full is given, and the rule in most jurisdictions is that the giving of such paper whether negotiable or not, is not even *prima facie* evidence of an unconditional and absolute payment of a pre-existing indebtedness in the absence of anything to show some kind of an agreement to that effect.⁴² Evidence that a check for an antecedent debt was delivered by a debtor to his creditor does not prove that the debt was thereby extinguished, unless it is also shown that the check was duly honored on presentation to the bank,⁴³ or that there was an agreement between the parties that the check should operate as payment.⁴⁴ The burden is on the party who asserts that the debt is ex-

⁴⁰ See Vol. I, § 616. See also, *Boone v. Mierow*, (Tex. Civ. App.) 76 S. W. 772; *Beattyville Bank v. Roberts*, (Ky.) 78 S. W. 901; *Marrotto v. McClotter*, 85 N. Y. S. 431.

⁴¹ Vol. I, § 579. See also, *Gray v. Anderson*, 99 Iowa 342, 68 N. W. 790, 61 Am. St. 243; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S. W. 303; *Rymer v. South Penn. Oil Co.*, (W. Va.) 46 S. E. 559; *Putnam Foundry & Co. v. Canfield*, 25 R. I. 548, 56 Atl. 1033. So independent agreements may sometimes be shown.

⁴² The authorities upon both sides

of the question are cited and reviewed in 22 Am. & Eng. Ency. of Law 555-564. See also, the following more recent cases. *Webb v. Nat. Bank of Repub.*, 67 Kans. 62, 72 Pac. 520; *Durfee v. Seale*, 139 Cal. 603, 73 Pac. 438; *Colby v. Maw*, (Wis.) 95 N. W. 677, holding that it is not payment. *Born v. First Nat. Bank*, 123 Ind. 78, 7 L. R. A. 442, 9 L. R. A. 263, notes.

⁴³ *Boyd v. Olvey*, 82 Ind. 294; *Sutton v. Baldwin*, 146 Ind. 361, 364, 45 N. E. 518; 2 *Greenleaf Ev.* (16th ed.), § 520.

⁴⁴ *Sutton v. Baldwin*, 146 Ind. 361, 364, 45 N. E. 518; *Cox v. Hayes*, 18

tinguished to overcome the presumption that the delivery and acceptance of the check constituted merely a conditional payment,⁴⁵ or to show that the check has been paid. Nor does certification before delivery alter the presumption that it was not a payment or relieve the debtor from such burden.⁴⁶ But according to the better doctrine, if the creditor, after receiving the check, instead of presenting it for payment, causes it to be certified by the bank, the debt will be discharged the same as if he had drawn the money and delivered it back to the bank in exchange for a certificate of deposit.⁴⁷

§ 2581. **Receipts.**—A receipt in full of all demands is admissible to prove payment, and generally raises a presumption that a debt which was in existence at the time it was given has been paid; but this presumption of full payment may be rebutted by evidence of the amount due, the amount actually paid, and the circumstances under which the payment was made,⁴⁸ and it may not always be even *prima facie* evidence of an absolute and unconditional payment.⁴⁹ A receipt for payment under one contract is not admissible in evidence to prove payment of the amount due under an entirely different contract.⁵⁰

Ind. App. 220, 225; Abbott Tr. Ev. (2nd ed.), 1020, § 11. See further that a check is not even evidence of unconditional payment; Steiner v. Jeffries, 118 Ala. 573, 24 So. 37; Barnett v. Smith, 30 N. H. 256, 64 Am. Dec. 290; Marrett v. Brackett, 60 Me. 524; Goodwin v. Massachusetts & Co., 152 Mass. 189, 25 N. E. 100; Smith v. Miller, 43 N. Y. 171, 3 Am. R. 690; Nat. Bank of Com. v. Chicago & C. R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. 566; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. R. 527.

⁴⁵ Cox v. Hayes, 18 Ind. App. 220, 225, 47 N. E. 844.

⁴⁶ Cincinnati & Co. v. National Laf. Bank, 51 Ohio St. 106, 46 Am. St. 560; Bickford v. Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Born v. First Nat. Bank, 123 Ind. 78, 83, 24 N. E. 173.

⁴⁷ Born v. First Nat. Bank, 123 Ind. 78, 24 N. E. 173; Meridian

Bank v. First Nat. Bank, 7 Ind. App. 322, 327, 34 N. E. 608. See also, Jersey City First Nat. Bank v. Leach, 52 N. Y. 350, 11 Am. R. 708; Boyd v. Nasmith, 17 Ont. 40. And there are other circumstances under which it may constitute or evidence payments. Smith & Co. v. Mitchell, 117 Ga. 772, 45 S. E. 47; Breck v. Barney, 183 Mass. 133, 66 N. E. 643; Brown v. Schintz, 202 Ill. 509, 67 N. E. 172; note in 69 Am. St. 346-349.

⁴⁸ Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132; 2 Greenleaf Ev. (16th ed.), § 517.

⁴⁹ See Colby v. Maw, (Wis.) 95 N. W. 677; Muldon v. Whitlock, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533; Weddigen v. Boston Elastic & Co., 100 Mass. 422; Loux v. Fox, 171 Pa. St. 68, 33 Atl. 190.

⁵⁰ Louisville & C. R. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611.

And even though a receipt has been taken for the payment of the debt in question, parol evidence is admissible to show the actual facts as to what, if anything was paid.⁵¹ The subject of parol evidence, where receipts are given has, however, been sufficiently considered elsewhere.⁵²

§ 2582. **Account books and other documents.**—The subject of entries in account books has been fully treated,⁵³ so that little remains to be said in this connection. As elsewhere shown, a strict rule is in force in many jurisdictions under which an entry for a cash payment or loan is not within the shop book rule. So, there is some conflict as to whether the fact that no payment is shown on the creditor's books is admissible in his favor, and, the weight of authority is probably to the effect that his books are not admissible as negative evidence to defeat a claim of the adverse party in that way,⁵⁴ but there are cases in which, upon a proper showing, it would seem that such evidence ought to be admitted;⁵⁵ and it may be shown as against the debtor that the books of the debtor in which he was accustomed to regularly make an entry of all payments made by him contain no entry of the alleged payment in question.⁵⁶ So, entries in the account book of the creditor showing that he received the payment are usually admissible against him.⁵⁷ Indorsements of credits or payments on the evidence of indebtedness may usually be shown as evidence of such payments,⁵⁸ although when the instrument has remained in the possession of the debtor other evidence of handwriting or authority may first be required.⁵⁹ The returned checks of the debtor endorsed by the creditor are also evidence that the amount of the check was paid

⁵¹ *Johnson v. Valido Marble Co.*, 64 Vt. 337, 25 Atl. 441; *Conway v. State Bank*, 13 Ark. 48; *Hinchman v. Whetstone*, 23 Ill. 108; *Wood v. State*, 8 Heisk. (Tenn.) 329; *Stafford v. Williams*, 12 Barb. (N. Y.) 240.

⁵² See Vol. I, § 617.

⁵³ See Vol. I, Chapters XXI, XXII and especially §§ 467, 482, and Vol. II, § 1289.

⁵⁴ Vol. I, § 467, n. 74.

⁵⁵ Vol. I, § 467, n. 75.

⁵⁶ *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524.

⁵⁷ *Jermain v. Denniston*, 6 N. Y. 276; *Guest v. Burlington &c. Co.*, 74 Iowa 457, 38 N. W. 158.

⁵⁸ *Brown v. Gooden*, 16 Ind. 444; *Mims v. Morrison*, 5 La. Ann. 650; *Clark v. Simmons*, 4 Port. (Ala.) 14; *Sowles v. Butler*, 71 Vt. 271, 45 Atl. 1045; *Mayer v. Schlamp*, (Ky.) 32 S. W. 399; *Conyers v. Portal &c. Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. 100.

⁵⁹ *Chamberlain v. Chamberlain*, 116 Ill. 480, 6 N. E. 444; *Erhart v. Dietrich*, 118 Mo. 418, 24 S. W. 188.

to the creditor.⁶⁰ But check stubs have been held inadmissible on the part of the debtor.⁶¹

§ 2583. **Collateral evidence as to payment.**—Facts which show it to be probable that the debt was paid, such as the fact that the debtor received a sum of money sufficient to discharge it at about the time he says it was paid, are admissible in evidence to corroborate his testimony that he paid it out of the money so received.⁶² So, there are other instances in which collateral evidence making it probable or improbable that there had been a payment was received.⁶³ But as a general rule, collateral evidence that is too remote or has no legitimate bearing upon the question should be refused admission. Thus, evidence of the habit of the debtor to pay his debts, or the like, has been held inadmissible,⁶⁴ and the same has been held as to the habit of the creditor to promptly collect his claims.⁶⁵ It has also been held that the fact that the debtor borrowed money ostensibly for the purpose of paying the debt is incompetent to show payment;⁶⁶ that on an issue as to whether a creditor was pushing the debtor for payment, evidence that the creditor had loaned other money is inadmissible;⁶⁷ and that evidence that an assignee for the benefit of creditors had not

⁶⁰ *Miller v. Brown*, 82 Iowa 79, 47 N. W. 895; *Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777; *Brown v. Burr*, 160 Pa. St. 458, 28 Atl. 828; *Stevens v. Gainesville Nat. Bank*, 62 Tex. 499. But see when payable to the creditor or bearer and not endorsed by him. *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. 900; *Patton v. Ash*, 7 S. & R. (Pa.) 116; *Lowe v. McClery* 3 Cranch (D. C.) 254.

⁶¹ *Wilson v. Goodin*, Wright (Ohio) 219; *Watts v. Shewell*, 31 Ohio St. 331. But see *Fulkerson v. Long*, 63 Mo. App. 268.

⁶² *Morgan v. Weir*, 119 Ind. 178, 21 N. E. 656; *Whisler v. Drake*, 35 Iowa 103; *Chester v. Dickerson*, 54 N. Y. 1.

⁶³ See Vol. I, § 178; *Parker v. Parker*, 52 Ill. App. 333; *Husky v. Maples*, 2 Coldw. (Tenn.) 25, 88 Am.

Dec. 538; *Church v. Fagin*, 43 Mo. 123; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. R. 153, and authorities cited in notes to next section.

⁶⁴ *Martin v. Shannon*, 92 Iowa 374, 60 N. W. 645; *Parker v. Parker*, 52 Ill. App. 333; *Strong v. Slicer*, 35 Vt. 40; *Abercombie v. Sheldon*, 8 Allen (Mass.) 532; *Rosencrance v. Johnson*, 191 Pa. St. 520, 43 Atl. 360. See also, *Filer v. Peebles*, 8 N. H. 226. But compare *Orr v. Jason*, 1 Ill. App. 439; *Waugh v. Riley*, 8 Metc. (Mass.) 290.

⁶⁵ *Young v. Doherty*, 183 Pa. St. 179, 38 Atl. 587. See also, *Shockley v. Van Eaton*, 81 Iowa 417, 46 N. W. 1097; *Bradley v. Freed*, (Tenn. Ch.) 51 S. W. 124.

⁶⁶ *Reed v. Pierson*, 3 N. J. L. 256.

⁶⁷ *Clemmons v. Clemmons*, 68 Vt. 77, 34 Atl. 34.

paid one preferred creditor is not admissible to show that he had not paid another.⁶⁸ So, where the defendant had testified that he paid a clerk in the plaintiff's store and that the clerk had promised to cancel the charge on the book and send a receipt, it was held error to permit the plaintiff to show that the defendant had always made payments before that time to the plaintiff in person.⁶⁹

§ 2584. **Collateral evidence of payment—Financial condition of parties.**—The weight of authority is to the effect that the fact that the creditor was in financial straits when and for a long time after the debt in question became due, rendering it necessary for him to collect all claims due him, or that he was without funds prior to the time of the alleged payment and immediately after that time was possessed of them, is admissible upon the question of payment.⁷⁰ The weight of authority is also to the effect that the possession by the debtor of means to have paid the debt at the time he claims to have paid it, on the one hand, or of his want of means, on the other, may be shown in evidence in a proper case, especially where there has been such a lapse of time or the other circumstances are such that no better evidence can well be obtained.⁷¹ But there is some conflict upon these ques-

⁶⁸ *Whintringham v. Dibble*, 66 N. Y. 634. See also, *Backhouse v. Jones*, 6 Bing. N. Cas. 65, 8 Scott 148.

⁶⁹ *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557. See also, *Conyers v. Ford*, 111 Ga. 754, 36 S. E. 949. The receipt of money by the creditor in satisfaction of the debt may be shown not to amount to payment by evidence that the money belonged to some one else than the debtor, and that the creditor has been compelled to restore it to the owner. *Fleece v. O'Rear*, 83 Ind. 200. Thus, the payment of a note with trust funds which the creditor is afterward compelled to restore to the beneficiary of the trust does not discharge the debtor. *Fleece v. O'Rear*, 83 Ind. 200. Proof of the giving of negotiable notes by the debtor to the creditor, payable to

the latter's wife, does not raise a presumption that the debt was thereby paid, where the notes are not shown to have ever been endorsed by the wife so as to make them negotiable in the hands of the creditor. *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434.

⁷⁰ *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. R. 153; *Looram*, in re, 73 Hun (N. Y.) 177; *Morrison v. Collins*, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. 827; *Stone v. Tupper*, 58 Vt. 409, 5 Atl. 387; *Koltze v. Messenbrink*, 74 Iowa 242, 37 N. W. 179.

⁷¹ *Hedge v. Talbott*, 8 Ind. App. 597, 600, 36 N. E. 437; *Supreme Tribe v. Hall*, 24 Ind. App. 316, 56 N. E. 780; *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360; *Disho v. Reynolds*, 17 Hun (N. Y.) 137; *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. R. 153; *Turrentine v. Grigsby*,

tions and mere evidence of the reputation for solvency or insolvency⁷² or even of actual financial condition would not of itself be sufficient to prove or disprove payment,⁷³ at least as against direct evidence, and the admission of such evidence ought, we think, to be confined to cases in which it will apparently be of aid in determining the question and is not too remote and collateral to tend, at least, to render the fact of payment probable or improbable.⁷⁴

§ 2585. **Admissions and declarations.**—Admissions or declarations by the creditor or his authorized agent that the debt has been paid or discharged are admissible as prima facie evidence of its payment.⁷⁵ And an admission of payment in full has been held to be competent even though the specific payments, shown by other evidence, were less than the amount of the debt.⁷⁶ So, payment of interest or a part of a debt has been held to operate as an admission, prima facie at least, that the person to whom the money is paid is the proper person to receive it.⁷⁷ Declarations accompanying the payment are usually competent to show whether it was made or applied in a certain way, or accepted in full, or the like.⁷⁸ But, when not part of the *res gestae*,

118 Ala. 380, 23 So. 666; Mertz' Appeal, (Pa.) 7 Atl. 187; Dowling v. Dowling, Ir. C. L. 236. See also, Rutherford v. McIvor, 21 Ala. 750; Beckley v. Jarvis, 55 Vt. 348; Vogt v. Butler, 105 Mo. 479, 16 S. W. 512; Bulen v. Granger, 58 Mich. 274, 25 N. W. 188; Vol. I, § 178.

⁷² See Holten v. Lake County, 55 Ind. 194.

⁷³ See Morrison v. Collins, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. 827.

⁷⁴ See Atwood v. Scott, 99 Mass. 177, 96 Am. Dec. 928; Veazie v. Hosmer, 11 Gray (Mass.) 396; Church v. Fagin, 43 Mo. 123; Hilton v. Scarborough, 5 Gray (Mass.) 422; Martin v. Shannon, 92 Iowa 374, 60 N. W. 645; Xenia First Nat. Bank v. Stewart, 114 U. S. 224, 5 Sup. Ct. 845.

⁷⁵ State Bank v. Wilson, 1 Dev. L. (N. Car.) 484; First Nat. Bank v. Ballou, 49 N. Y. 155; Benjamin v.

Northwestern Elevator Co., 6 N. Dak. 254, 69 N. W. 296; Foster v. Walker, 34 Miss. 365; Morse v. Bruce, 70 Vt. 378, 40 Atl. 1034; Applegate v. Baxley, 93 Ind. 147.

⁷⁶ Henderson v. Moore, 5 Cranch (U. S.) 11.

⁷⁷ James v. Blou, 2 Sim. & S. 600, 606; Chapman v. Beard, 3 Anstr. 942. And admissions of the debtor as to the continuance of the debt are competent against such debtor. May v. Hewett, 33 Ala. 161; Whatton v. Thomason, 78 Ala. 45; Batchelder v. Rand, 117 Mass. 176; Wheeler v. Thomas, 67 Conn. 577, 35 Atl. 499; Hatcher v. Bowen, 74 Ga. 840.

⁷⁸ Brown v. Kenyon, 108 Ind. 283, 9 N. E. 283; Dillard v. Scruggs, 36 Ala. 670; Gay v. Gay, 5 Allen (Mass.) 157; Hood v. French, 37 Fla. 117, 19 So. 165; Bank of Woodstock v. Clark, 25 Vt. 308.

self-serving declarations of either debtor or creditor in the absence of the other are inadmissible in his favor.⁷⁹

§ 2586. Applications of payments.—The debtor has the first right to determine the application or appropriation of a payment voluntarily made by him; but, if he does not in any way exercise that right, the creditor may then make the application in any just way. If neither exercises the right the law will make the application in accordance with certain general rules that are supposed to be just and equitable.⁸⁰ If the intention of the parties appears the court will generally make the application in accordance with such intention, and it may be implied or inferred from circumstances.⁸¹ For this purpose, evidence of receipts,⁸² the conduct and course of dealing of the parties⁸³ and other relevant circumstances is generally competent. The question as to what the parties intended is generally a question of fact,⁸⁴ and the burden of proving an intention or direction to make a particular application is usually upon the party who seeks to estab-

⁷⁹ *Lanier v. Huguley*, 91 Ga. 791, 18 S. E. 39; *Bradley v. Freed*, (Tenn.) 51 S. W. 124; *Kennedy v. Yoe*, (Tex. Civ. App.) 39 S. W. 946; *Abercombie v. Sheldon*, 8 Allen (Mass.) 532; *Schwartz v. Allen*, 7 N. Y. S. 5.

⁸⁰ See, upon the general subject, *Blake v. Sawyer*, 83 Me. 129, 12 L. R. A. 712, notes; *Jacobs v. Balenger*, 130 Ind. 231, 15 L. R. A. 169; 2 Am. & Eng. Ency. L. (2nd ed.) 434-467; and elaborate note in 96 Am. St. 44-82.

⁸¹ *Taylor v. Sandiford*, 7 Wheat. (U. S.) 120; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Harrison v. Johnston*, 27 Ala. 445; *Terhune v. Colton*, 12 N. J. Eq. 237; *Lauten v. Rowan*, 59 N. H. 215; *Roakes v. Bailey*, 55 Vt. 542; *Otto v. Klauber*, 23 Wis. 471; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; note in 96 Am. St. 77-79.

⁸² *Sawyer v. Tappan*, 14 N. H. 352; *Otto v. Klauber*, 23 Wis. 471; *Stew-*

art v. Keith, 12 Pa. St. 238; *Bowes v. Lucas*, Andr. 55.

⁸³ *Gwin v. McLean*, 62 Miss. 121; *Chaffee v. Mackenzie*, 43 La. Ann. 1062, 10 So. 369; *Boyd v. Webster*, 59 N. H. 89; *Starrett v. Barber*, 20 Me. 457; *Wittkowsky v. Reid*, 82 N. Car. 116; *Garrett's Appeal*, 100 Pa. St. 597; *Hodge v. Hoppock*, 75 N. Y. 491; *Stewart v. Hopkins*, 30 Ohio St. 540; *Newmarch v. Clay*, 14 East 239; *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81; *McWhorter v. Bluthenthal*, 126 Ala. 568. See, for other instances of evidence held admissible, note in 96 Am. St. 79, 80.

⁸⁴ *Killorin v. Bacon*, 57 Ga. 497; *Cox v. Wall*, 84 Ga. 456; *Oliver v. Phelps*, 20 N. J. L. 180; *Logan v. Mason*, 6 Watts & S. (Pa.) 15; *Fowke v. Bowle*, 4 Har. & J. (Md.) 566; *Dulles v. De Forest*, 19 Conn. 190; *Walker v. Butler*, 6 El. & Bl. 506; *Alexandria v. Patten*, 4 Cranch (U. S.) 317.

lish it.⁸⁶ But the manner in which the application should be made when no intention of the parties appears or can be ascertained would seem to be a question of law for the court.⁸⁶

§ 2587. **Tender.**—As the subject of tender is closely connected with that of payment and most of the decisions in regard to tender relate to the substantive law rather than to the law of evidence, it has been thought best to devote a section in this chapter to evidence upon the issue of tender. As where payment is pleaded, so where tender is pleaded the burden as to that issue has been held to rest upon the party pleading it.⁸⁷ The facts necessary to constitute a valid tender must be shown by satisfactory evidence,⁸⁸ but it has been held that tender may be shown by circumstantial as well as direct evidence.⁸⁹ Evidence of a waiver of tender has also been held admissible under a plea of tender,⁹⁰ and it has been held proper to require the party to whom the tender was made to state whether it would have been accepted under any circumstances,⁹¹ but this doctrine seems somewhat questionable.⁹² The effect of a tender as an admission and of an objection to a tender on a specific ground has been considered elsewhere.⁹³

⁸⁶ *Kent v. Marks*, 101 Ala. 350, 14 So. 472; *Perry v. Bozeman*, 67 Ga. 643; *Thatcher v. Massey*, 26 S. Car. 155, 1 S. E. 465; *Trundle v. Williams*, 4 Gill (Md.) 313; *Gass v. Stinson*, 3 Sumn. (U. S.) 114; *Reid v. Wells*, 56 S. Car. 435, 34 S. E. 401.

⁸⁷ See *Nutall v. Brannin*, 5 Bush (68 Ky.) 11, 19.

⁸⁸ *Butler v. Hannah*, 103 Ala. 481, 15 So. 641; *Park v. Wiley*, 67 Ala. 310. As when it must be shown that the tender was kept good, see *Sanders v. Bryer*, 152 Mass. 141, 25 N. E. 86; 1 *Elliott Gen. Pr.*, §§ 321, 322.

⁸⁹ Cases first cited in last note, *supra*; also *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50; *Tuthill v. Morris*, 81 N. Y. 94; *Reynolds v. Washington & Co.*, 23 R. I. 197, 49 Atl. 707; *Potts v. Plaisted*, 30 Mich. 149.

⁹⁰ *Cockrill v. Kirkpatrick*, 9 Mo. 697.

⁹¹ *Holmes v. Holmes*, 9 N. Y. 525.

⁹² *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115. This was permitted, the evidence being conflicting, as bearing upon the question as to whether the reason for refusing the tender was stated at the time.

⁹³ See *Bluntzer v. Dewees*, 79 Tex. 272, 15 S. W. 29; *Tarbell v. Farmer's & Co.*, 44 Minn. 471, 47 N. W. 152.

⁹⁴ See Vol. I, § 225. In a recent case it is held that a certified check may be read in evidence as a tender of payment of money when it appears from the evidence that no objection was made to it on the ground that it was in the form of a certified check instead of actual money. *Beckham v. Puckett*, 88 Mo. App. 636.

CHAPTER CXIX.

PUBLIC OFFICERS.

Sec.	Sec.
2588. Presumptions.	2596. Evidence of vacancy.
2589. De facto officers.	2597. Expulsion from office.
2590. Eligibility.	2598. Estoppel.
2591. Official oath and bond.	2599. Actions by officers.
2592. Commission—Executive appointment.	2600. Actions against officers and bondsmen.
2593. Commission or certificate as evidence.	2601. Actions—Demand.
2594. Entries and reports.	2602. Defenses of officers.
2595. Return of officer.	2603. Defenses—Process fair on its face.

§ 2588. **Presumptions.**—As elsewhere shown, there is a presumption that public officers have done their duty, and this presumption that they have done what it was their legal right to do,¹ at the proper time and in the proper manner,² and rightfully in accordance with the law,³ is indulged, in many instances, in actions by or against the official whose action is in question,⁴ or by or against another official⁵ as well as in other cases; and no evidence is, ordinarily required to

¹ *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Selby v. Bass*, 19 La. 499; *Ross v. Reed*, 1 Wheat. (U. S.) 482; *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925; *Collins v. Valteau*, 79 Iowa 626, 43 N. W. 284; *Bernhard v. Wyandotte*, 33 Kans. 465, 6 Pac. 617; *Smith v. Knox Dist. Tp.*, 42 Iowa 522; *Ellis v. Carr*, 1 Bush (Ky.) 527; *Thayer v. McGee*, 20 Mich. 195; *State v. Dugan*, 110 Mo. 138, 19 S. W. 195; *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; *State v. Wenzel*, 77 Ind. 428; *Sanders v. Hartge*, 17 Ind. App. 243, 248, 46 N. E. 604.

² *Thompson v. State*, 3 Ind. App. 371, 375, 28 N. E. 996; *Abbott Tr. Ev.* (2nd ed.), 246, § 14.

³ *Racer v. State*, 131 Ind. 393, 404, 31 N. E. 81.

⁴ *Blann v. Beal*, 5 Ala. 357; *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. 295; *Racer v. State*, 131 Ind. 393, 404, 31 N. E. 81; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213.

⁵ *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; Vol. I, § 103.

show that an official duty was performed according to law,⁶ or that an act was done by the proper officer,⁷ until some evidence to the contrary is introduced. But this presumption is not conclusive and may be rebutted.⁸ It has been held, too, that it is only the performance of official acts by officers within the scope of their authority that is presumed, in such cases; and not the authority itself, and that the mere fact that a public officer did an act does not raise any presumption of the existence of a fact on which his authority to do such an act depended.⁹ But, while the presumption that public officers have done their duty does not supply proof of independent substantive facts,¹⁰ appointment and qualification may be presumed,¹¹ and in cases in which some preceding act or pre-existing fact was necessary to the validity of the particular official act it has been inferred or presumed from the doing of the act in question because of the presumption that the act in question was regularly done.¹²

§ 2589. *De facto officers.*—The general rule is well settled that where the official character of a public officer is collaterally called in question, when it is necessary to show the validity of an official act performed by him, the fact that he was an officer or the deputy of an officer may be proved by parol.¹³ The public should not be permitted to suffer because those discharging the functions of public officers may have a defective title or no title at all, and evidence that the person who performed an official act was an officer *de facto*, generally shows the act to be as valid in such cases as if he were an officer *de*

⁶ *Racer v. State*, 131 Ind. 393, 404, 31 N. E. 81; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996; *Sanders v. Hartge*, 17 Ind. App. 243, 248, 46 N. E. 604.

⁷ *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162.

⁸ *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996; *Baldwin v. Shill*, 3 Ind. App. 291, 29 N. E. 619.

⁹ *State v. Stanley*, 14 Ind. 409, 411; see also, Vol. I, §§ 89, 104.

¹⁰ Vol. I, §§ 89, 104.

¹¹ *United States Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Ingraham v. United States*, 155 U. S. 434, 15 Sup. Ct. 148; *Burke v. Cutler*, 78 Iowa 299, 43 N. W. 204;

Fowler v. Bebee, 9 Mass. 231, 6 Am. Dec. 62; *Hutchings v. Van Bokkelen*, 34 Me. 126; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345; Vol. I, § 103.

¹² *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267; *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256; *Booth v. Booth*, 7 Conn. 366; *Wray v. Doe*, 10 Sm. & M. (Miss.) 452; *Jackson v. Cole*, 4 Cow. (N. Y.) 587; *Huey v. Van Wie*, 23 Wis. 613; *Ward v. Barrows*, 2 Ohio St. 241.

¹³ *Hall v. Bishop*, 78 Ind. 370.

jure.¹⁴ Proof that a person is acting notoriously as a public officer, where the law creates or authorizes such an officer, and is generally recognized as such, is *prima facie* evidence of his official character,¹⁵ and evidence that he is in actual possession of the office and is performing the duties pertaining to it¹⁶ is sufficient proof that he is an officer *de facto*. Where an office has been legally created by the constitution or a valid statute, it has also been held that the fact that the statute under which a person is elected or appointed to fill that office was unconstitutional will not prevent him from being an officer *de facto* if such statute has not been judicially declared to be void.¹⁷ Even in an action by a public officer against his predecessor in office to recover the public money in his hand, it has been held sufficient for the plaintiff to prove *prima facie* title and right to the office, as the validity of his election or appointment and his ultimate right to the office will not be inquired into by the court in such an action.¹⁸ A defaulting officer and his sureties cannot challenge the right of his successor in such office to sue for the recovery of the public money,¹⁹ since the action is not for the benefit of the officer, but rather for that of the public corporation. But there cannot be an officer *de facto* and an officer *de jure* occupying the same office at the same time, and where an office is filled by one having title to it, it has been held that

¹⁴ *Old Dominion B. & L. Asso. v. Sohn*, 54 W. Va. 101, 46 S. E. 222, and numerous authorities cited in the opinion; *Att'y-General v. Merston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. R. 334; *Adam v. Mengel*, (Pa.) 8 Atl. 606; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Walker v. State*, 107 Ala. 5, 18 So. 393; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. R. 61; *Burke v. Cutler*, 78 Iowa 299, 43 N. W. 204; *Nofire v. United States*, 164 U. S. 657, 17 Sup. Ct. 212; *Hussey v. Smith*, 99 U. S. 20; *Northwestern &c. Ins. Co. v. Seaman*, 80 Fed. 357; *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 5 E. C. L. 278; *Rex v. Slythe*, 6 B. & C. 240, 13 E. C. L. 156; *Mowbray v. State*, 88 Ind. 324, 329; *Baker v. Wambaugh*, 99 Ind. 312, 317; *Parker v. State*, 133 Ind. 178, 32 N. E. 836.

¹⁵ *North v. People*, 139 Ill. 81, 28 N. E. 966; Vol. I, § 210; *Swails v. State*, 4 Ind. 516.

¹⁶ *Blackman v. State*, 12 Ind. 556; *Bansemmer v. Mace*, 18 Ind. 27; *Gumberts v. Adams Ex. Co.*, 28 Ind. 181; *State v. Crowe*, 150 Ind. 455, 462, 50 N. E. 471; *State v. Row*, 81 Iowa 138, 46 N. W. 872.

¹⁷ *Parker v. State*, 133 Ind. 178, 200, 32 N. E. 836; *Chicago &c. R. Co. v. Langlade*, 56 Wis. 614, 14 N. W. 844.

¹⁸ *Manor v. State*, 149 Ind. 310, 318, 49 N. E. 160; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345.

¹⁹ *Osborne v. State*, 128 Ind. 129, 27 N. E. 345; *Lucas v. State*, 86 Ind. 180.

the acts of a mere usurper who assumes to act in such office without color of title are wholly void.²⁰ A defendant in a prosecution for bribery while holding a public office is conclusively bound by proof that he committed the offense while serving as a *de facto* officer, and evidence that he was not eligible to the office or that he had no legal right to it is not admissible in his defense.²¹

§ 2590. **Eligibility.**—Whether a person must be eligible at the time of being elected or merely at the time of taking office depends largely upon the wording of the particular statute. In some cases he is required to be eligible at the time of the election,²² but in others where the question whether he is eligible to fill an office is in dispute, the evidence must be addressed to the time of taking possession of the office, and not to the time of the election by which he was chosen to fill it.²³ Where the latter rule prevails, if a person has accepted and qualified in a judicial office, the fact that the term has not yet expired,²⁴ or that he is an alien,²⁵ or a defaulter²⁶ or is otherwise ineligible to hold an office at the time he is elected, is not proof of his incapacity to take the office at the proper time, as he may become eligible by naturalization,²⁷ or the expiration of his judicial term,²⁸ or

²⁰ Van Arminge v. Taylor, 108 N. Car. 196, 12 S. E. 1005; Burke v. Elliott, 4 Ired. L. (N. Car.) 361; Boardman v. Holliday, 10 Paige (N. Y.) 223; State v. Blossom, 19 Nev. 312; Steinback v. State, 38 Ind. 483; Everroad v. Flatrock Tp., 49 Ind. 451; but see, Abbott Tr. Ev. (2nd ed.), 244, § 8, and People v. Nostrand; 46 N. Y. 375, 382.

²¹ State v. Duncan, 153 Ind. 318, 54 N. E. 1066; State v. Ray, 153 Ind. 334, 54 N. E. 1067; Abbott Tr. Ev. (2nd ed.), 246, § 13; see also, Lister v. Priestly, Wightw. 67; Roscoe N. P. 70.

²² State v. Moores, 52 Neb. 770, 78 N. W. 299; People v. Leonard, 73 Cal. 230; Carroll v. Green, 148 Ind. 364, 47 N. E. 223; Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802; see also,

People v. State, Board, 129 U. S. 369.

²³ Smith v. Moore, 90 Ind. 294, 306; Brown v. Gobin, 122 Ind. 113, 23 N. E. 519; Shuck v. State, 136 Ind. 63, 69, 35 N. E. 993; People v. Hamilton, 24 Ill. App. 609; Kirkpatrick v. Brownfield, 97 Ky. 558, 31 S. W. 137; State v. Murray, 28 Wis. 99.

²⁴ Smith v. Moore, 90 Ind. 294, 305; Vogel v. State, 107 Ind. 374, 380, 8 N. E. 164.

²⁵ Smith v. Moore, 90 Ind. 294, 303.

²⁶ Brown v. Gobin, 122 Ind. 113, 23 N. E. 519; Shuck v. State, 136 Ind. 63, 69, 35 N. E. 993.

²⁷ Smith v. Moore, 90 Ind. 294, 303.

²⁸ Smith v. Moore, 90 Ind. 294, 305.

payment of all arrearages to the public treasury,³⁰ before the time for his term to begin.

§ 2591. **Official oath and bond.**—Statutes requiring the official oath to be in writing, subscribed and filed have been held to be mandatory and compliance therewith has been held essential to an investiture with the powers of the office;³¹ but, in another jurisdiction such a statute has been held to be directory only.³² In either case, however, if the officer assumes to act as such under color of authority although he has not complied with the statute, his acts are valid as to the public and third persons,³³ and the sureties on the official bond of the officer are liable for his defaults.³⁴ A record reciting that one purporting to be the incumbent of an office “took the oath of office” has been held to be sufficient evidence that he took the oath prescribed by law;³⁵ but a recital that he was “sworn into office” has been held insufficient,³⁶ and so has a recital that the officer “qualified.”³⁷ In an action on an official bond, if the bond is regular and is procured from the proper custody, it will be presumed, in the absence of anything to the contrary, that it was approved and accepted by the officer charged with that duty.³⁸

§ 2592. **Commission—Executive appointment.**—Where the power of appointment to an office is in the governor, his commission is the proper evidence of title to such office, and, except as against evidence that there was no vacancy at the time the appointment was made,³⁹ is generally conclusive.⁴⁰ But if the recitals in the commission show

³⁰ *Brown v. Gobin*, 122 Ind. 113, 23 N. E. 519.

³¹ *Shuck v. State*, 136 Ind. 63, 69, 35 N. E. 993.

³² *School Dist. v. Bennett*, 52 Ark. 511; *Harwood v. Marshall*, 9 Md. 83.

³³ *Brunott v. M'Kee*, 6 W. & S. (Pa.) 513.

³⁴ *Commonwealth v. Valsalka*, 181 Pa. St. 17, 37 Atl. 405; *State v. Horton*, 19 Nev. 199.

³⁵ *Brunott v. M'Kee*, 6 W. & S. (Pa.) 513.

³⁶ *Scammon v. Scammon*, 28 N. H. 418; see also, *Harwood v. Marshall*, 9 Md. 83.

³⁷ *Cardigan v. Page*, 6 N. H. 182.

³⁸ *Ainsworth v. Dean*, 21 N. H. 400; *Gibson v. Bailey*, 9 N. H. 170.

³⁹ *McClure v. Colclough*, 5 Ala. 65; *State v. Fredericks*, 8 Iowa 553; *Apthorp v. North*, 14 Mass. 167; as to liability on sheriff's bond, see note in *Feller v. Gates*, 40 Ore. 543, 91 Am. St. 531-553.

⁴⁰ *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

⁴¹ *Beal v. Morton*, 18 Ind. 346; *State v. Allen*, 21 Ind. 516, 521; *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

that it was issued because of an election or appointment to office by some other authority, its force as evidence of appointment by executive authority is destroyed;⁴¹ and in addition to what appears on the face of the commission the records in the governor's office have been held to be competent evidence to prove that a holder of such a commission was not appointed by the governor, but was chosen by some authority which conferred no title to the office.⁴² Recitals in a commission that the person commissioned was elected by the people or the legislature, and is commissioned because thereof, have been held to be conclusive evidence that he was not appointed by the governor.⁴³

§ 2593. **Commission or certificate as evidence.**—Where the power of choosing an officer is in the people, or lodged with any other authority than the executive, the commission issued by the governor⁴⁴ is only prima facie evidence of the facts which it recites. And the same has been held as to the certificate issued by a returning board of an election.⁴⁵ In collateral proceedings such a commission or certificate may be received as conclusive evidence of the holder's title to the office,⁴⁶ but in a direct proceeding it is not conclusive evidence of anything except its own existence.⁴⁷ It is the election by the people, and not the declaration of the board of canvassers nor the governor's commission, that vests title to an elective office.⁴⁸ Indeed, such a commission or certificate is not, ordinarily, essential to the right of one who has been legally chosen to hold office to which he has been elected,⁴⁹ and he may establish his right to the office by evidence that

⁴¹ *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

⁴² *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

⁴³ *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

⁴⁴ *State v. Chapin*, 110 Ind. 272, 11 N. E. 317; *Jones v. State*, 112 Ind. 193, 197, 13 N. E. 416; *State v. Peelle*, 124 Ind. 515, 24 N. E. 440; *Shuck v. State*, 136 Ind. 63, 35 N. E. 993; but it is held the best and highest evidence; *State v. Johnson*, 35 Fla. 539, 16 So. 786, 31 L. R. A. 357.

⁴⁵ *Reynolds v. State*, 61 Ind. 392 424; *Hadley v. Guttridge*, 58 Ind.

302, 314; *State v. Shay*, 101 Ind. 36; *Robertson v. State*, 109 Ind. 79, 142, 10 N. E. 582; *State v. Jackson*, 27 La. Ann. 541; *Wood v. Peake*, 8 Johns. (N. Y.) 69.

⁴⁶ *Robertson v. State*, 109 Ind. 79, 142, 10 N. E. 582.

⁴⁷ *Robertson v. State*, 109 Ind. 79, 142, 10 N. E. 582; *Shuck v. State*, 136 Ind. 63, 35 N. E. 993; see also, *Hoglan v. Carpenter*, 4 Bush. (Ky.) 91.

⁴⁸ *Shuck v. State*, 136 Ind. 63, 35 N. E. 993.

⁴⁹ *Marbury v. Madison*, 1 Cranch (U. S.) 137; *People v. Murray*, 5 Hun (N. Y.) 42; *Board &c. v. State*,

he was duly chosen at a popular election or otherwise, as provided by law, although his commission is withheld.⁵⁰ When a commission is offered as proof of title to an office it may be rebutted by evidence that another person was vested with the title, and that the commission was procured by means of fraudulent affidavits and representations, which imposed on the governor and induced him to issue it,⁵¹ and it may be shown that the governor afterward issued a second commission to another claimant.⁵² The governor's commission cannot extend the term of an office for a longer period than that which is fixed by law, and proof that the term has expired will overcome a recital in the commission that the officer is to hold for a longer time.^{52*}

§ 2594. Entries and reports.—Entries in the books of a public officer,⁵³ and statements in reports filed by him in obedience to law,⁵⁴ charging himself with money or property belonging to the public, are prima facie evidence against such officer and his sureties. If such an entry or report shows that a balance is due from the officer, and is not satisfactorily contradicted, it is sufficient, without other evidence, to warrant a verdict or finding against him and his surety for such amount,⁵⁵ but such entries and reports are not necessarily conclusive evidence in an action on his bond as against the sureties, nor even against the officer himself,⁵⁶ and it has been held that the sureties may show by extrinsic evidence that a mistake occurred in making such entry or report,⁵⁷ or that a defalcation actually occurred before they signed the officer's bond, and was canceled by means of false entries in his books and false statements in his reports.⁵⁸ Nor is it necessary that such a report be first reformed, nor even that reformation

61 Ind. 379, 387; *Robertson v. State*, 109 Ind. 79, 142, 10 N. E. 582; *Jones v. State*, 112 Ind. 193, 13 N. E. 416.

⁵⁰ *Shuck v. State*, 136 Ind. 63, 35 N. E. 993; but see, *Burnham v. Sumner*, 50 Miss. 517.

⁵¹ *Board &c. v. State*, 61 Ind. 379, 383.

⁵² *Gulick v. New*, 14 Ind. 93, 100; *State v. Peelle*, 124 Ind. 515, 24 N. E. 440.

⁵³ *Hench v. State*, 72 Ind. 297; *State v. Chapin*, 110 Ind. 272, 11 N. E. 317.

⁵⁴ *Ohning v. Evansville*, 66 Ind. 59.

⁵⁵ Vol. I, § 1305; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345.

⁵⁶ *Osborne v. State*, 128 Ind. 129, 27 N. E. 345.

⁵⁷ *Ohning v. Evansville*, 66 Ind. 59; *Strong v. State*, 75 Ind. 440; *Lowry v. State*, 64 Ind. 421.

⁵⁸ *Thomas v. Hubbell*, 15 N. Y. 405, 35 N. Y. 120; *Hunt v. State*, 93 Ind. 311.

⁵⁹ *Ohning v. Evansville*, 66 Ind. 59, 64; *Goodwine v. State*, 81 Ind. 109; see also, *Crawford v. Turk*, 24 Gratt. (Va.) 176; *State v. Rhoades*, 6 Nev. 352.

be asked in order to admit evidence on behalf of the sureties to show that it is incorrect.⁵⁹ The record of a settlement by a public officer with the officer representing a political corporation whose funds were in his possession is *prima facie* evidence of the correctness of the result stated, but it has been held not to be conclusive in favor of either party, and upon proof that the officer failed to account for all the public moneys in his hands he will be liable to judgment for such balance,⁶⁰ while the officer may compel a further allowance to him upon proof that the officers to whom he is required to account have refused to allow him for credits to which he is entitled.⁶¹ Under a principle elsewhere explained where the books are voluminous or the entries of accounts complicated, parol evidence of competent witnesses who have examined them and are able to give an intelligible explanation of them is competent, but it has been held that a witness so testifying should be prepared to corroborate every statement by reference to the books in the presence of the jury if called on to do so.⁶² The subject of the admissibility and effect of entries in books of officers classed as public documents has already been considered.⁶³

§ 2595. **Return of officer.**—The return of a sheriff or constable is generally conclusive evidence against him and his sureties in an action against them growing out of his official acts, and they are not permitted to introduce parol evidence to vary or contradict its statements.⁶⁴ Such a return has also been held conclusive evidence against the parties to the action⁶⁵ in all actions except suits against the officer for making

⁵⁹ *Strong v. State*, 75 Ind. 440.

⁶⁰ *Hunt v. State*, 93 Ind. 311; *Rogers v. State*, 99 Ind. 218; *Board &c. v. State*, 106 Ind. 270, 6 N. E. 623.

⁶¹ *State v. Board &c.*, 136 Ind. 207, 35 N. E. 1100.

⁶² *Rogers v. State*, 99 Ind. 218, 228.

⁶³ See Vol. I, §§ 404, 405, 485; Vol. II, § 1310.

⁶⁴ *Sheldon v. Payne*, 7 N. Y. 453; *Clarke v. Gary*, 11 Ala. 98; *Breckenridge Mercantile Co. v. Bailif*, 16 Colo. App. 554, 66 Pac. 1079; *Gardner v. Hosmer*, 6 Mass. 325; *Purinton v. Loring*, 7 Mass. 388; *Lines v. State*, 6 Blackf. (Ind.) 464;

Splahn v. Gillespie, 48 Ind. 397, 404;

State v. Ruff, 6 Ind. App. 38, 44, 33 N. E. 124; see, *Boots v. Ristine*, 146 Ind. 75, 44 N. E. 15; *Commonwealth v. Rooney*, 167 Pa. St. 244, 31 Atl. 562, it is said that parol evidence may be admissible to explain; see also, *Evans v. Davis*, 3 B. Mon. (Ky.) 346.

⁶⁵ *Splahn v. Gillespie*, 48 Ind. 397; *Meredith v. Chancey*, 59 Ind. 466; *Stockton v. Stockton*, 50 Ind. 574; *McAnaney v. Quigley*, 105 Ill. App. 611; but see, *Baldwin v. Burt*, 2 Neb. 377, 96 N. W. 401; it is generally held conclusive between the parties as against collateral attack. 2 Jones Ev., § 649.

a false return, and prima facie evidence in favor of the officer, even in such an action, or any other to which he may be made a party.⁶⁶ But it is, in general, only the statements of the return as to official acts done in the ordinary and usual course of procedure which are conclusive evidence of the facts stated,⁶⁷ and recitals which do not properly constitute a part of the return, such, perhaps, as the date of sale,⁶⁸ or mere matters of opinion or excuses for failure to perform a duty,⁶⁹ cannot, ordinarily, be made evidence by stating them in return, and may be disputed by parol evidence.⁷⁰

§ 2596. Evidence of vacancy.—In order to prove the existence of a vacancy it must usually be shown that the office was without an incumbent legally entitled to continue therein; but the fact that a usurper is actually holding the office in defiance of law is no proof that there is not a vacancy.⁷¹ The fact that an office has been judicially declared vacant is conclusive evidence of that fact as against all parties to the suit in which the judgment was rendered; but such a declaration merely by administrative,⁷² or executive,⁷³ or legislative⁷⁴ authority is not ordinarily sufficient proof of a vacancy. Evidence that an officer has removed from his county,⁷⁵ or his township, or town, and thereby vacated the office, or has become a defaulter, and fled from the state, leaving no one to care for the public affairs, and has abandoned his office,⁷⁶ or that he submitted his resignation to the proper authority, to take effect immediately⁷⁷ or that he offered his

⁶⁶ *Butler v. State*, 20 Ind. 169, 173; 311; *Cator v. Stakes*, 1 Mau. & S. 599; see also, *G. W. Mining Co. v. Splahn v. Gillespie*, 48 Ind. 397, 407; *Hessong v. Pressley*, 86 Ind. 555; *Abbott Tr. Ev.* (2nd ed.) 245, 204.

⁶⁷ *State v. Harrison*, 113 Ind. 434, § 10; *Cornell v. Cook*, 7 Cow. (N. Y.) 448, 16 N. E. 384.
⁶⁸ *Board &c. v. Johnson*, 124 Ind. 145, 24 N. E. 148.

⁶⁹ *State v. Harrison*, 113 Ind. 434, 448, 16 N. E. 384.
⁷⁰ *Stocking v. State*, 7 Ind. 326.

⁷¹ *Hedley v. Board &c.*, 4 Blackf. (Ind.) 116; *State v. Jones*, 19 Ind. 356; *Gosman v. State*, 106 Ind. 203, 208, 6 N. E. 349; *Curry v. Stewart*, 8 Bush (Ky.) 560; *Prather v. Hart*, 17 Neb. 598.

⁷² *Lindley v. Kelley*, 42 Ind. 294, 307; *Hessong v. Pressley*, 86 Ind. 555.
⁷³ *Osborne v. State*, 128 Ind. 129, 27 N. E. 345.

⁷⁴ *Abbott Tr. Ev.* (2nd ed.) 248, § 15; *First v. Miller*, 4 Bibb (Ky.) 105.
⁷⁵ *State v. Hauss*, 43 Ind. 105.

resignation to take effect at a certain time, and at that time a successor was not appointed,⁷⁸ or that his term has expired and he has surrendered the office,⁷⁹ or that he has served as long as the constitution permits one person to occupy the office,⁸⁰ has been held sufficient to prove that a vacancy existed which justified the appointment of a successor to serve at least until a new officer should be chosen. So it has been held that evidence that an officer failed to give bond and take the required oath within the time allowed by law raises a presumption that he has abandoned the office and that it is vacant.⁸¹ But in some states there must be a judicial declaration of vacancy.⁸² And the presumption even where it is indulged, may be rebutted by proof that the officer had no such intention, but had a sufficient excuse for the delay, as that he had not received his commission,⁸³ or that there was a legal doubt as to the exact time when his term of office should begin, and that he took necessary steps to qualify as soon as that doubt was removed;⁸⁴ but the burden has been held on the claimant to explain the delay.⁸⁵ Where, however, an officer is re-elected to an office which he is eligible to hold a second term, and continues to hold it, his failure to file a new bond within the time allowed does not raise a presumption that the office is vacant, since it will rather be presumed that he continued in office under the provisions of the constitution pending the qualification of his successor;⁸⁶ and the failure of one who has qualified and taken possession of his office to give an additional bond required by law within the time limited does not of itself necessarily establish a vacation of the office, and proof of a subsequent compliance with the law by giving the required bond while continuing to hold the office has been held sufficient to establish his right to continue holding it.⁸⁷

⁷⁸ *McGee v. State*, 103 Ind. 444, 3 N. E. 139.

⁷⁹ *Baker v. Wambaugh*, 99 Ind. 312.

⁸⁰ *Gosman v. State*, 106 Ind. 203, 208, 6 N. E. 349.

⁸¹ *State v. Johnson*, 100 Ind. 489; see also, *Payne v. San Francisco*, 3 Cal. 122; *Branham v. Long*, 78 Va. 352.

⁸² *State v. Towne*, 21 La. Ann. 490; *Vann v. Pipkin*, 77 N. Car. 408; *Coleman v. Sands*, 87 Va. 689.

⁸³ *State v. Hadley*, 27 Ind. 496.

⁸⁴ *Albaugh v. State*, 145 Ind. 356, 360, 44 N. E. 355; see also, *Ross v. Williamson*, 44 Ga. 501.

⁸⁵ *State v. Johnson*, 100 Ind. 489.

⁸⁶ *Koerner v. State*, 148 Ind. 158, 47 N. E. 323; *State v. Berg*, 50 Ind. 496; *State v. Hadley*, 27 Ind. 496; see also, *Beebe v. Robinson*, 52 Ala. 66; *McGregor v. Gladwin Co.*, 37 Mich. 388; *Eddy v. Kincaid*, 28 Ore. 537, 41 Pac. 156, 655.

⁸⁷ *Board &c. v. Johnson*, 124 Ind. 145, 148.

§ 2597. **Expulsion from office.**—The statutes of the different states usually provide for the manner of removing or expelling subordinate officers, but the regularity of the proceeding may be inquired into by the courts.^{87*} In an action to expel a person from an office under the law of the state, to which it is admitted that he was at one time entitled, the fact that he has vacated such office is sufficiently shown, in some states, by evidence that he has accepted another lucrative office either under the state or federal government. Thus, proof of the acceptance of the office of county commissioner sufficiently proves the vacation of the office of county recorder,⁸⁸ and proof that defendant was appointed and qualified as township trustee, is sufficient to show a vacation of the office of road supervisor.⁸⁹ Evidence that the defendant became mayor of a city has been held sufficient to show a vacation of the office of prison director,⁹⁰ and evidence that he accepted the office of trustee of a state benevolent institution proved his surrender of the office of school trustee of a city.⁹¹ But evidence that a public officer has accepted another office which is purely municipal, such as the office of councilman,⁹² does not, it has been held, prove that he vacated the public office. Evidence of the acceptance of a lucrative office under the federal government has also been held sufficient to show the vacation of a state office held by the defendant, and the surrender of the office of reporter of the supreme court is shown by evidence that the incumbent has become a colonel of volunteers in the United States army.⁹³ Proof that the defendant has become a postmaster has been held to prove the vacation by him of the office of township trustee, but where the federal office is held at the time of accepting a state office, the state courts will not undertake to declare the former office vacated by such acceptance; yet if the officer continues to hold his place under the federal government they may expel him from the state office.⁹⁴ And evidence of his liability to ex-

^{87*} *People v. Therrien*, 80 Mich. 187, 45 N. W. 78; *Nicholls, In re*, 6 Abb. N. Cas. (N. Y.) 474, 57 How. Pr. 395; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8.

⁸⁸ *Dailey v. State*, 8 Blackf. (Ind.) 329.

⁸⁹ *Creighton v. Piper*, 14 Ind. 182.

⁹⁰ *Howard v. Shoemaker*, 35 Ind. 111.

⁹¹ *Chambers v. State*, 127 Ind. 365, 26 N. E. 893.

⁹² *Booher v. Goldsborough*, 44 Ind. 490, 502; *Mohan v. Jackson*, 52 Ind. 599.

⁹³ *Kerr v. Jones*, 19 Ind. 351; many other examples are given in 19 Am. & Eng. Ency. of Law (1st ed.), 562 w., et seq.

⁹⁴ *Foltz v. Kerlin*, 105 Ind. 221, 4 N. E. 439; *Wood v. State*, 130 Ind. 364, 30 N. E. 309.

pulsion for that cause cannot be overcome by evidence that he resigned the office of postmaster after suit was brought against him.⁹⁵

§ 2598. **Estoppel.**—As a general rule, persons dealing with a public officer having only limited statutory powers must take notice of the scope of his authority and are bound at their peril to ascertain its extent; and neither the officer⁹⁶ nor a public corporation that he represents⁹⁷ can, ordinarily, be estopped by the acts of such an officer in excess of his authority. But there may be cases in which a public corporation may be liable even for the acts of a de facto officer,⁹⁸ and one assuming authority that he does not possess may be personally liable, in some instances at least, and estop himself from showing that he was not eligible, and was not an officer.⁹⁹

§ 2599. **Actions by officers.**—It has been held that where one claims to act under special statutory authority the burden is upon him to show that he has the required qualification.¹⁰⁰ So, in an action for his salary, or the like, it has been held that he must prove his title and the commission or certificate of election is only prima facie evidence.¹⁰¹ But, ordinarily, his title to the office cannot be inquired into in a collateral proceeding, further at least than to determine whether he is a mere intruder or usurper,¹⁰² and evidence that a public officer suing as such upon a cause of action in him as the representative of the public corporation is and has been acting as such and has a prima facie title and right to the office is generally sufficient.¹⁰³

⁹⁵ *Bishop v. State*, 149 Ind. 223, 232, 48 N. E. 1038.

⁹⁶ *Baldwin v. Shill*, 3 Ind. App. 291, 297, 29 N. E. 619.

⁹⁷ *Rissing v. Fort Wayne*, 137 Ind. 427, 37 N. E. 328; *State v. Portsmouth Savings Bank*, 106 Ind. 435, 458, 7 N. E. 379; *Madison v. Smith*, 83 Ind. 502, 519; *Whiteside v. United States*, 93 U. S. 247; *Merchants' Bank v. Bergen Co.*, 115 U. S. 384; *Craycraft v. Selvage*, 10 Bush (Ky.) 696; *Elliott Roads & Streets* (2nd ed.), § 522; 1 *Beach Pub. Co.*, §§ 195, 202.

⁹⁸ See, *Clark v. Easton*, 146 Mass. 43, 14 N. E. 795.

⁹⁹ See, *Wilcox v. Smith*, 5 Wend.

(N. Y.) 231; *State v. Duncan*, 153 Ind. 318, 54 N. E. 1066; 1 *Greenleaf Ev.*, § 207.

¹⁰⁰ *State v. Williamstown & Co.*, 24 N. J. L. 547.

¹⁰¹ *Dolan v. Mayor & Co.*, 68 N. Y. 278, 23 Am. R. 168; *State v. Smith*, 17 R. I. 415; *People v. Nostrand*, 46 N. Y. 375; *Philadelphia v. Given*, 60 Pa. St. 136; *McCue v. Wapello Co.*, 56 Iowa 698; *Dolliver v. Parks*, 136 Mass. 499; *Stott v. Chicago*, 205 Ill. 281, 68 N. E. 736.

¹⁰² *United States v. Alexander*, 46 Fed. 728; *Brearton, In re*, 89 N. Y. S. 893.

¹⁰³ *Creighton v. Piper*, 14 Ind. 182; *Manor v. State*, 149 Ind. 310, 317,

§ 2600. **Actions against officers and bondsmen.**—The presumption, as already stated, is that a public officer has performed his duty, and the burden is upon the private person who seeks to hold him liable in damages for breach of duty to show it.¹⁰⁴ So, in an action for damages by an individual against a public officer,¹⁰⁵ or his bondsmen,¹⁰⁶ it is necessary for the plaintiff to show not only a violation of official duty by the defendant and the fact that he was damaged,¹⁰⁷ but also that the damage resulted from the failure of the defendant in the performance of some duty which, as such officer, he owed to the plaintiff especially.¹⁰⁸ It is generally sufficient, however, in a suit on the official bond of an officer to recover damages for his wrongful or oppressive acts, by which the private rights of the plaintiff were invaded, to prove that the acts were done by the officer while acting as such. The sureties on the bond of a public officer may be liable for his wrongful acts done by color of his office as well as those done by virtue of his office.¹⁰⁹ Thus, the bondsmen of a county clerk have been held liable for money paid to him as clerk to redeem land from a sale on foreclosure of a tax lien, although there is no law authorizing the clerk to receive money for that purpose.¹¹⁰

§ 2601. **Actions—Demand.**—As it is presumed that a public officer will perform any duty which he owes to an individual if properly requested, it is usually necessary in an action by a private person to compel the performance of an official act to aver and prove a demand before bringing suit.¹¹¹ But there are exceptional cases in which a

318, 49 N. E. 160; *State v. Johnson*, 35 Fla. 539, 16 So. 786, 31 L. R. A. 357, and note; see also, *State v. Board*, 124 Ind. 554, 25 N. E. 10; *Redden v. Covington*, 29 Ind. 118; *Crowell v. Lambert*, 10 Minn. 369.

¹⁰⁴ *Craig v. Adair*, 22 Ga. 373; *People v. Hayes*, 63 Ill. App. 427; *Bassett v. Orr*, 7 Biss. (U. S.) 297; see also, *O'Connor Min. Co. v. Dickson*, 112 Ala. 304, 20 So. 413; *Lyendecker v. Martin*, 38 Tex. 287; *Dowd v. Crow*, 205 Pa. St. 214, 54 Atl. 780.

¹⁰⁵ *Lane v. Board &c.*, 7 Ind. App. 625, 35 N. E. 28, for elaborate notes upon the subject of the liability of officers to private persons, see, *Warden v. Witt*, 4 Idaho 404, 95 Am.

St. 72-134; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 726-732.

¹⁰⁶ *State v. Hughes*, 19 Ind. App. 266, 271, 49 N. E. 393.

¹⁰⁷ *State v. Hughes*, 19 Ind. App. 266, 49 N. E. 393.

¹⁰⁸ *State v. Harris*, 89 Ind. 363; *Louden v. Ball*, 93 Ind. 232; *Lane v. Board &c.*, 7 Ind. App. 625, 35 N. E. 28.

¹⁰⁹ *State v. Walford*, 11 Ind. App. 392, 39 N. E. 162; *State v. McGill*, 15 Ind. App. 289, 292, 40 N. E. 1115; *State v. White*, 88 Ind. 587, 593.

¹¹⁰ *State v. McGill*, 15 Ind. App. 289, 40 N. E. 1115.

¹¹¹ *Ingerman v. State*, 128 Ind. 225,

neglect of duty is equivalent to a refusal and may excuse an express demand.^{111*} A demand, it has been held, must also be proved in an action against a public officer, and his sureties, to recover money received by him in his official capacity, whether it was received in the discharge of an official duty imposed by law,¹¹² or merely under color of his office;¹¹³ but in an action to oust a public officer on the ground that he has done an act which worked a forfeiture on his office, it has been held not necessary to prove a demand for the surrender of the office, although the relator is also claiming title to it.¹¹⁴

§ 2602. **Defenses of officers.**—Where the official acts for which a public officer is sued were done by him in good faith in the discharge of duties imposed on him by law, he cannot, ordinarily, be held liable for any harm resulting to others by reason of such performance of his duty, because the law, when it requires a thing to be done, impliedly extends its protection to the doer.¹¹⁵ The record of his appointment by an authority having apparent jurisdiction or power has been held conclusive,¹¹⁶ and parol evidence is competent at least where there is no writing and none is required by law.¹¹⁷ As will be shown in the next section, process fair on its face is generally a sufficient justification or defense for properly acting thereunder, and it has been held that if an officer seizes property ostensibly belonging to a third person, but in reality transferred by the judgment debtor in fraud of creditors he may show such fraudulent conveyance in justification.¹¹⁸ But an

27 N. E. 499; *State v. Schaack*, 28 Minn. 358, 10 N. W. 22; *Oroville & R. Co. v. Supervisors*, 37 Cal. 354; *People v. Hyde Park*, 117 Ill. 462, 6 N. E. 33; *Board v. Arrghi*, 51 Miss. 667; *Rex v. Bishop of London*, 13 East 419.

^{111*} See, *Palmer v. Stacy*, 44 Iowa 340; *Chumasero v. Potts*, 2 Mont. 242; *Attorney-General v. Boston*, 123 Mass. 460.

¹¹² *Landers v. Fisher*, 2 Ind. App. 64, 28 N. E. 204.

¹¹³ *State v. McGill*, 15 Ind. App. 289, 40 N. E. 1115.

¹¹⁴ *Wood v. State*, 130 Ind. 364, 30 N. E. 309.

¹¹⁵ *Russell v. Earl*, 10 Ind. App.

513, 38 N. E. 76; see also, *West v. St. John*, 63 Iowa 287, 19 N. W. 238; *Schroeder v. Clark*, 18 Mo. 184; *Smith v. Stephen*, 66 Md. 381.

¹¹⁶ *Wood v. Peake*, 8 Johns. (N. Y.) 69; *State v. Jackson*, 27 La. Ann. 541.

¹¹⁷ *Hoke v. Field*, 10 Bush (Ky.) 144.

¹¹⁸ *Ellsassar v. Hunter*, 26 Cal. 279; but see as to what he must show in such cases, *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441; *Pease v. Anderson*, 44 Ill. 218; *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946; *Ford v. McMaster*, 6 Mont. 240, 11 Pac. 669.

order of a court to seize property or an attachment upon an insufficient affidavit has been held no defense where the property in fact belongs to another,¹¹⁹ or is in the possession of another who is the owner.¹²⁰

§ 2603. **Actions—Process fair on its face.**—Process that is fair on its face is generally a sufficient protection to the sheriff, or other ministerial officers in whose hands it is placed for service, as against any liability for acts done in obedience to it.¹²¹ As a general rule, in order to defeat an action to recover property seized by an officer under such a writ,¹²² or an action for trespass for acts done in serving the same,¹²³ it is only necessary, as a rule, to show that the writ proceeded from a court, magistrate, or similar body having authority to issue a process of that nature, that it was legal in form, and on its face contained nothing to notify or fairly apprise the officer that it was issued without authority, and that the acts of the defendant were done in obedience to its command.¹²⁴ The officer is not concerned and chargeable with any illegality that may exist back of the instrument,¹²⁵ and it has been held that liability on the part of the officer cannot be established by evidence that there was no judgment on which to found the writ, and that the officer had notice of that fact.¹²⁶ This rule has been held to extend to acts done in serving a warrant,¹²⁷ or a fee bill,¹²⁸ or

¹¹⁹ *Rhodes v. Patterson*, 3 Cal. 469; *Mathews v. Densmore*, 43 Mich. 461, 5 N. W. 669.

¹²⁰ *Oberfelder v. Kavanaugh*, 21 Neb. 483, 32 N. W. 295; *Thornburgh v. Hand*, 7 Cal. 554; see also, *Shuff v. Morgan*, 9 Mart. (La.) 592; *Ford v. Dyer*, 26 Miss. 243; *McDowell v. McCormick*, 90 Fed. 393.

¹²¹ *Noland v. Busby*, 28 Ind. 154; *Miller v. Weida*, 41 Ind. 199; *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996; *Erskine v. Hohnback*, 14 Wall. (U. S.) 613; *West v. Hayes*, 120 Ala. 92, 23 So. 727, 74 Am. St. 24; *Clark v. Lamb*, 76 Ala. 406; *Miller v. Halm*, 116 Mich. 607, 74 N. W. 1051; *O'Meara v. Merritt*, 128 Mich. 249, 87 N. W. 197; *Chase v. Ingalls*, 97 Mass. 524; *Hamner v. Ballantyne*, 16 Utah 436, 52 Pac. 770, 67 Am.

St. 643; *Campbell v. Sherman*, 35 Wis. 103; *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. 388; *Henline v. Reese*, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. 736.

¹²² *Hartlep v. Cole*, 101 Ind. 458.

¹²³ *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996.

¹²⁴ *Henline v. Reese*, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. 736; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996.

¹²⁵ *Gall v. Fryberger*, 75 Ind. 98, 102; *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996; *Henline v. Reese*, 54 Ohio St. 599, 44 N. E. 259, 56 Am. St. 736.

¹²⁶ *State v. Polke*, 7 Blackf. (Ind.) 27; *Miller v. Weida*, 41 Ind. 199.

¹²⁷ *Jeffries v. McNamera*, 49 Ind. 142, 145.

an execution,¹²⁹ or in collecting taxes charged on a tax duplicate,¹³⁰ or in opening a highway in obedience to an order of the court which has pronounced a judgment establishing it,¹³¹ and, in general, in serving any legal process. But where the process is in fact void for lack of jurisdiction to issue it, the sheriff may refuse to execute it, and its invalidity is a sufficient defense to any action against him or his bondsmen for such refusal.¹³² And where the property is in the name or possession of a third person claiming title, the officer must generally show something more than process regular on its face.¹³³ So, where it was sought to justify an act under a judgment on which no writ was issued, evidence that the court had no jurisdiction to pronounce the judgment was held sufficient to prove the officer a trespasser.¹³⁴ And evidence that the proceedings of the officer subsequent to the delivery of the process to him were not in obedience to law will usually establish his liability as a trespasser *ab initio*.¹³⁵

¹²⁹ *Miller v. Weida*, 41 Ind. 199.

¹³⁰ *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996.

¹³¹ *Noland v. Busby*, 28 Ind. 154; *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162.

¹³² *Rutherford v. Davis*, 95 Ind. 245.

¹³³ *State v. Hamilton*, 32 Ind. 104; *Thompson v. State*, 3 Ind. App. 271, 28 N. E. 996.

¹³⁴ *Thornburgh v. Hand*, 7 Cal. 554; *Trowbridge v. Bullard*, 81

Mich. 451, 45 N. W. 1012; *Hines v. Chambers*, 29 Minn. 7, 11 N. W. 129; *Jansen v. Acker*, 23 Wend. (N. Y.) 480; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121.

¹³⁵ *Cottingham v. Fortville &c. Co.*, 112 Ind. 522, 14 N. E. 479.

¹³⁶ *Jarratt v. Gwathmey*, 5 Blackf. (Ind.) 237; *Rutherford v. Davis*, 95 Ind. 245; note in 95 Am. St. 72, et seq.; and note in 14 Am. Dec. 365-369.

CHAPTER CXX.

REPLEVIN.

Sec.	Sec.
2604. Generally—Nature of the action.	own title—Evidence of title.
2605. What property may be replevied.	2610. Defendant's possession.
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2609. Must recover on strength of	2614. Damages.
	2615. Tax lists as evidence.

§ 2604. **Generally—Nature of the action.**—The action of replevin, says Greenleaf, "lies for the recovery in specie of any personal chattel which has been taken and detained from the owner's possession, together with damages or the detention; unless the taking and detention can be justified or excused, or the right of action is suspended or discharged.¹ It lies at common law, not only for goods distrained, but for goods taken and unjustly detained for any other cause whatever; except that, where goods are taken by process of law, the party against whom the process issued cannot replevy them; but, if the goods of a stranger to the process are taken, he may replevy them from the sheriff.² In a note ³ to a recent case it is said: "At common law, detinue was the remedy for the recovery of personal property, unlawfully detained, but it is now little used. The action of replevin at common law was originally of a more limited character. It lay to recover back property illegally distrained; but it afterward came into use in all cases where personal property was illegally taken. The two actions of detinue, for unlawful detentions, and replevin, for unlawful takings, thus came to cover the whole ground of unlawful deprivations

¹ 2 Greenleaf Ev., § 560; Hammond Wend. (N. Y.) 349; Seaver v. Dingley, 4 Greenl. (Me.) 306.

² Clark v. Skinner, 20 Johns. (N. Y.) 465, 470; Allen v. Crary, 10

of personal property, so far as recovering the specific articles was concerned."⁴ In most of the states, therefore, the action of replevin, as broadened by statute, or as it is sometimes called the action to recover the possession of property, or claim and delivery of personal property, lies to recover the property in specie where it is unlawfully detained as well as where it was unlawfully taken. As said in the note from which we have already quoted, "to support replevin under the common law an unlawful taking was necessary; an unlawful detention was not enough:"⁵ but the law of the remedy has been so changed by force of statutes and otherwise that replevin now lies in this country for wrongful detention as well as for a wrongful taking. In other words, an unlawful detention alone, without an unlawful taking, will support replevin."⁶ The nature of the action and its essential elements or the matters that must be shown in order to sustain it are more fully stated by Mr. Shipman as follows: "The action of replevin lies where specific personal property has been wrongfully taken and is wrongfully detained, or, in most states by statute, also where it has been lawfully taken, but is wrongfully detained, to recover possession of the property, together with damages for its detention. To support the action it is necessary: (a) That the property shall be personal. (b) That the plaintiff at the time of the suit shall have a general or special property in the chattel, entitling him to the immediate possession. (c) That (at common law) the defendant shall have wrongfully taken the property (replevin in the cepit). But, by statute in most states, the action will now also lie where the property is wrongfully detained, though it was lawfully obtained in the first instance (replevin in the detinet). (d) That the property shall be wrongfully detained by the defendant at the time of suit."⁷

⁴ *Wilson v. Rybolt*, 17 Ind. 381, 79 Am. Dec. 491; *Maxham v. Day*, 16 Gray (Mass.) 213, 77 Am. Dec. 409.

⁵ *Mennie v. Blake*, 6 El. & B. 842; *Harwood v. Smethurst*, 29 N. J. L. 195, 80 Am. Dec. 207; *Wheelock v. Cozzens*, 6 How. (Miss.) 279; *Cummings v. MacGill*, 2 Murph. (N. Car.) 357.

⁶ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501; *Dearmon v. Blackburn*, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160; *Root v.*

French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 432; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555; *Oleson v. Merrill*, 20 Wis. 487, 91 Am. Dec. 428; *Skinner v. Stouse*, 4 Mo. 93; *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152; *Pirani v. Barden*, 5 Ark. 81, 84; *Trapnall v. Hattier*, 6 Ark. 18.

⁷ *Shipman C. L. Pl.* (2nd ed.) 107; *Gordon v. Harper*, 7 Term R. 9; *Gates v. Gates*, 15 Mass. 310; *Collins v. Evans*, 15 Pick. (Mass.) 63;.

§ 2605. **What property may be replevied.**—The question as to what kind of property may be replevied is one of substantive law, and, hence, is not within the scope of this chapter. It may be said generally, however, that, in most jurisdictions replevin lies only for the recovery of personal property, and that it lies to recover almost all kinds of personal property, except money which is not specifically marked or identified. Property which has been attached to the realty may even be so served or treated as to become personalty and subject to an action of replevin. But property which is in the true sense in custodia legis, or which is exempt or taken for a tax in some jurisdictions can not be replevied, although, of course, property may often be replevied from officers as well as others when it has been wrongfully taken.⁸

§ 2606. **Common law rules.**—Much learning and technical discussion in regard to the subject of replevin, as well as in regard to other forms of common law actions, will be found in the older reports and text-books. It would be out of place here, however, to go into an extended consideration of the common law rules and distinctions. At common law, as under most of the statutes, where the question of title was in issue, the plaintiff was required to prove either a general or a special property in the goods and a right to immediate, and, generally, exclusive possession.⁹ But, under the general issue of non-cepit the plaintiff's title was admitted, though the plaintiff was required to prove that the defendant had the goods in the place mentioned in the declaration. If the defense was that the defendant never had the goods in that place his plea was cepit in alio loco, which did not admit the taking as laid in the declaration.¹⁰ There were also many technical

Rogers v. Arnold, 12 Wend. (N. Y.) 30; Wheeler v. Train, 4 Pick. (Mass.) 168; Smith v. Williamson, 1 Har. & J. (Md.) 147; Ingraham v. Martin, 3 Shepl. (Me.) 373; Lake Shore &c. R. Co. v. Ellsey, 85 Pa. St. 283; Lamb v. Johnson, 10 Cush. (Mass.) 126; Essen v. Tarbell, 9 Cush. (Mass.) 407; Kimball v. Thompson, 4 Cush. (Mass.) 441; Lockwood v. Perry, 9 Metc. (Mass.) 440; Kidd v. Belden, 19 Barb. (N. Y.) 266; Rockwell v. Saunders, 19 Barb. (N. Y.) 473; Young v. Kim-

ball, 23 Pa. St. 193; see also, Bray v. Raymond, 166 Mass. 146, 44 N. E. 131; Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90; Carpenter v. Glass, 67 Ark. 135, 53 S. W. 678.

⁸ See elaborate note as to what property is repleviable in 80 Am. St. 756-764.

⁹ 2 Greenleaf Ev., § 562; 1 Saund. 347 w.

¹⁰ Bullythorpe v. Turner, Willes 475; People v. Niagara &c., 2 Wend. (N. Y.) 644; 2 Greenleaf Ev., § 562.

rules in regard to the plea of avowry by the defendant¹¹ and in regard to the answer or reply of the plaintiff thereto.¹²

§ 2607. **Burden of proof.**—As a general rule, it may be said that the plaintiff has the burden of proving all the essential facts denied by the defendant and necessary to make the plaintiff's case.¹³ Thus, the burden is upon the plaintiff to show that he is entitled to possession of the property in controversy, and, if its ownership is in issue, that he is the owner,¹⁴ and that the defendant has unlawfully taken such property or wrongfully detains it.¹⁵ But it has been held that the plaintiff need not prove facts admitted by the defendant,¹⁶ and in some jurisdictions the burden as to a particular issue may be upon the defendant who pleads affirmatively, or the burden may be upon him to produce evidence after certain proof has been made by the plaintiff.¹⁷ Proof that plaintiff is a part owner is not sufficient against another who is also a

¹¹ See, *Presgrave v. Saunders*, 1 Salk. 5; *Bemus v. Beekman*, 3 Wend. (N. Y.) 667; *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Clarke v. Davies*, 7 Taunt. 72; 2 *Greenleaf Ev.*, §§ 563-564-568; *Buller N. P.* 59, 60, 299.

¹² See, *Dunk v. Hunter*, 5 B. & Ald. 322; *Parry v. House*, *Holt's Cas.* 489, and note; *Gravenor v. Woodhouse*, 1 Bing. 38, *Plea of rieux en arrere*; *Hill v. Wright*, 2 Esp. 669; *Harrison v. Barnby*, 5 Term R. 246, 248; 2 *Greenleaf Ev.*, § 566. *Distrainment as bailiff*; *Leigh v. Shepherd*, 2 B. & B. 465; *Lamb v. Mills*, 4 Mod. 378; *Whitehead v. Taylor*, 10 Ad. & El. 210.

¹³ See, *Chandler v. Lincoln*, 52 Ill. 74; *Roberts v. White*, 146 Mass. 256, 15 N. E. 568; *Capital Lumber Co. v. Hall*, 10 Ore. 202; *Wyatt v. Freeman*, 4 Colo. 14; *Dunb v. Hunter*, 5 B. & Ald. 322; *Westbay v. Milligan*, 89 Mo. App. 294; see, *Morgan v. Jackson*, 32 Ind. App. 169, 171, 69 N. E. 410, to the effect that the burden of ultimately establishing his case still remains upon the plaintiff.

¹⁴ *Waterbury v. Miller*, 13 Ind. App. 197, 209, 41 N. E. 383; *Hillman v. Grigham*, 110 Iowa 220; *Gibbs v. Childs*, 143 Mass. 103, 9 N. E. 3; *Uncapher v. Baltimore & C. R. Co.*, 112 Fed. 899; *Lamotte v. Wisner*, 51 Md. 543.

¹⁵ *Andrews v. Costican*, 30 Mo. App. 29; *Webber v. Read*, 65 Me. 564; *Loomis v. Foster*, 1 Mich. 165; *Child v. Child*, 13 Wis. 18; *Wheeler & C. Mfg. Co. v. Leetzlaff*, 53 Wis. 211, 10 N. W. 155; *Chas. H. Dodd & Co. v. Williams-Smithson Co.*, 27 Wash. St. 89, 67 Pac. 352.

¹⁶ *Mills v. Kansas Lumber Co.*, 26 Kans. 574; *Jones v. Spears*, 47 Cal. 20; see also, *Harrison v. Clark*, 74 Conn. 18, 49 Atl. 186; *Hursh v. Starr*, 6 Kans. App. 8, 49 Pac. 618; *Carpenter v. Stearns*, 32 Mo. App. 132.

¹⁷ *Baer v. Martin*, 2 Ind. 229; *Krug v. Herod*, 69 Ind. 78; *Simpson v. M'Farland*, 18 Pick. (Mass.) 427, 29 Am. Dec. 602; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.

joint owner of the property as his partner,¹⁸ or against one who holds under such partner.¹⁹ In some jurisdictions an execution defendant cannot maintain an action to recover personal property seized under an execution against him, except in cases where it affirmatively appears that the property was exempt from execution, and in an action of replevin by a resident householder to recover property²⁰ levied upon on the ground that the same was exempt from execution, it was held that the burden was on the plaintiff to show that the judgment on which the writ issued was rendered upon a contract, express or implied, and that the plaintiff owned the property.²¹ A mortgage on the property does not destroy the owner's right to hold it as exempt from execution and to recover its value from one who wrongfully deprives him of it and fails to return it.²² It has also been held that the mere fact that a justice of the peace issued an execution against the property of a judgment defendant does not establish any liability on his part for the seizure by the constable of property belonging to a third person to satisfy the writ without special direction from the justice as to what property should be seized; and if there is any evidence at all that the property seized belonged to the execution defendant, the judgment and writ under which the constable acted are admissible in evidence in his favor.²³

§ 2608. Plaintiff's ownership and right to possession.—To sustain replevin for personal property the plaintiff must not only show some interest or property in himself, either general or special, but he must also be entitled to the immediate possession thereof.²⁴ He may prove either a general or special ownership in himself with the right to the

¹⁸ Noble v. Epperly, 6 Ind. 414.

¹⁹ Branch v. Wiseman, 51 Ind. 1.

²⁰ Hartlep v. Cole, 101 Ind. 458; Louisville &c. Co. v. Payne, 103 Ind. 183, 2 N. E. 582; Miller v. Hudson, 114 Ind. 550, 17 N. E. 122.

²¹ Thompson v. Ross, 87 Ind. 156; Newcomer v. Alexander, 96 Ind. 453.

²² Adams v. Hessian, 11 Ind. App. 598, 39 N. E. 530.

²³ Fruits v. Elmore, 8 Ind. App. 278, 34 N. E. 829.

²⁴ Carpenter v. Glass, 67 Ark. 135, 53 S. W. 678; McFadden v. Ross, 108 Ind. 512, 8 N. E. 161; Britt v.

Aylett, 11 Ark. 475, 52 Am. Dec. 282; Updyke v. Wheeler, 37 Mo. App. 680; Kavanaugh v. Brodball, 40 Neb. 875, 59 N. W. 517; Morse v. Hamill, 97 Iowa, 631, 66 N. W. 892; Alden v. Carver, 13 Iowa 253, 81 Am. Dec. 430; Nichols v. Knutson, 62 Minn. 237, 64 N. W. 391; Chambers v. Hunt, 3 Harr. (N. J.) 339; Berthold v. Fox, 13 Minn. 501, 97 Am. Dec. 243; Sanford Mfg. Co. v. Wigglin, 14 N. H. 441, 40 Am. Dec. 198; Robb v. Dobrinski (Okla.), 78 Pac. 101.

immediate possession;²⁵ but it must generally be made to appear that he was entitled to possession of the property at the time of beginning suit.²⁶ It is not essential that the plaintiff should prove title and ownership in himself in order to recover, but if he shows such an interest in the property as gives him a *prima facie* right to possession, it has been held the verdict should be in his favor, unless the defendant proves a better title.²⁷ The fact of possession under claim of title by purchase is enough to establish the right of the possessor as against a mere trespasser,²⁸ and in general it has been said that any one having possession of property is entitled to recover it back from a wrongdoer, although it does not belong to him.²⁹ But replevin is a possessory action and, as already shown, the plaintiff cannot recover without proof that he is entitled to the immediate possession of the property in controversy.³⁰ Evidence of ownership is not conclusive proof of the owner's right to recover the property in controversy,³¹ because the title and right of possession may become separated and be held by different parties. But it is a strong circumstance tending to show the owner's right to possession.³² And it has been held sufficient where the defendant shows no right to possession.³³

§ 2609. **Must recover on strength of own title—Evidence of title.**—The plaintiff in a replevin suit must recover on the strength of his own title,³⁴ and not merely upon the weakness of his adversary's

²⁵ *Entsminger v. Jackson*, 73 Ind. 278; *Whitehead v. Coyle*, 1 Ind. 144; *Krug v. McGillard*, 76 Ind. 28; *Buck v. Young*, 1 Ind. App. 558, 561, 27 N. E. 1106; *Goodman v. Sampliner*, 23 Ind. App. 72, 54 N. E. 823; *Abbott Tr. Ev.* (2nd ed.) 868, § 2; 2 *Greenleaf Ev.* (16th ed.), § 561.

²⁶ *Ferguson v. Day*, 6 Ind. App. 138, 142, 33 N. E. 213.

²⁷ *Ingersoll v. Emmerson*, 1 Ind. 76.

²⁸ *Udlike v. Wheeler*, 37 Mo. App. 680; *Anderson v. Goulberg*, 51 Minn. 294, 53 N. W. 636; *Dederick v. Brandt*, 16 Ind. App. 264, 44 N. E. 1010.

²⁹ *Moorman v. Quick*, 20 Ind. 67.

³⁰ *Carpenter v. Glass*, 67 Ark. 135, 53 S. W. 678; *Rose v. Cash*, 58 Ind.

278; *Whitehead v. Coyle*, 1 Ind. App. 450, 27 N. E. 716; *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829; *Aultman v. Forgey*, 10 Ind. App. 397, 36 N. E. 939; *Van Allen v. Smith*, 11 Ind. App. 103, 38 N. E. 542, note in 80 Am. St. 745.

³¹ *Kramer v. Matthews*, 68 Ind. 172; *Entsminger v. Jackson*, 73 Ind. 144; *Pacey v. Powell*, 97 Ind. 371.

³² *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829.

³³ *Cassel v. Western & Co.*, 12 Iowa 47.

³⁴ *Williams v. Osbon*, 75 Ind. 280; *Easter v. Fleming*, 78 Ind. 116; *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213; *Johnson v. Neale*, 6 Allen (Mass.) 227; *Fuller v. Brownell*, 48

title or the latter's want of right. He must produce evidence affirmatively proving his own title or right to possession.³⁵ A chattel mortgage has been held *prima facie* evidence as against the mortgagor of the mortgagee's right to possession of the property it covers,³⁶ and it has been held that the mortgagor cannot successfully defend on the ground that a senior mortgagee is entitled to possession by reason of condition broken.³⁷ It has been held that the holder of a chattel mortgage seeking to replevy the mortgaged goods from third persons who have purchased them, or from a sheriff who has seized them to satisfy the mortgagor's debts has the burden of proving that the formalities prescribed by law were fully complied with in executing and recording the mortgage;³⁸ but it seems that an executory contract for possession is not sufficient evidence of the obligee's right to recover the property without proof that such property was delivered to him pursuant to the terms of the contract.³⁹ Where facts are established showing that plaintiff had rightful possession of the property in controversy, such right is generally presumed to continue until the contrary is made to appear.⁴⁰ The declarations of a person in actual possession of personal property as to the title have been held admissible in evidence on the question of title in favor of the party making such declarations,⁴¹ or his representative,⁴² as well as against him and persons claiming under him.⁴³ Evidence that plaintiff is a joint owner with a third person of the property has been held not to be sufficient to entitle him to replevy such property in his own name.⁴⁴ But, evidence as to whose money

Neb. 145, 67 N. W. 6; *First Nat. Bank v. Hughes*, 3 Neb. (Unoff.) 823, 92 N. W. 986.

³⁵ *Preston v. Peterson*, 107 Iowa 244, 77 N. W. 864; *Kavanaugh v. Brodhead*, 40 Neb. 875, 59 N. W. 517; *Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312; *Herman v. Kneipp*, 59 Neb. 208, 80 N. W. 816; *Leete v. State Bank*, 141 Mo. 584, 42 S. W. 927; *Iowa State Nat. Bank v. Taylor*, 98 Iowa 631, 67 N. W. 677; *Miller v. Lively*, 1 Ind. App. 6, 27 N. E. 437; *Van Allen v. Smith*, 11 Ind. App. 103, 38 N. E. 542.

³⁶ *Johnson v. Simpson*, 77 Ind. 412, 415; *Broadhead v. McKay*, 46 Ind. 595; *Lee v. Fox*, 113 Ind. 98, 14 N.

E. 889; *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

³⁷ *Koehring v. Aultman & Co.*, 7 Ind. App. 475, 483, 34 N. E. 30.

³⁸ *Kahn v. Hayes*, 22 Ind. App. 182, 53 N. E. 430.

³⁹ *Dixon v. Duke*, 85 Ind. 434.

⁴⁰ *Haffner v. Barnard*, 123 Ind. 429, 24 N. E. 152; *Abbott Tr. Ev.* (2nd ed.) 869, § 2.

⁴¹ *Garr-Scott Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811.

⁴² *McConnell v. Hannah*, 96 Ind. 102.

⁴³ *Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394.

⁴⁴ *Bain v. Trixler*, 24 Ind. App. 246, 250, 56 N. E. 690; *Branch v. Wise-*

paid for the property has been held competent on the question of ownership.⁴⁵

§ 2610. **Defendant's possession.**—The defendant must have actual or constructive possession or control of the property in controversy at the time of the commencement of the action, whether he is an officer or a private individual;⁴⁶ except, in some instances, where it has been fraudulently disposed of or concealed to avoid the writ.⁴⁷ The plaintiff must prove either that the property sued for has been wrongfully taken or that it is unlawfully detained by the defendant.⁴⁸ It is only when one of these facts exists that the plaintiff has a right of action to recover the property, and such fact must not only be alleged, but must also be proved.⁴⁹ No recovery can be had against a defendant who did not have the possession either actual or constructive,⁵⁰ but proof of the fact that property was in defendant's possession at the beginning of a replevin suit which was dismissed for want of a sufficient bond, a judgment of return being rendered, has been held sufficient to establish constructive possession of such property by the defendant, in whose favor the judgment of return was given, although a second action of replevin was begun by the plaintiff without actually restoring the property to him.⁵¹ And evidence that a sheriff levied on the property and

man, 51 Ind. 1; see Vol. II, §§ 692, 694.

⁴⁵ *First Nat. Bank v. Ragsdale*, 171 Mo. 168, 71 S. W. 178.

⁴⁶ *Hall v. Kalamazoo*, 131 Mich. 404, 91 N. W. 615; *Eales v. Francis*, 115 Mich. 636, 73 N. W. 894; *Reid v. Ferris*, 112 Mich. 693, 71 N. W. 484, 67 Am. St. 437; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *Tozier v. Merriam*, 12 Minn. 87; *Feder v. Abrahams*, 28 Mo. App. 454; *Penn v. Brashear*, 65 Mo. App. 24; *Dow v. Dempsey*, 21 Wash. St. 86, 57 Pac. 355; *Depriest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Irwin v. Walling*, 4 Okla. 128, 44 Pac. 219; *Alaske & Co. Verein v. Wall*, 28 Misc. (N. Y.) 174, 58 N. Y. S. 1115; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829; *Krug v. Herod*, 69 Ind. 78; *Peninsular Stove Co. v. Ellis*, 20 Ind.

App. 491, 51 N. E. 105; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506.

⁴⁷ *Reid v. Ferris*, 112 Mich. 693, 71 N. W. 484, 67 Am. R. 437; *Starke v. Paine*, 85 Wis. 633, 55 N. W. 185; *Depriest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *McCormick & Co. Machine Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939; *Willis v. Dewitt*, 3 S. Dak. 281, 52 N. W. 1090.

⁴⁸ *Baer v. Martin*, 2 Ind. 229; *Clark v. Heck*, 17 Ind. 281; *Krug v. Herod*, 69 Ind. 78; *Entsminger v. Jackson*, 73 Ind. 144; 2 *Greenleaf Ev.* (16th ed.), § 562.

⁴⁹ *Krug v. Herod*, 69 Ind. 78.

⁵⁰ *Aman v. Mottweiler*, 15 Ind. App. 405, 44 N. E. 63.

⁵¹ *Teeple v. Dickey*, 94 Ind. 124.

forbade the plaintiff to touch or remove it, and left a man in charge of it and refused to deliver it to the plaintiff on demand, has been held to sufficiently prove the sheriff to be in possession of the property although he did not take it from the place where he found it.⁵² It has been held that evidence that a sheriff, after levying on plaintiff's property for the debt of another, took a delivery bond from plaintiff, leaving the property in his possession, and upon formal demand refused to return any of the property to plaintiff or release it from his levy, sufficiently proves the sheriff to be in possession of such property;⁵³ and that proof that defendant tore down a fence belonging to plaintiff on the line between the farms owned by plaintiff and defendant and threw rails upon his own land, together with evidence tending to show that he had no intention of rebuilding the fence, will support a finding that defendant was in unlawful possession of the rails.⁵⁴ But one who is in actual possession of property belonging to another without right cannot defeat an action of replevin by wrongfully transferring the possession to a third person, even though the transfer be made before suit is brought, and evidence that defendant was in possession of plaintiff's property, with knowledge of plaintiff's claim thereto, and transferred it to another for the purpose of evading a writ of replevin,⁵⁵ has been held sufficient to charge defendant with constructive possession of it. The fact that one who seized property did so as agent for another does not affect his liability in an action of replevin, nor is he released by the fact that immediately after seizing the property he delivered it to other persons to be transported to his principal, and that it was in their hands when it was seized on the writ of replevin.⁵⁶ But it has been held that a mere paper levy by a county treasurer on chattels for delinquent taxes, without taking actual possession or putting some one in charge or taking a delivery bond, is not a possession by him which will sustain replevin against him.⁵⁷ So, it has been held that evidence that defendant, acting as a justice of the peace, issued an execution

⁵² *Aman v. Mottweiler*, 15 Ind. App. 405, 44 N. E. 63.

⁵³ *Louthain v. Fitzer*, 78 Ind. 449; *Hadley v. Hadley*, 82 Ind. 75, 79; but see, *Hove v. McHenry*, 60 Iowa 227, 14 N. W. 301; *Morrison v. Lumbard*, 48 Mich. 548, 12 N. W. 696.

⁵⁴ *Moore v. Combs*, 24 Ind. App. 464, 56 N. E. 35.

⁵⁵ *Helman v. Withers*, 3 Ind. App. 532, 30 N. E. 5.

⁵⁶ *Berghoff v. McDonald*, 87 Ind. 549.

⁵⁷ *Standard Oil Co. v. Bretz*, 98 Ind. 231; *Owens v. Gacho*, 154 Ind. 225, 56 N. E. 224; *Gaff v. Harding*, 43 Ill. 148, 150; *Brand v. Hedwick*, 43 Kans. 131, 23 Pac. 111.

against the property of a third person, under which the constable seized plaintiff's property, does not show either actual or constructive possession of the latter by the justice of the peace, where he gave no command to levy the execution on the particular property in controversy.⁵⁸

§ 2611. Demand.—Demand and refusal are generally necessary to sustain replevin where the defendant came lawfully into possession of the property, or where his possession is not wrongful.⁵⁹ But no demand is necessary, as a rule at least, to sustain replevin where the possession of the property was originally acquired by a tort,⁶⁰ as where property is fraudulently purchased or the like.⁶¹ As a general rule it is only where the defendant has rightfully obtained possession of the property that it is necessary to prove a demand to sustain an action of replevin.⁶² Where the original taking is shown to have been unlawful and without right,⁶³ or where the defendant is proved to have obtained possession by fraud,⁶⁴ or to have wrongfully converted the property to his own use,⁶⁵ it is not necessary to prove a demand before beginning a suit

⁵⁸ *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829.

⁵⁹ *Oleson v. Merrill*, 20 Wis. 487, 91 Am. Dec. 428; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Moran v. Abbott*, 26 App. Div. (N. Y.) 570, 50 N. Y. S. 337; *Porges v. Cohen*, 23 Misc. (N. Y.) 703, 52 N. Y. S. 71; *Fleischman v. Glaser*, 28 Misc. (N. Y.) 555, 59 N. Y. S. 686; *Comba v. Bays*, 19 Ind. App. 263, 49 N. E. 358; *Campbell v. Quackenbush*, 33 Mich. 287; *Adams v. Wood*, 51 Mich. 411, 16 N. W. 788; *Keller v. Robinson*, 153 Ill. 458, 38 N. E. 1072.

⁶⁰ *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Guthrie v. Olsen*, 44 Minn. 404, 46 N. W. 853; *Olsen v. Merrill*, 20 Wis. 487, 91 Am. Dec. 428; *Breitenwischer v. Clough*, 111 Mich. 6, 69 N. W. 88, 66 Am. St. 372; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Richey v. Ford*, 84 Ill. App. 121; *Cottrell v. Carter*, 178

Mass. 155, 53 N. E. 375; *Denton v. Smith*, 61 Mich. 431, 28 N. W. 160.

⁶¹ *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Reeder v. Moore*, 95 Mich. 594, 55 N. W. 436; *Parrish v. Thurston*, 87 Ind. 437.

⁶² *Kuhns v. Gates*, 92 Ind. 66; *Haffner v. Barnard*, 123 Ind. 429, 433, 24 N. E. 152; *Abbott Tr. Ev.* (2nd ed.) 870, § 5.

⁶³ *Cunningham v. Baker*, 84 Ind. 597; *Hamilton v. Browning*, 94 Ind. 242; *Deeter v. Sellers*, 102 Ind. 458.

⁶⁴ *Brower v. Goodyer*, 88 Ind. 572; *Grunson v. State*, 89 Ind. 533; *Tennessee Coal & Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215; *West v. Graff*, 23 Ind. App. 410, 414, 55 N. E. 506.

⁶⁵ *Cox v. Albert*, 78 Ind. 341; *Terrill v. Butterfield*, 92 Ind. 1, 10; *Deeter v. Sellers*, 102 Ind. 458;

against the wrongdoer to recover the property; but as against one who has purchased the property from the original wrongdoer in good faith, and without notice of plaintiff's claim, a demand putting the defendant in the wrong must be proved.⁶⁶ Evidence that the defendant had knowledge of plaintiff's rights at the time he bought such property may, however, excuse proof of a demand.⁶⁷ So, it may be excused where it would be futile and unavailing, as where the defendant asserts ownership and sets up the right to possession in himself or has, as he admits, wrongfully disposed of the property. Where an infant is no longer subject to guardianship, as in case of a married woman who has not reached her majority, it has been held that a demand by her for possession of her property before bringing suit to recover it is sufficient, and it is not necessary to prove a demand by the next friend in whose name such suit is prosecuted.⁶⁸ Where an action of replevin has failed for lack of proof of a demand, and a second suit has been instituted, evidence that a demand was really made before bringing the first suit has been held inadmissible, such fact being wholly immaterial.⁶⁹

§ 2612. **Defendant's evidence—Property in third person.**—As a general rule, at least in most of the code states, under a plea of general denial to a complaint in replevin, the defendant may in general prove any facts which tend to defeat the plaintiff's alleged right to possession of the property.⁷⁰ Thus evidence that the property belongs to a

Koehring v. Aultman &c. Co., 7 Ind. App. 475, 485, 34 N. E. 30.

⁶⁶ Wood v. Cohen, 6 Ind. 455; Sherry v. Picken, 10 Ind. 375; Conner v. Comstock, 17 Ind. 90; Roberts v. Norris, 67 Ind. 386; Torlan v. McClure, 83 Ind. 310; Kuhns v. Gates, 92 Ind. 66; Ledbetter v. Embree, 12 Ind. App. 617, 40 N. E. 928.

⁶⁷ Torres v. Rogers, 28 Misc. (N. Y.) 176, 58 N. Y. S. 1104; Barton v. Mulvane, 59 Kans. 313, 52 Pac. 883; Bunce v. McMallon, 6 Wyo. 24, 42 Pac. 23; Triplett v. Rugby Distilling Co., 66 Ark. 219, 49 S. W.

975; George v. Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. 626; Leek v. Chesley, 98 Iowa 593, 67 N. W. 580.

⁶⁸ Bush v. Groomes, 125 Ind. 14, 24 N. E. 81.

⁶⁹ Williams v. Lewis, 124 Ind. 344, 24 N. E. 733.

⁷⁰ Aultman &c. Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756, 75 Am. St. 603; White v. Gemeny, 47 Kans. 741, 28 Pac. 1011, 27 Am. St. 320; Aultman & Co. v. Forgey, 10 Ind. App. 397, 401, 36 N. E. 939; Davis v. Warfield, 38 Ind. 461; Branch v. Wiseman, 51 Ind. 1; Smith v. Harris, 76 Ind. 104.

third person,⁷¹ or to defendant himself,⁷² or jointly to plaintiff and to a third person of whose interest defendant has the right to possession,⁷³ or that the plaintiff is not the sole owner of the property,⁷⁴ has been held admissible under the general denial without being specially pleaded. But there has been considerable conflict among the authorities upon this subject, and in some jurisdictions evidence of property in a third person is not admissible.^{74*} It has also been held that breach of warranty of personal property constituting a set-off against part of the purchase price may be proved as a defense to an action to recover possession of such property on account of a failure to pay the purchase price in full, where the property was sold under a contract by which the seller could retain title until it was fully paid for.⁷⁵ Where defendant is entitled to possession of the property under a chattel mortgage, he may prove his right to possession under an answer of general denial,⁷⁶ but in order that property or the right of possession in a third person may be a sufficient defense, it must not only be shown that such person was the owner or entitled to the possession, but prima facie right shown by the plaintiff in making out his case must also be disproved.⁷⁷ A person who is sued for possession of

⁷¹ *Woodworth v. Knowlton*, 22 Cal. 164; *Neeb v. McMillan*, 98 Iowa 718, 68 N. W. 438; *Schulenberg v. Harri-man*, 21 Wall. (U. S.) 44; *Bliss Code Pl.*, § 328; note in 100 Am. Dec. 743; and see, *Griffin v. Long Island &c. R. Co.*, 101 N. Y. 348, 352, 4 N. E. 740; *Robb v. Dobinski* (Okla.), 78 Pac. 101; *Lane v. Sparks*, 75 Ind. 278; *Williams v. Kessler*, 82 Ind. 183; *Porter v. Mitchell*, 82 Ind. 214; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829.

⁷² *Harvey v. Ivory*, 35 Wash. 397, 77 Pac. 725; *May v. Pavey*, 63 Ind. 4; *Aultman & Co. v. Forgey*, 10 Ind. App. 397, 36 N. E. 939; *Shipman &c. Co. v. Pfeiffer*, 11 Ind. App. 445, 39 N. E. 291; *Abbott Trial Ev.* (2nd ed.), 871, § 8; *Halstead v. Cooper*, 12 R. I. 500; *Sutton v. Stephen*, 101 Cal. 545, 36 Pac. 106; *Esshom v. Watertown Hotel Co.*, 7 S. Dak. 74, 63 N. W. 229.

⁷³ *Branch v. Wiseman*, 51 Ind. 1.

⁷⁴ *Bain v. Trixler*, 24 Ind. App. 246, 56 N. E. 690.

^{74*} *Harper v. Baker*, 3 T. B. Mon. (Ky.) 422, 16 Am. Dec. 112; *Hopkins v. Burney*, 2 Fla. 42; *Shuter v. Page*, 11 Johns. (N. Y.) 196; *Reed v. Reed*, 13 Iowa 5; *McClung v. Bergfeld*, 4 Minn. 148. Even under special plea, where the title is created by himself and the third person had no right to possession at the commencement of the suit; *A. D. Puffer &c. Mfg. Co. v. May*, 78 Md. 74, 26 Atl. 1020; *Gottschalk v. Klinger*, 33 Mo. App. 410, *Adams v. Wildes*, 107 Mass. 123; *Cobbey Replevin*, § 787.

⁷⁵ *Aultman & Co. v. Forgey*, 10 Ind. App. 397, 36 N. E. 939.

⁷⁶ *Louchheim v. Gill*, 17 Ind. 139.

⁷⁷ *Koehring v. Aultman &c. Co.*, 7 Ind. App. 475, 483, 34 N. E. 30.

property covered by a chattel mortgage cannot successfully defend by showing that such property is subject to a prior mortgage in favor of a third person, and that the condition in the senior mortgage has been broken.⁷⁸ The junior mortgagee, being entitled to the possession as against the defendant, may recover, notwithstanding the rights of the holder of the senior mortgage.⁷⁹ A plaintiff suing as sole owner cannot recover where the evidence shows that he is a joint owner with third persons of the property in controversy.⁸⁰

§ 2613. **Fraudulent purchase.**—Where the vendor is induced to part with his goods by the fraud of the vendee, and they are fraudulently detained by the vendee, the vendor may rescind the sale and recover possession of them by replevin.⁸¹ In many jurisdictions he may also recover them from others into whose hands they have gone, except an innocent purchaser for value, without notice.⁸² The fraudulent intent of the vendee may be proved as in other cases, and may be inferred from the circumstances surrounding the transaction.⁸³ Evidence that the vendee, at the time he purchased the goods, was not able to pay for them and knew that fact, and that he intended not to pay for them, or had no reasonable expectation of being able to do so, justifies an inference that the purchase was fraudulent.⁸⁴ So, proof that the purchaser bought with a design of not paying for the property has been held sufficient to establish a fraud that will enable the vendor

⁷⁸ *Koehring v. Aultman & Co.*, 7 Ind. App. 475, 483, 34 N. E. 30.

⁷⁹ *Koehring v. Aultman & Co.* 7 Ind. App., 475, 483, 34 N. E. 30.

⁸⁰ *Bain v. Trixler*, 24 Ind. App. 246, 56 N. E. 690.

⁸¹ *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *McKinney v. First Nat. Bank*, 36 Neb. 629, 54 N. W. 963; *Parrish v. Thurston*, 87 Ind. 437; *Gulledge v. Slayden & Co. Mills*, 75 Miss. 297, 22 So. 952; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. 177.

⁸² *Hacker v. Munroe*, 176 Ill. 384, 52 N. E. 12; *Farley v. Lincoln*, 51 N. H. 577, 12 Am. R. 182; *Williamson*

v. New Jersey & Co., 29 N. J. Eq. 311; *Weed v. Page*, 7 Wis. 503; in some jurisdictions he must return or offer to return anything of value he may have received from the purchaser. See conflicting authorities cited in note 80 Am. St. 765.

⁸³ *Parrish v. Thurston*, 87 Ind. 437; *Brower v. Goodyer*, 88 Ind. 572; *Tennessee Coal & Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215; *Abbott Tr. Ev.* (2nd ed.) 870, § 4.

⁸⁴ *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 496, 51 N. E. 105; *Tennessee Coal & Co. v. Sargent*, 2 Ind. App. 458, 461, 28 N. E. 215; *Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028.

to recover back the goods,⁸⁵ and evidence of misrepresentations by the purchaser as to his financial standing at the time of making purchases is competent, in connection with evidence that he was then insolvent, to establish a fraudulent intent.⁸⁶ It has also been held that it may be shown that a note of an insolvent maker transferred by the plaintiff to the defendant at its face value in payment of such property was represented by him to be the note of a person bearing the same name, who was not only solvent, but wealthy,⁸⁷ but evidence that the defendant bought the goods in good faith for a valuable consideration is generally sufficient to defeat an action to recover them back on account of the fraud of another person to whom the plaintiff sold them and from whom the defendant purchased them.⁸⁸

§ 2614. **Damages.**—When it is shown that the property was wrongfully taken and unlawfully detained, the plaintiff is entitled to recover nominal damages without proof of actual damage.⁸⁹ The fact that the property was surrendered to the plaintiff soon after the action to recover it had been instituted does not destroy the plaintiff's right to recover nominal damages for its detention;⁹⁰ but, except as the plaintiff may be entitled to nominal damages, only compensatory damages can properly be assessed in replevin,⁹¹ although in some jurisdictions it seems that exemplary damages may be awarded to the defendant where the replevin action is vexatious and oppressive,⁹² and substantial damages should never be assessed in excess of the amount of actual damages proved.⁹³ If the plaintiff fails to recover the property sued for he is not entitled to damages, and where the main issue was decided against him, the exclusion of evidence as to his loss of time and other elements of damages on account of being deprived of the property may be treated as harmless.⁹⁴ Where the plaintiff recovers, however, he is usually entitled to recover under proper evidence the value of the use of the property for the time he was wrongfully deprived of

⁸⁵ *Curme v. Rauh*, 100 Ind. 247, 251.

⁸⁶ *Tennessee Coal &c. Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215; *Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028.

⁸⁷ *Parrish v. Thurston*, 87 Ind. 437.

⁸⁸ *Clafin v. Cottman*, 77 Ind. 58, 62.

⁸⁹ *Bartlett v. Brickett*, 14 Allen (Mass.) 62; 1 Sedgwick Dam. 88.

⁹⁰ *Robinson v. Shatzley*, 75 Ind. 461; *Cardwill v. Gilmore*, 86 Ind. 428.

⁹¹ *Hotchkiss v. Jones*, 4 Ind. 260.

⁹² *Washington Ice. Co. v. Webster*, 68 Me. 449.

⁹³ *Stevens v. McClure*, 56 Ind. 384; *Hotchkiss v. Jones*, 4 Ind. 260.

⁹⁴ *Smith v. Harris*, 76 Ind. 104, 107.

it,⁹⁵ and for its depreciation in value while wrongfully detained by the defendant.⁹⁶

§ 2615. **Tax list as evidence.**—A tax list sworn to by the plaintiff, which assumes to contain a schedule of all of his property, but omits the property in question, is admissible in evidence against him to disprove his ownership at the time the list was made.⁹⁷ So, evidence of the assessment and payment of the taxes and the like is generally admissible on the question of ownership.⁹⁸ Such a list is also competent as impeaching evidence, where the plaintiff or witness who swore to it gives evidence that contradicts it at the trial;⁹⁹ but in an action by a married woman to recover property seized on execution for a debt of her husband, a tax list in which the husband returned such property for taxation as belonging to him, is not admissible as original evidence against her,¹⁰⁰ and if it is admitted to impeach the husband's testimony, the assessor may be called in support of such testimony and questioned as to the husband's statement regarding his wife's ownership at the time the list was made.¹⁰¹

⁹⁵ *Butler v. Mehrling*, 15 Ill. 488; *Hartley State Bank v. McCorkell*, 91 Iowa 660, 60 N. W. 197.

⁹⁶ *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296; *Bowersock v. Adams*, 59 Kans. 779, 54 Pac. 1064; *Clow v. Yount*, 93 Ill. App. 112.

⁹⁷ *Lefever v. Johnson*, 79 Ind. 554; *Cincinnati &c. R. Co. v. McDougall*, 108 Ind. 179, 182, 8 N. E. 571; *Burket v. Pheister*, 114 Ind. 503, 16 N. E. 813; *Kastl v. Arthur*, (Mich.) 97 N. W. 711.

⁹⁸ *Carr v. Dodge*, 40 N. H. 403; *Dickens v. Winter*, 169 Pa. St. 126, 32 Atl. 289; *Irwin v. Patchen*, 164 Pa. St. 51, 30 Atl. 436; see, Vol. 1, §179, and authorities cited; Vol. 2, §1285.

⁹⁹ *Burket v. Pheister*, 114 Ind. 503, 16 N. E. 813; *Hadley v. Hadley*, 82 Ind. 75.

¹⁰⁰ *Stanfield v. Stiltz*, 93 Ind. 249.

¹⁰¹ *Hadley v. Hadley*, 82 Ind. 75.

CHAPTER CX XI.

SALES.

Sec.	Sec.
2616. Generally.	2623. Presumptions.
2617. Evidence of a sale.	2624. Intent.
2618. Delivery.	2625. Price—Consideration.
2619. Inspection.	2626. Documentary evidence.
2620. Acceptance.	2627. Parol evidence.
2621. Question of law or fact.	2628. Actions by seller.
2622. Burden of proof.	2629. Actions by buyer.

§ 2616. **Generally.**—Many questions relating to sales have been so fully treated elsewhere that they need not be specifically considered in this chapter. Thus, questions in regard to fraudulent sales and questions in regard to damages are fully treated in other chapters devoted to those subjects. So, questions as to admissions, book entries and parol evidence have been so fully treated that little remains to be said in this connection. In this chapter we shall consider the nature of sales and evidence to prove them and their essential elements, questions of law and of fact in cases relating to alleged sales, questions as to the burden of proof and presumptions, and as to the evidence on certain issues or matters that are most often involved, especially in actions by the vendor or vendee. The essentials of a sale must be established in actions relying upon the sale of personal property and the evidence must usually show a mutual agreement between competent parties, a price or money consideration and a transfer of the absolute or general property in the article from the seller to the buyer. These are, in general, the requisite elements of a sale, and furnish the ordinary test for distinguishing it from other transactions. But, in some instances, resort must be had to the intention of the parties as shown by the nature of the transaction and its attending facts and circumstances.¹

¹ See, R. M. Benjamin Sales 1; At- Saunders, 13 Gray (Mass.) 37; Bar-
kinson Sales, 5; Gardner v. Lane, ker v. Marine Ins. Co., 2 Mason (U.
12 Allen (Mass.) 39; Schenck v. S.) 369. Yet an unexplained deliv-

§ 2617. **Evidence of a sale.**—Evidence that goods were furnished by one person and received by another, both acting in their line of business, has been said to be *prima facie* evidence of a sale,² but to make strict proof of a sale more would generally be required. Witnesses may be allowed to testify as to the transaction, who were present at and who know the circumstances of the transaction.³ The circumstances surrounding the transaction may be taken into consideration in determining if it amounts to a sale,⁴ and an instrument although absolute upon its face may be declared a mortgage where the circumstances warrant, as for instance, under certain circumstances between father and son when third parties are affected.⁵ Where the defendant in an action for the purchase price denies having bought the goods, the fact that he accepted the goods and used them is *prima facie* evidence that the sale was made to him.⁶ Evidence may be introduced to prove that a defendant purchased certain goods, by showing that he selected the goods, fixed upon the price, had the goods altered to suit himself, and also that he ratified the sale afterwards by saying that he would pay for them.⁷ So, where there is a dispute as to whether the transaction was a sale or a mortgage, the plaintiff may show that the defendant also considered it as a sale, by the fact that the defendant has treated the property as his own and has sold all or a part of it.⁸ And, generally, all the circumstances surrounding the transaction may be taken into consideration to determine whether it was a sale or a bailment or consignment.⁹

ery of personal property to another at his request has been held to raise a presumption of a sale rather than a gift. *Dant v. State*, 106 Ind. 79, 5 N. E. 870.

²*Carman v. Scribner*, 3 Houst. (Del.) 554.

³*Stern v. Filene*, 14 Allen (Mass.) 9; *Harris Photographic Supply Co. v. Fisher*, 81 Mich. 136, 45 N. W. 661; see, *Zwisler v. Storts*, 30 Mo. App. 163, which held that certain facts are not sufficient to show a sale.

⁴*Buhl Iron Works v. Teuton*, 67 Mich. 623, 35 N. W. 804; *Cake v. Shull*, 18 Stew. (N. J.) 208, 16 Atl. 434; *Keller v. Paine*, 107 N.

Y. 83, 13 N. E. 635; *Dean v. Lamers*, 63 Wis. 331, 23 N. W. 892.

⁵*Woodworth v. Hodgson*, 56 Hun (N. Y.) 236, 9 N. Y. S. 750.

⁶*Maresl v. American Yacht Club*, 10 Misc. (N. Y.) 220, 30 N. Y. S. 1068.

⁷*Richards v. Ross*, 83 Hun (N. Y.) 390, 31 N. Y. S. 905.

⁸*Eby v. Winters*, 51 Kans. 777, 33 Pac. 471.

⁹*Simpson v. Pegram*, 108 N. Car. 407, 13 S. E. 7, holds that where a broker writes, "Please send me the following, etc.," and the broker uses his letter-head and printed forms which indicate an assignment, such facts may be taken into considera-

§ 2618. **Delivery.**—It is the duty of the seller to deliver the goods to the buyer in accordance with the terms of the contract, upon compliance by the latter with the conditions precedent, if any, on his part. If nothing is specified as to the time, the delivery must be within a reasonable time, and if properly made within such time it will be sufficient. The manner and time of delivering goods may be proved by the oral testimony of witnesses cognizant of the facts,¹⁰ even when the goods were delivered pursuant to a written order or contract. But it is not necessary that delivery shall be shown by direct evidence, for it may, like any other fact, be inferred from circumstances,¹¹ and a delivery of part may evidence a delivery of the whole.^{11*} The fact that the property is in possession of a person claiming ownership by assignment or sale has been held to be *prima facie* evidence of its delivery to him by the former owner.¹² In order to amount to a delivery of property there must usually be some act beyond the words of the contract, by which the seller relinquishes his dominion over the property and puts it in the power of the vendee.¹³ But much depends upon the circumstances of the particular case,¹⁴ and constructive or symbolical delivery is sufficient in many cases.¹⁵ Evidence of delivery is not always essential to establish the fact of a sale, and it is competent for the parties to agree that the seller shall hold possession as bailee,

tion by the jury in determining whether a sale or consignment.

¹⁰ *Lee v. Hills*, 66 Ind. 474; see also, as to parol evidence as to time and reasonable time. *Consolidated &c. Co. v. Mercer*, 16 Ind. App. 504, 44 N. E. 1005; *Stange v. Wilson*, 17 Mich. 342; *Roberts v. Mazeppa Mills*, 30 Minn. 415, 15 N. W. 680; *Loneragan v. Waldo*, 179 Mass. 135, 60 N. E. 479; as to usage, see, *Robinson v. United States*, 13 Wall. (U. S.) 363.

¹¹ *Lance v. Pearce*, 101 Ind. 595.

^{11*} *Boynton v. Veazie*, 24 Me. 286; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Benjamin Sales*, § 488; *Dixon v. Yates*, 5 B. & Ad. 313, 27 E. C. L. 86; *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

¹² *Stewart v. Davis*, 18 Ind. 74; *Paulman v. Claycomb*, 75 Ind. 64;

Garrigus v. Home &c. Soc., 3 Ind. App. 91, 28 N. E. 1009; *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201.

¹³ *Owens v. Lewis*, 46 Ind. 488, 521; *Dehority v. Paxson*, 97 Ind. 253, 256.

¹⁴ See, as to what is sufficient to constitute a delivery. *Lord v. Edwards*, 148 Mass. 476, 20 N. E. 1621, 2 L. R. A. 519, and note; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247.

¹⁵ *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; *Vining v. Gilbreth*, 39 Me. 496; *Davis v. Russell*, 52 Cal. 611, 28 Am. R. 647; *Gant v. Broadway*, 2 Ariz. 315, 15 Pac. 862; *Knox v. Fuller*, 23 Wash. St. 34, 62 Pac. 131; *Benjamin Sales* (6th Am. ed.), §§ 696, 813.

and a sale of personal property may be complete so as to pass the title without a delivery.¹⁶ In order to establish such a delivery as will take a sale out of the statute of frauds, however, some act of acceptance on the part of the purchaser must generally be proved.¹⁷ In a recent case it is held that all that is ordinarily required of a party to a contract to deliver personal property to several persons at the same time upon the payment of the price, where no place of delivery is specified, is that he shall put the property in some convenient place, subject to the disposal of the payer upon his compliance with the contract, and notify the promisors of the fact.¹⁸ It is also held in another recent case that the shipment of goods under a contract for a sale which does not specify any time for delivery must be made within a reasonable time; that a letter from a vendor to his agent at the shipping port prior to the shipment of goods, characterizing the delay thereof as altogether unreasonable, is admissible in an action by such vendor for damages for refusal to accept and pay for the goods, in which the defense is unreasonable delay in shipment; that a vendee's understanding as to what will constitute reasonable time for delivery, when contained in an answer to a request to change the method of shipment, which involves the question of time, will be binding on the vendor if no response is made thereto; and that evidence of statements as to when goods will probably be shipped, made by the vendor's broker at the time of making the contract, which specifies no time for delivery, is admissible to show the intention of the parties as to what should constitute reasonable time for the delivery thereof under the contract.¹⁹ So, evidence as to what the vendor did and said after he

¹⁶ *Bertelson v. Bower*, 81 Ind. 512; *Dobson v. State*, 57 Ind. 69; *Cloud v. Moorman*, 18 Ind. 40; *Sherry v. Picken*, 10 Ind. 375.

¹⁷ *Keiwert v. Meyer*, 62 Ind. 587; *Dehority v. Paxson*, 97 Ind. 253.

¹⁸ *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247; *Carpenter v. Holcomb*, 105 Mass. 280; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. R. 197; *Cobb v. Hall*, 33 Vt. 233. And, generally, in the absence of anything to the contrary in the contract or circumstances, the delivery is to be at the place where the goods are sold by there placing them at

the disposal of the buyer. *Whittle v. Phelps*, 181 Mass. 317, 63 N. E. 907; *Tift v. Wight & Co.*, 113 Ga. 681, 39 S. E. 503; *Hatch v. Standard Oil Co.*, 100 U. S. 134; *Bloxam v. Sanders*, 4 B. & C. 941, 948, 10 E. C. L. 480; *Benjamin Sales* (6th Am. ed.), §§ 679, 682. So proper delivery to a common carrier is usually delivery to the buyer; *Benjamin Sales* (6th Am. ed.), § 693; 2 *Schouler Pers. Prop.* (2d ed.), § 396.

¹⁹ *Eppens & Co. v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19; 52 L. R. A. 811.

executed a bill of sale has been held admissible when pertinent to the issue as to whether the sale had been accompanied by immediate delivery and change of possession.²⁰

§ 2619. **Inspection.**—The buyer has the right to inspect the goods, and a tender without a reasonable opportunity to inspect is not, ordinarily, sufficient to constitute or excuse a delivery and put the buyer in default.²¹ But it may, of course, be waived.²² What is a reasonable time for inspection under the circumstances is usually a question of fact for the jury.²³ But it has been held that in an action for the price of goods sold by sample it will be presumed, in the absence of anything to the contrary, that the buyer inspected them when he received them.²⁴

§ 2620. **Acceptance.**—As it is the duty of the seller to deliver, so it is the duty of the buyer to accept upon delivery in accordance with the contract,²⁵ although, as shown in the last preceding section, he generally has the right of inspection before acceptance. It therefore includes more than the mere temporary possession or receipt of the goods,²⁶ and possession merely for the purpose of inspection does not, ordinarily, constitute an acceptance.²⁷ But it may be shown by conduct and circumstantial evidence,²⁸ as well as by express language and

²⁰ *Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. 668, 25 Am. St. 181; as to entries in shop or account books as evidence of delivery, see, Vol. I, § 467.

²¹ *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513; *Cole v. Bryant*, 78 Miss. 297, 18 So. 655; *Strauss v. Nat. Parlor & Co.*, 76 Miss. 343, 24 So. 703; *Charles v. Carter*, 96 Tenn. 607, 36 S. W. 396; *Tasker v. Crane Co.*, 55 Fed. 449; *Isherwood v. Whitmore*, 11 M. & W. 347.

²² *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777.

²³ *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; see also, *Doane v. Dunham*, 79 Ill. 131; *Hickman v. Shimp*, 109 Pa. St. 16; *Boothby v. Scales*, 27 Wis. 626.

²⁴ *Ogden v. Beatty*, 137 Pa. St. 197, 20 Atl. 620, 21 Am. St. 862.

²⁵ *Harrison v. Fortlage*, 161 U. S. 57, 16 Sup. Ct. 488; *Parker v. Selden*, 69 Conn. 544, 38 Atl. 212; *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Nichols v. Morse*, 100 Mass. 523; *Loftus v. Riley*, 83 Iowa 503, 50 N. W. 17; *Salomon, In re*, 81 L. T. N. S. 325.

²⁶ *Armsby v. Shewmake*, 113 Ga. 1086, 39 S. E. 473; *Simpson v. Krumdick*, 28 Minn. 355, 10 N. W. 18; *Demens v. Le Moyne*, 26 Fla. 323.

²⁷ *Love v. Barnesville & Co.*, 3 Pen. (Del.) 569, 50 Atl. 536; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17.

²⁸ *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798; *Stewart v. Gilruth*, 8 S. Dak. 181, 65 N. W. 1065.

acts.²⁹ The question as to whether there has been an acceptance or a non-acceptance in the particular case is usually a question of fact, or a mixed question of law and fact, for the jury.³⁰

§ 2621. **Questions of law or fact.**—It is for the court to construe and determine the nature of a written contract complete in itself.³¹ And what is necessary in law to constitute a sale and the legal rights, duties and remedies of buyer and seller are, in a sense, questions of law for the court; but the law is usually given to the jury by instructions, and it is left for them to determine the facts and apply it in most cases. Thus the question as to whether there has been a sale or not in the particular case, and what the contract was, is in general one for the jury.³² So, it is generally a question of fact or a mixed question of law and fact whether the sale has been completed or not,³³ whether the transaction is a bailment or sale,³⁴ whether it is a mortgage or sale,³⁵ and whether the transaction is simply an exchange or sale.³⁶ The selling price is a question of fact,³⁷ the intent is for the jury,³⁸ and where there is an oral agreement of sale the jury must determine whether it is executory or executed.³⁹ What constitutes a reasonable

²⁹ *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798.

³⁰ *Western Mfg. Co. v. Kingman*, 50 C. C. A. 221, 112 Fed. 246; *Garfield v. Paris*, 96 U. S. 557, 563; *Coates v. Huffine*, 13 Ind. App. 182, 41 N. E. 465; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; see also, *Greenleaf v. Hamilton*, 94 Me. 118, 46 Atl. 798; *Gowing v. Knowles*, 118 Mass. 232; *Strauss v. Nat. Parlor &c. Co.*, 76 Miss. 297, 343; *Aultman &c. Co. v. Nilson*, 112 Iowa 634, 84 N. W. 692.

³¹ *Foley v. Felrath*, 98 Ala. 176, 13 So. 485, 39 Am. St. 39; *Wadsworth v. Allcott*, 6 N. Y. 64.

³² *McClung v. Kelley*, 21 Iowa 508; *Alfred Shrimpton & Son v. Brice*, 102 Ala. 655, 15 So. 452; *Llewellyn Mfg. Co. v. Malter*, 76 Cal. 242, 18 Pac. 271; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Laurel Hill State Co. v. Snyder*, (Pa.) 13 Atl. 194; *Moon v. Hawks*, 2 Aikens (Vt.) 390, 16 Am. Dec. 725; *Columbian &c. Co.*

v. Douglas, 84 Md. 44, 34 Atl. 1118, 57 Am. St. 362.

³³ *De Ridder v. M'Knight*, 13 Johns. (N. Y.) 294.

³⁴ *Crosby v. Delaware Canal Co.*, 119 N. Y. 334, 23 N. E. 736; *Brown v. Gilliam*, 53 Mo. App. 376; *Reissner v. Oxley*, 80 Ind. 580; *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107; *Bretz v. Diehle*, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. 106.

³⁵ *Cook v. Lion Fire Ins. Co.*, 67 Cal. 368, 7 Pac. 784.

³⁶ *Deford v. Dryden*, 46 Md. 248.

³⁷ *Gallup v. Fox*, 64 Conn. 491, 30 Atl. 756; *Llewellyn Steam Mfg. Co. v. Malter*, 76 Cal. 242, 18 Pac. 271; *Barwick v. Gast Lithographing Co.*, 58 Hun (N. Y.) 603, 11 N. Y. S. 373.

³⁸ *Henry v. Patrick*, 18 N. Car. 353; *Theiss v. Weiss*, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. 638.

³⁹ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Darden v. Lovelace*, 52 Ala. 289.

time within which to deliver goods, or the like, where no time is specified, is usually a question of fact for the jury to determine,⁴⁰ and depends largely upon the circumstances of the particular case.⁴¹ So, generally but not always, it is a question of fact for the jury to determine whether there has been a sufficient delivery.⁴² The question as to whether there has been an offer and acceptance is one for the jury.⁴³ Where a parol representation was made at the time of the sale, the question as to whether such representation was a statement of fact or simply the expression of an opinion was held to be a question for the jury,⁴⁴ and whether the vendor knew that the article was defective and fraudulently concealed such defect is a question of fact.⁴⁵ The jury should determine whether the evidence is sufficient to show that goods were purchased fraudulently and with an intention not to pay for them,⁴⁶ and the question whether the vendor relied upon the false representation of the vendee is a question for the jury.⁴⁷ So, the question as to whether such representations were false, and therefore a fraud, is a question of fact to be determined by the jury.⁴⁸ To whom credit was extended is a question of fact for the jury,⁴⁹ and where

"Pope v. Terre Haute &c. Co., 107 N. Y. 61, 13 N. E. 592; Boyington v. Sweeney, 77 Wis. 55, 45 N. W. 938; see also, Vol. I, § 571; Robinson v. Brooks, 40 Fed. 525; Berthold v. St. Louis &c. Co., 165 Mo. 280, 65 S. W. 784; Henkle v. Smith, 21 Ill. 238; Rhoades v. Cotton, 90 Me. 453, 38 Atl. 367; Burton v. Griffiths, 11 M. & W. 817.

"Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743.

"Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. 692, and note; Gibbons v. Robinson, 63 Mich. 146, 29 N. W. 533; Litchfield Bank v. Elliott, 83 Minn. 469, 86 N. W. 454. Or a mixed question of law and fact, to be determined by the jury under proper instructions. Greenleaf v. Hamilton, 94 Me. 118, 46 Atl. 798; Goss &c. Co. v. Jordan, 171 Pa. St. 474, 32 Atl. 1031.

"Naested v. Scott, 20 N. Car. 389; Woolbright v. Sneed, 5 Ga. 167.

"Moses v. Katzenberger, 84 Ala.

95, 4 So. 237; Brown v. Freeman, 79 Ala. 406.

"Sides v. Hilleary, 6 Har. & John. (Md.) 86; Schramm v. Boston Sugar Refining Co., 146 Mass. 211, 15 N. E. 571; Bigler v. Flickinger, 55 Pa. St. 279.

"Edson v. Hudson, 83 Mich. 450, 47 N. W. 347; Redpath v. Brown, 71 Mich. 258, 39 N. W. 51; Morae v. Shaw, 124 Mass. 59; Ross v. Miner, 67 Mich. 410, 35 N. W. 60; Gavin v. Armstead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. 262.

"Singer v. Schilling, 74 Wis. 369, 43 N. W. 101; Lee v. Burnham, 82 Wis. 209, 52 N. W. 255. Or whether there is a breach of warranty and whether the purchaser relied on the warranty or waived it. Northwestern Cordage Co. v. Rice, 5 N. Dak. 432, 57 Am. St. 563.

"Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425; King v. Fitch, 2 Abb. Dec. (N. Y.) 508.

"Callam v. Barnes, 44 Mich. 593,

there is a charge upon the books of the seller, this is not conclusive, but the jury is to determine who bought the goods.⁶⁰

§ 2622. **Burden of proof.**—Attention has elsewhere been called to the fact that the term "burden of proof" is used in two different senses, and that, in the opinion of the authors, the true rule is that the burden of proof in the sense of ultimately establishing his cause of action is and remains, without shifting, upon the actor, who is usually the plaintiff, but at various stages it may happen that the burden of introducing or proceeding with evidence, in order to prevent defeat, is upon the defendant, and it is frequently said in general terms that the burden of proving affirmative defenses set up by the defendant is upon him. But we do not understand this to mean that the plaintiff or actor is relieved of the burden of proving or in some way establishing enough to entitle him to recover under all the evidence. What is hereafter said in this section is, therefore, to be taken with this explanation, as the section is devoted mainly to cases in which it has been held that the burden as to certain defenses, in one sense at least, is upon the defendant. Illustrative cases holding the burden of proof to be upon the plaintiff to establish his case will be referred to in the sections on actions by the buyer and seller. The burden of proof is upon the plaintiff seeking to establish a sale.⁶¹ But where a breach of warranty is relied upon, the party relying upon such breach must establish both the warranty and the breach,⁶² and where the defendant attempts to avoid liability upon this ground, the burden has been held to be upon him to show that the articles were not as warranted.⁶³ So, the burden has been held to be upon the defendant to prove that certain articles were not of standard quality or that they were not branded or had never been inspected;⁶⁴ but the burden has been held to be upon the plaintiff to show the violation of a state

7 N. W. 198; *Burkhalter v. Farmer*, 5 Kans. 477; *Spurr v. Coffing*, 44 Conn. 147; *Green v. Ford*, 35 Md. 82; *Ingersoll v. Baker*, 41 Mich. 48, 1 N. W. 907; *Henry C. Hart Mfg. Co. v. Mann's Boudoir Car Co.*, 65 Mich. 564, 32 N. W. 820; *Dousman v. Peters*, 85 Mich. 488, 48 N. W. 697; *Oothaut v. Leahy*, 23 Wis. 114.

⁶⁰ *Leranger v. Foley*, 79 Mich. 244, 44 N. W. 781.

⁶¹ *Ellerbee v. Cleveland*, 93 Ala. 591, 9 So. 619.

⁶² *Tacoma Coal Co. v. Bradley*, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. 890; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. 507; *Raines v. Totman*, 64 How. Pr. (N. Y.) 493; *Buckstaff v. Russell & Co.*, 151 U. S. 526, 14 U. S. 526, 14 Sup. Ct. 448.

⁶³ *Wilcox v. Howard*, 51 Ga. 298.

⁶⁴ *Avera v. Tool*, 74 Ga. 398; *Hewes v. Platts*, 78 Mass. 143.

statute in regard to weights, measures, tagging, sealing, branding or inspection.⁵⁵ In an action to recover the purchase price for goods fraudulently sold, the burden has been held to be upon the defendant setting up such a defense to prove the fraud and the knowledge thereof upon the part of the plaintiff.⁵⁶ But the plaintiff may by way of rebuttal show any proper facts which would show the honesty upon his part and that the defendant accepted the goods or retained them, knowing their exact condition.⁵⁷ It has also been held that where an action is brought to recover damages because of misrepresentations upon the part of the defendant, and such statements are shown to be material, the burden is upon the defendant to show that the buyer did not rely upon them, and that without them the purchase would have been made just the same.⁵⁸ So, where the defendant pleads failure of consideration, in a suit upon a note, because of misrepresentations upon the part of the plaintiff, it has been held that the burden is upon such defendant to show that the representations were false as to a material matter and that he relied upon them.⁵⁹

§ 2623. **Presumptions.**—The presumption, in the absence of anything to the contrary, is that the sale was for cash or cash on delivery,⁶⁰ and that the title was not intended to pass until then.⁶¹ Use and possession of an article of personal property for a long period, with the knowledge of the former owner, has been held to raise the presumption of a sale as against the former owner.⁶² Where there has been a revocation of an order for services or material, in the absence of evidence

⁵⁵ *Goddard v. Rawson*, 130 Mass. Hewes v. Platts, 78 Mass. 143. but see, *Devlin v. Crary*, 60 N. Y. 635.

⁵⁶ *Bartholomew v. Bushnell*, 20 Conn. 271, 52 Am. Dec. 338; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Beninger v. Corwin*, 24 N. J. L. (43ab.) 257; *Caruthers v. Cherry*, (Tex. App.) 16 S. W. 867.

⁵⁷ *Bush v. Bradford*, 15 Ala. 317, holds that where the defendant attempts to show fraud or misrepresentations upon the part of the plaintiff in selling the goods as to quality, age, soundness, etc., it is competent for the plaintiff to repel the presumption of fraud by show-

ing that after the sale he told the defendant of his error in representations, and offered to take back the property, but the defendant preferred to retain the property.

⁵⁸ *Fishback v. Miller*, 15 Nev. 428.

⁵⁹ *Caruthers v. Cherry*, (Tex. App.) 16 S. W. 867.

⁶⁰ *Cleveland v. Pearl*, 53 Vt. 127, 21 Atl. 261, 25 Am. St. 748; *Roberts v. Wilcoxson*, 36 Ark. 355.

⁶¹ *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311; see also brief in, *Tyler Lumber Co. v. Charlton*, 128 Mich. 299, 55 L. R. A. 302; *Roberts v. Wilcoxson*, 36 Ark. 355.

⁶² *Bullard v. Billings*, 2 Vt. 309.

to the contrary, it will be presumed that such revocation was made before acceptance.⁶² The unexplained delivery of personal property to another at his request raises the presumption or inference of a sale rather than a gift,⁶⁴ but the delivery of grain to a warehouseman, who stores grain, will not raise the presumption of a sale, and other evidence must be adduced in order to determine the real character of the transaction.⁶⁵ So, where a custom of handling grain has grown up in a community and has continued for so long as to be well known and to warrant the conclusion that men dealing with the dealer understood the custom, the presumption will then arise that this grain was accepted as other grain.⁶⁶ Where charges have been made upon books the presumption is that the articles were sold to the parties so charged, but this presumption may be rebutted by showing the circumstances of the sale and the purpose for which such an entry was made.⁶⁷ In the absence of fraud or collusion, the price agreed upon in the contract will be presumed to be a fair and reasonable price,⁶⁸ and the presumption in the absence of anything to the contrary is that the contract price is the true value of the goods.⁶⁹ So, where goods are sold and delivered the presumption is that they are as represented and in good condition and working order,⁷⁰ but where the buyer refuses to accept goods because they are not as warranted or of standard quality, the burden has been held to be upon the seller to show the condition of the goods.⁷¹ It has also been held that where the vendee for a long time makes no objection after receiving the goods he will be presumed to have waived

⁶² *Johnson v. Filkington*, 39 Wis. XXI, as to entries in account and shop books.

⁶⁴ *Dant v. State*, 106 Ind. 79, 5 N. E. 370.

⁶⁵ *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107.

⁶⁶ *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107.

⁶⁷ *Walker v. Richards*, 41 N. H. 388; *Packer v. Holt*, 15 N. H. 143; *Champion v. Doty*, 31 Wis. 190, holds that it is not necessary for the plaintiff, in order to rebut the presumption arising from the charging the goods on his books to the account of another, to show that it was caused by mistake or fraud. See also, Vol. I, § 108, and Chapter

⁶⁸ *Fowle v. Raleigh*, 75 N. Car. 273.

⁶⁹ *Aultman v. Morse*, 14 Fed. 152.

⁷⁰ *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 497; *Atkins v. Cobb*, 56 Ga. 86; *Edwards v. Plaquemine Ice &c. Co.*, 46 La. Ann. 360, 15 So. 61.

⁷¹ *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. St. 315, 44 Pac. 544; *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728; *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N. W. 864; *Parker v. Hendrie*, 3 Iowa 263; *Coates & Sons v. Huffine*, 13 Ind. App. 182, 41 N. E. 465.

objection to their quality,⁷² and that where a statement of account has been rendered for goods sold and no objection is made, the account will be presumed correct.⁷³

§ 2624. *Intent.*—The intention of the parties is an important consideration in determining questions in regard to sales or alleged sales. Thus, whether the transaction is an absolute sale or something else, whether complete or executory, and whether the title has passed may all depend very largely if not entirely upon the intention of the parties as expressed or inferred from the contract and circumstances. So, where fraud is claimed, and in other instances hereinafter mentioned, intent is often a matter of importance. The situation of the parties when a contract is made, its subject matter, and the purpose of its execution are material in determining the intention of the parties and the meaning of the terms used.⁷⁴ So, the question as to whether a sale of personal property is complete or only executory is to be determined, ordinarily, from the intent of the parties as gathered from the contract, the nature and situation of the thing sold, and the circumstances surrounding the sale.⁷⁵ And it has been held that the passing of title usually depends on intent, and that actual delivery, weighing and setting apart are not conclusive, but are merely circumstances from which such an intention may be inferred.⁷⁶ Evidence of the general indebtedness of the buyer at the time of the sale is admissible in a proper case on the question of his reasonable expectation of being able to pay the purchase price.⁷⁷ The question as to whether the buyer purchased with intent not to pay may be inquired into by

⁷² *Davis v. Fish*, 1 Greene (Iowa) 406, 48 Am. Dec. 387.

⁷³ *Webb v. Chambers*, 3 Ired. L. (N. Car.) 374.

⁷⁴ *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247.

⁷⁵ *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 767, 45 Am. St. 859; *Morgan v. King*, 28 W. Va. 1, 14, 57 Am. R. 633; *Lingham v. Eggleston*, 27 Mich. 324.

⁷⁶ *Commonwealth v. Hess*, 148 Pa. St. 98, 23 Atl. 977, 33 Am. St. 810; *Winslow v. Leonard*, 24 Pa. St. 14, 62 Am. Dec. 354; see also, *Sumner v. Hamlet*, 12 Pick. (Mass.) 76; *Riddle v. Varnum*, 20 Pick. (Mass.)

280; as to when title passes, see also, *Hetterman v. Powers*, 102 Ky. 133, 43 S. W. 180, 30 Am. St. 348; *Farmers' Phosphate Co. v. Gill*, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767; *Dunn v. State*, 82 Ga. 27, 8 S. C. 806, 3 L. R. A. 199; *Commonwealth v. Hess*, 148 Pa. 98, 23 Atl. 977, 17 L. R. A. 176.

⁷⁷ *Peters v. Hilles*, 48 Md. 506; *Stallcup v. National Park Bank of New York*, 6 N. Y. St. R. 512; *Schufeldt v. Schnitzler*, 21 Hun (N. Y.) 462; *Dobson v. Warner*, 58 Hun (N. Y.) 602, 128 N. Y. 649, 29 N. E. 147, 11 N. Y. S. 760.

the vendor.⁷⁸ The fraudulent intent not to pay may be proved by the vendor either by direct statements shown to be untrue or by circumstances tending to the same result.⁷⁹ Thus, for example, where the vendor attempts to rescind a contract by which credit was extended to the vendee, on the ground of fraud because of insolvency of the debtor, the question of the debtor's intent may be determined by evidence of the financial condition of the debtor, his hopes and reasonable expectations, and the bases of them; and any proper evidence which will throw light upon the bases of his expectations is admissible to show the intent.⁸⁰ So, it has even been held that an intent not to pay may be inferred from the circumstances and conduct of the vendee not only in respect to the sale in question, but also in other contemporaneous transactions.⁸¹ As already stated, evidence of the buyer's insolvency at the time of the purchase may be shown upon the question of the existence of an intent not to pay, and it has been held that a balance sheet made by the buyer, showing the state of his business, also his list for taxation, made shortly before the purchase, are admissible as tending to show his insolvency.⁸² So, it has been held that in an action to replevy goods and rescind the sale because of fraudulent representations, evidence that the vendee overdrew his bank account daily, at or before the purchase, or that he filed a voluntary petition in bankruptcy immediately after the sale, is admissible as tending to show the intent to defraud and that he must have known his financial condition,⁸³ but it has been held that where there is an

⁷⁸ *Skinner v. Flint*, 105 Mass. 528, holds that, the fact that a purchaser's store was closed and empty shortly after a sale, and that proceedings in bankruptcy were begun, and that there were alterations in the books, may be shown to prove that there was an intention not to pay for the goods. *Schmidt v. Schanzlin*, 21 Jones & S. (N. Y.) 498; *Huskins v. Warren*, 115 Mass. 514.

⁷⁹ *Van Kleeck v. Leroy*, 4 Abb. Dec. 479, 4 Abb. Pr. (N. S.) 431; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425; *Loeb v. Flash*, 65 Ala. 526.

⁸⁰ *Stallcup v. National Park Bank of New York*, 6 N. Y. St. R. 512;

Cooper Mfg. Co. v. De Forest, 5 App. Div. (N. Y.) 43, 38 N. Y. S. 1038.

⁸¹ *Miller v. White*, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. 791.

⁸² *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Cincinnati Cooperage Co. v. Gaul*, 170 Pa. St. 545, 32 Atl. 1093; *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283; *Fay v. Grant*, 53 Hun (N. Y.) 44, 126 N. Y. 525, 27 N. E. 410, 5 N. Y. S. 910; *Schufeldt v. Schnitzler*, 21 Hun (N. Y.) 462.

⁸³ *Haskins v. Warren*, 115 Mass. 514; *Whitaker Iron Co. v. Preston Nat. Bank*, 101 Mich. 146, 59 N. W. 395; *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. 283.

attempt to show the buyer a bankrupt, there must also be evidence that there was no change in his financial condition between the date of the bankruptcy and the time of the sale.⁸⁴ Upon the question of the intent not to pay for goods purchased it may also be shown that the buyer purchased on credit and immediately upon their receipt had them delivered to a creditor⁸⁵ as part payment upon another debt; and this evidence of intent not to pay is strengthened where the goods are turned over to the creditor below cost.⁸⁶ Where the vendor attempts to avoid a sale on the ground of fraud or misrepresentations, evidence of third parties who have sold goods to the buyer showing that the buyer knew himself to be insolvent or unable to pay has been held competent in some cases as tending to prove such fraud,⁸⁷ and where an attempt is made to show that a purchaser obtained the goods because of false representations, it has been held that the vendor may show other false representation to other parties about the same time, as tending to show that the goods were obtained through fraud.⁸⁸ Fraudulent acts committed by the buyer may be shown in a proper case to prove intent to defraud.⁸⁹ So, where the seller attempts to prove that the goods were obtained through fraudulent representations, evidence that the goods were bought and received under such circumstances that they could not be sold at a profit or paid for is admissible to prove or as tending to prove fraudulent intent,⁹⁰ and there are many circumstances and actions of the buyer that may be shown as tending to show fraud.⁹¹ The statements of a third party,

⁸⁴ *Hosmer v. Oldham*, 122 Mass. 551.

⁸⁵ *Slagle & Co. v. Goodnow*, 45 Minn. 531, 48 N. W. 402.

⁸⁶ *Loeb v. Flash*, 65 Ala. 526; *Slagle & Co. v. Goodnow*, 45 Minn. 531, 48 N. W. 402.

⁸⁷ *Rowley v. Bigelow*, 29 Mass. 307, 23 Am. Dec. 607; but see, *Wheeler & Wilson Mfg. Co. v. Keeler*, 65 Hun (N. Y.) 508, 20 N. Y. S. 388; *Bradley v. Obear*, 10 N. H. 477; *Peters v. Hilles*, 48 Md. 506.

⁸⁸ *Hawes v. Dingley*, 17 Me. 341; *Schofield v. Shiffer*, 156 Pa. St. 65, 27 Atl. 69; *Bliss v. Sickles*, 142 N. Y. 647, 36 N. E. 1064.

⁸⁹ *Starr v. Stevenson*, 91 Iowa 684,

60 N. W. 217; *Hedges v. Payne*, 63 Hun (N. Y.) 630, 17 N. Y. S. 809.

⁹⁰ *Kline v. Baker*, 106 Mass. 61; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Schmidt v. Schanzlin*, 21 Jones & S. (N. Y.) 498; *Brower v. Goodyer*, 88 Ind. 572; *Higgins v. Lodge*, 68 Md. 229, 11 Atl. 846, 6 Am. St. 437.

⁹¹ *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. 425; *Cole v. Putnam*, 62 N. H. 616; *Whitney Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007; *Starr v. Stevenson*, 91 Iowa 684, 60 N. W. 217; *Hedges v. Payne*, 63 Hun (N. Y.) 630, 17 N. Y. S. 809; *Brower v. Goodyer*, 88 Ind. 572; *Cooper Mfg. Co. v. De*

which are the means by which the credit is obtained, if made without knowledge, authority or consent of the buyer, are not ordinarily admissible as against him to prove fraud.⁹² But the statements of the broker or salesman who procured the sale, falsely recommending the quality of the article, have been held admissible to show that the sale was fraudulently procured.⁹³ Evidence that the goods were as represented, that they were worth all the defendant paid for them, or, in general, any circumstance which will show that such sale was not procured by false representations, may be received,⁹⁴ but it has been held that statements of the seller before the sale may be shown to prove fraud, where the seller denies any knowledge of defectiveness.⁹⁵ And evidence of statements to commercial or mercantile agencies and ratings on their books with the knowledge of the purchaser has been held admissible on the question of intent.⁹⁶

§ 2625. **Price—Consideration.**—When the testimony is conflicting as to the price agreed upon in a sale, it is often proper to show the value of the articles at the time of the sale as tending to show the real contract price,⁹⁷ and the price paid for other orders for the same articles may be competent.⁹⁸ So, where there is no direct evidence of a price agreed upon, a schedule of prices may be used if submitted to the buyer and it can be shown that the buyer bought knowing these prices.⁹⁹ As elsewhere shown, the true consideration of a contract, at least when the contract is not under seal and the consideration is not contractual, may be shown by parol,¹⁰⁰ and this rule has been applied to a bill of sale.¹⁰¹ So, at least as between the parties, failure or want

Forest, 5 App. Div. (N. Y.) 43, 38 N. Y. S. 1038.

⁹² Morris v. Wells, 54 Hun (N. Y.) 634, 7 N. Y. S. 61; Bradley v. Obeare, 10 N. H. 477.

⁹³ Mayer v. Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Hirschberg Optical Co. v. Dalton, Nye & Cannon Co., 7 Utah 433, 27 Pac. 83.

⁹⁴ Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028; Pharo v. Beadleston, 2 Misc. (N. Y.) 424, 19 N. Y. S. 816, 21 N. Y. S. 989.

⁹⁵ Dowling v. Lawrence, 58 Wis. 282, 16 N. W. 552.

⁹⁶ Taylor v. Mississippi Mills, 47 Ark. 247, 1 S. W. 283; Lindauer v. Hay, 61 Iowa 663, 17 N. W. 98; see also, Zucker v. Korpeles, 88 Mich. 413, 50 N. W. 373.

⁹⁷ Fry v. Tilton, 11 Neb. 456, 9 N. W. 638; Miller v. Lamb, 22 Minn. 43.

⁹⁸ Julius King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912.

⁹⁹ Llewellyn Steam Condenser Mfg. Co. v. Malter, 76 Cal. 242, 18 Pac. 271.

¹⁰⁰ See Vol. I, § 582.

¹⁰¹ Eckles v. Carter, 26 Ala. 563.

of consideration may be shown.¹⁰² In an action to recover for the sale for goods, evidence that the goods were worthless is admissible, to prove a failure of consideration.¹⁰³ The mere fact that goods did not come up to expectation, however, or when represented and advertised to be of certain amount, saying nothing of quality, does not prove failure of consideration,¹⁰⁴ but if not of the quality represented, that may be a partial failure of consideration.¹⁰⁵ Where the defendant denies his liability and claims that he bought the goods of another, evidence of indebtedness to the third party for the same article has been held admissible.¹⁰⁶ So, it has been held that where goods are delivered to one party and charged to the account of another, the defendant who received such goods may show what arrangements he had with such person;¹⁰⁷ and that evidence of the defendant's credit at the time of the sale is admissible.¹⁰⁸

§ 2626. **Documentary evidence.**—Where the contract is in writing, the written instrument is, of course, the best evidence of its contents, and the general rules, elsewhere fully treated, as to when and under what circumstances parol evidence is or is not admissible are applicable. Their application to bills of sale is shown in the sections referred to below.¹⁰⁹ The competency or admissibility of shop and account book entries has also been fully treated.¹¹⁰ An invoice is not a bill of sale and cannot be used as evidence of a sale and proof of title when standing alone and unaccompanied with other details of the transaction.¹¹¹ But it may, of course, be relevant and admissible in a proper case at least in connection with other evidence. So, a bill of

¹⁰² See Vol. I, § 582.

¹⁰⁶ Vol. I, §§ 587, 611.

¹⁰³ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Bischof v. Lucas*, 6 Ind. 26; *Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840.

¹⁰⁹ See, Vol. I, Ch. XXI, XXII; see also, *Beebe v. Carter*, 54 Kans. 261, 38 Pac. 278; *Baird v. Hooker*, 8 Ill. App. 306; *Lyon v. Chamberlain*, 41 Mich. 119, 1 N. W. 983; *Quinby v. Carhart*, 133 N. Y. 579, 30 N. E. 972; *Stubbings v. Dockery*, 80 Wis. 618, 50 N. W. 775; *Champion v. Doty*, 31 Wis. 190.

¹⁰⁴ *Wilch v. Phelps*, 16 Neb. 515, 20 N. W. 840.

¹⁰⁵ *Bischof v. Lucas*, 6 Ind. 26.

¹⁰⁶ *Richmond v. Sundberg*, 77 Iowa 255, 42 N. W. 184.

¹⁰⁷ *Bridgman v. Hallberg*, 52 Minn. 376, 54 N. W. 752; *Maher v. Willson*, 50 Hun (N. Y.) 605, 25 N. E. 954; *Woodward v. Remington*, 31 Hun (N. Y.) 160, 30 N. Y. S. 743.

¹⁰⁸ *Moore v. Meacham*, 10 N. Y. 207.

¹¹¹ *Strum v. Baker*, 150 U. S. 312, 14 Sup. Ct. 99; *Dows v. National Exch. Bank*, 91 U. S. 618; see also, *Newcomb v. Boston & C. R. Co.*, 115 Mass. 230; *Shepherd v. Harrison*, L. R. 4 App. Cas. 116.

lading and live stock contract for poultry claimed to have been shipped by the plaintiff to the defendant have been held admissible where there was a controversy as to whether the plaintiff owned and shipped such poultry to the defendant.¹¹² So, too, letters are admissible in a proper case to show the sale of personal property.¹¹³ Where the seller brings suit for the purchase price of chattels, a bill of lading is admissible which states that the property had been bought at a stipulated price, and so are letters between the buyer and seller which show a demand for payment or a request for more time.¹¹⁴ A receipted bill may also be admissible as evidence of a sale.¹¹⁵ So, in general, any written memorandum showing a sale and delivery of the goods and a promise upon the part of the buyer to pay may be received in a proper case to prove or as tending to prove the sale.¹¹⁶ The necessity for a writing in certain cases under the statute of frauds is considered in the first volume of this work in the chapter treating of that statute.

§ 2627. **Parol evidence.**—As between the parties, and except where the statute of frauds applies, a sale or contract of sale may be oral or by words, acts and conduct as well as in writing. So, while it is the rule here, as well as in other cases, that a complete written contract cannot, ordinarily at least, be contradicted or varied by parol evidence,¹¹⁷ yet, as is illustrated in several sections in this chapter, parol evidence may nearly always be admissible as to some matter involved or for some purpose. Thus, it is often admissible to identify the property or the parties, or to show the surrounding circumstances, or even some custom, and there are few cases in which what was done under the contract, such as the time and manner of delivery, payment, character, quality or value of the property, or the like, can be shown in any other way than by parol evidence, for the reason that there is no written evidence. So, in cases of fraud, and in other cases where intention is material and is shown by conduct and extrinsic circumstances, such evidence is usually competent.¹¹⁸ In some cases a bill of

¹¹² *Richmond v. Sundberg*, 77 Iowa 255, 42 N. W. 184.

¹¹³ *Stagg v. Compton*, 81 Ind. 171; *Fremont Cultivator Co. v. McCamy*, 80 Ga. 343, 4 S. E. 849; *Smith v. Colby*, 136 Mass. 562.

¹¹⁴ *Fremont Cultivator Co. v. McCamy*, 80 Ga. 343, 4 S. E. 849; *Wight v. Stiles*, 16 Shep. (Me.) 164.

¹¹⁵ *Barker v. Bushnell*, 75 Ill. 220;

McArthur v. Wilder, 3 Barb. (N. Y.) 66; see, *Reherd's Adm. v. Clem*, 86

Va. 374, 10 S. E. 504.

¹¹⁶ *Cassidy v. Hyland*, 120 Mass. 221; *Smith v. Colby*, 136 Mass. 562; *Barr v. Chandler*, 47 N. J. Eq. 532, 20 Atl. 733.

¹¹⁷ See, Vol. I, Ch. XXVI.

¹¹⁸ See, *Armstrong v. Huffstutler*, 19 Ala. 51; *Loeb v. Flash*, 65 Ala.

sale absolute on its face may be explained, and even in an action by the seller for possession of the property, oral evidence may be introduced to show that it was given for security.¹¹⁹ In some states statutes have been passed which declare that a bill of sale for certain chattels, absolute upon its face, but where the vendor retains possession, shall be interpreted as a chattel mortgage and shall be treated accordingly.¹²⁰ Oral evidence may be introduced in a proper case to show that a transaction, evidenced by a bill of sale, was a mortgage or something different from what the bill of sale purports to be,¹²¹ but it generally requires clear and decisive evidence to show that a bill of sale absolute upon its face was intended for something else.¹²² Declarations of an alleged seller that he has sold certain articles, taken with evidence of a written agreement of sale and the fact that the buyer went into pos-

526; *Turner v. Huggins*, 6 Eng. (Ark.) 337; *Baldwin v. Marsh*, 6 Ind. App. 533, 33 N. E. 973; *Mann v. Taylor*, 78 Iowa 355, 43 N. W. 220; *Rees v. Jackson*, 64 Pa. St. 486, 3 Am. R. 608; *Hedges v. Payne*, 63 Hun (N. Y.) 630, 17 N. Y. S. 809; *Ross v. Miner*, 64 Mich. 204, 31 N. W. 185; *Silberman v. Munroe*, 104 Mich. 352, 62 N. W. 555; *Way v. Ryther*, 165 Mass. 226, 42 N. E. 1128; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Gross v. Drager*, 66 Wis. 150, 28 N. W. 141; *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. 552; *Blake v. Blackley*, 109 N. Car. 257, 13 S. E. 786; *Stearn v. Clifford*, 62 Vt. 92, 18 Atl. 1045; *Miller v. White*, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. 791; see also, for other illustrations in cases of a different character, *Ontario &c. Asso. v. Cutting &c. Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681; *Baird v. Hooker*, 8 Ill. App. 306; *Beebe v. Carter*, 54 Kans. 261, 38 Pac. 278; *Lyon v. Chamberlain*, 41 Mich. 119, 1 N. W. 983; *Montague v. Dougan*, 68 Mich. 98, 35 N. W. 840; *Deranleau v. Jandt*, 37 Neb. 532, 56 N. W. 299; *Foster v. Persch*, 68 N. Y. 400; *Amrhein v. Clausen*,

155 Pa. 93, 25 Atl. 877; *Howe v. Morehouse*, 55 Hun (N. Y.) 606, 130 N. Y. 651, 7 N. Y. S. 938, 29 N. E. 1033; *Pacific Cable Co. v. McNatt*, 2 Wash. St. 216, 27 Pac. 869; *Tidden v. Raab*, 60 Hun (N. Y.) 579, 14 N. Y. S. 556; *Quinby v. Carhart*, 133 N. Y. 579, 30 N. E. 972.

¹¹⁹ *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361, 35 Am. Dec. 126; *McAnnulty v. Seick*, 59 Iowa 586, 13 N. W. 743; *Butts v. Privett*, 36 Kans. 711, 14 Pac. 247; *Pinch v. Willard*, 108 Mich. 204, 66 N. W. 42; *Morgan v. Shinn*, 15 Wall. (U. S.) 105, 21 L. Ed. 87; *Manufacturers' Bank of Milwaukee v. Rugee*, 59 Wis. 221, 18 N. W. 251; see, however, *Harper v. Ross*, 10 Allen (Mass.) 332; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Bend v. Susquehanna Co.*, 6 H. & J. (Md.) 128, 14 Am. Dec. 261.

¹²⁰ *Zumpfe v. Gentry*, 153 Ind. 219, 54 N. E. 805; *McKinney v. Miller*, 19 Mich. 142.

¹²¹ *George v. Norris*, 23 Ark. 121; *Nattin v. Riley*, 54 Ark. 30, 14 S. W. 1100.

¹²² *Trieber v. Andrews*, 31 Ark. 163; *Danforth v. Cleary*, 41 Ill. App. 655.

session, are admissible and generally sufficient to prove a sale.¹²² So, parol evidence is often admissible to show the purpose for which an article was received, and may thus explain whether a transaction was a sale or a bailment, even where a receipt showing a bailment is given,¹²⁴ but it is said that the evidence should be clear.¹²⁵

§ 2628. **Actions by seller.**—The seller sometimes has an election of remedies. Thus, where the property has been obtained by a fraudulent sale, he may sue for the price under the contract,¹²⁶ or, if he acts in time, he may disaffirm the contract and sue in tort,¹²⁷ and in certain cases he has certain rights against the goods and may resell or exercise the right of stoppage in transitu,¹²⁸ or, in some instances, he may maintain replevin. But the most usual remedy is an action for damages for breach of the contract, or an action for the price of the goods. The general rule has been laid down^{129*} that in actions by the seller for damages for breach of contract, "subject to the usual rule of evidence, any fact is admissible in evidence tending to prove or disprove the existence and terms of the contract, performance by the plaintiff in accordance with the terms of the contract of all conditions precedent or concurrent,¹²⁹ or an excuse for non-performance, coupled with an ability and a willingness to perform¹³⁰ and the amount of

¹²² *Bunte v. Wilson*, 8 Colo. App. 136, 45 Pac. 232.

¹²³ *McCabe v. McKinstry*, 5 Dill. (U. S.) 509, 15 Fed. Cas. No. 8667.

¹²⁴ See, *Rodgers v. Crook*, 97 Ala. 722, 12 So. 108.

¹²⁵ *Moller v. Tuska*, 87 N. Y. 166; *Patterson v. Prior*, 18 Ind. 440; *McCullough v. McCullough*, 14 Pa. St. 295.

¹²⁷ *Kline v. Baker*, 99 Mass. 253, 255; *Prentiss v. Russ*, 16 Me. 30; 1 Elliott Gen. Pr., § 300.

¹²⁸ See notes in *Farrell v. Richmond & Co. R. Co.*, 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647; *Fenkhausen v. Fellows*, 20 Neb. 312, 21 Pac. 86, 4 L. R. A. 732; *Kingman & Co. v. Dennison*, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347; *Allen v. Maine & Co. R. Co.*, 79 Me. 327, 9 Atl. 895, 1 Am. St. 312-314.

^{129*} 24 Am. & Eng. Ency. of Law 1117.

¹²⁶ *Kimball v. Deere*, 108 Iowa 676, 77 N. W. 1041; *Penn v. Smith*, 104 Ala. 445, 18 So. 38; *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328, affirming *Kingman & Co. v. Hanna & Co.*, 74 Ill. App. 22; *Schofield v. Conley*, 126 Mich. 712, 86 N. W. 129; *Eppens & Co. v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19.

¹³⁰ *Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433; *Fletcher v. Jacob Dold Packing Co.*, 169 N. Y. 571, 41 App. Div. (N. Y.) 30, 61 N. E. 1129; *Diamond State Iron Co. v. San Antonio & Co. R. Co.*, 11 Tex. Civ. App. 587; *Shore Lumber Co. v. Claney*, 102 Wis. 235, 78 N. W. 451; tender held unnecessary under the circumstances, in *McHenry v. Bullfant*, 207 Pa. St. 15, 56 Atl. 226.

damages suffered,¹⁸¹ involving usually proof of the real market value of the goods,¹⁸² and the contract price for the amount to be delivered."¹⁸³ The burden of proof is generally upon the plaintiff to show performance upon his part in accordance with the terms of the contract,¹⁸⁴ or that he was able and willing to perform.¹⁸⁵ So, the burden is upon the seller suing for the price of goods under what he claims was an absolute sale, to show that fact,¹⁸⁶ and the other facts necessary to constitute his cause of action.¹⁸⁷ And where the statute made it a criminal offense to sell milk containing a less or smaller per cent. of solids or

¹⁸¹ *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845; *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 50 U. S. App. 212, 112 Fed. 239; *Slaughter v. Marlow*, 3 Ariz. 429, 31 Pac. 547; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020.

¹⁸² *Yellow Poplar Lumber Co. v. Chapman*, 20 U. S. App. 503, 74 Fed. 444; *Lawrence Canning Co. v. H. D. Lee Mercantile Co.*, 5 Kans. App. 77; 48 Pac. 749; *Sanders v. Bond*, (Ky.) 66 S. W. 635; *Perlin & Co. v. Boatman*, 89 Mo. App. 43; *Halliday v. Lesh*, 85 Mo. App. 285; *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. (N. Y.) 30; *Deery v. Williams*, 27 App. Div. (N. Y.) 131; *Kelso v. Marshall*, 24 App. Div. (N. Y.) 128; *Jones v. Jennings*, 168 Pa. St. 493, 32 Atl. 51; *Breneman v. Kilgore*, (Tex. Civ. App.) 35 S. W. 202; *T. B. Scott Lumber Co. v. Hafner-Lotham Mfg. Co.*, 91 Wis. 667, 65 N. W. 513; see also, as to manner of proving market value and admissibility of evidence of value, Vol. I, §§ 182, 325; as to opinions of non-experts, Vol. I, § 685; experts, Vol. II, § 1110.

¹⁸³ *Nash v. Classen*, 163 Ill. 409, 45 N. E. 276; *Collins v. Shaw*, 124 Mich. 474; *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. (N. Y.) 30. [Affirmed without report, 169 N. Y. 571.]

¹⁸⁴ *Milliken v. Randall*, 89 Me. 200, 36 Atl. 75; *Richard v. Haebler*, 36 App. Div. (N. Y.) 94; *Eppens & Co. v. Littlejohn*, 164 N. Y. 187, 27 App. Div. (N. Y.) 22; *Duryea v. Rayner*, (Sup. Ct. App. T.) 20 Misc. (N. Y.) 544; *Wright v. Ramp*, 41 Ore. 285, 68 Pac. 731; *Pacific Coast Elevator Co. v. Bravinder*, 14 Wash. St. 315, 44 Pac. 544.

¹⁸⁵ *Sweetser v. Mellick*, 4 Idaho 201, 38 Pac. 403.

¹⁸⁶ *Ampel v. Selfert*, 84 N. Y. S. 122.

¹⁸⁷ *Geiser Mfg. Co. v. Yost*, 90 Minn. 47, 95 N. W. 584; *Rose v. Wells*, 36 App. Div. (N. Y.) 593; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Coates v. Huffine*, 13 Ind. App. 182, 41 N. E. 465; *Holt Live Stock Co. v. Watkins*, 21 Colo. 531, 43 Pac. 121; *Alpert v. Bright*, 74 Conn. 614, 51 Atl. 521; *Collins v. Gage*, 69 Ark. 659, 64 S. W. 878; *Schultz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906; but see, *Dowagiac Mfg. Co. v. Watson*, 90 Minn. 100, 95 N. W. 884; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612, and numerous authorities cited to the effect that the seller need not show acceptance, but is entitled to recover the contract price if he has done such acts as vested the title in the purchaser or would have vested it in him if he had accepted.

milk fat than therein specified, it was held that the burden of proof, in an action to recover for the milk sold, was on the plaintiff to show that the milk had not been watered, and contained the statutory amount of solids, since a delivery for any other kind of milk would fail, as a matter of description, to be a compliance with the contract to sell and deliver milk.¹³⁸ But where the defendants in an action to recover the price of lumber based their defense on the ground that the lumber was accepted by them under an agreement with plaintiff to hold and dispose of it as best they could for his benefit, and not to be paid for until sold by them, it was held that the burden of proof was on the defendants to establish such facts.¹³⁹ And, in one sense, the burden is usually upon the defendant to show any affirmative defense set up by him.¹⁴⁰ So, it has been held that an admission in an action for the price of shoes that a certain amount was due, except as it might be reduced by proof of offsets or settlement, makes proof of delivery of the shoes unnecessary.¹⁴¹

§ 2629. Actions by buyer.—To entitle the buyer to maintain such an action for damages for failure to deliver, the seller must have made default in delivery,¹⁴² and, in a recent case, where the defendant had agreed to deliver to the plaintiff all the tomatoes grown on his land in a certain year, it was held incumbent on the plaintiff to show that tomatoes were so grown that year.¹⁴³ So, the purchaser must have per-

¹³⁸ *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218.

¹³⁹ *Heidelbaugh v. Cranston*, (Del.) 56 Atl. 367.

¹⁴⁰ *Middleton v. Kentucky Lumber Co.*, (Ky.) 66 S. W. 42; *Perkins v. Schneider*, 54 Minn. 368, 56 N. W. 39; *Clement v. Drybread*, 108 Iowa 701, 78 N. W. 235; *Harvey v. Henry*, 108 Iowa 168, 78 N. W. 850; *Morris v. Willaux*, 159 Ill. 627, 43 N. E. 837; *Christian v. Bryant*, 102 Ga. 561, 27 S. E. 666; *May v. Behrends*, (Tex. Civ. App.) 50 S. W. 413; *Ward v. Blake Mfg. Co.*, 5 U. S. App. 538, 56 Fed. 437; *Tacoma Coal Co. v. Bradley*, 2 Wash. St. 600, 27 Pac. 454, 26 Am. St. 890; as to evidence generally in actions for price of goods sold, see, *Lillenthal v. Suffolk*

&c. Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. 234; *Beck &c. Co. v. Houppert*, 104 Ala. 503, 16 So. 522, 53 Am. St. 77; *Boston &c. R. Co. v. Sullivan*, 177 Mass. 230, 58 N. E. 689, 83 Am. St. 277.

¹⁴¹ *Judgment, Danziger v. Pittsfield Shoe Co.*, 107 Ill. App. 47, affirmed, *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534.

¹⁴² *Raisin Fertilizer Co. v. Barrow, Jr., Co.*, 97 Ala. 694, 12 So. 388; *Coffin v. Reynolds*, 21 Minn. 456; *Guild v. Huwer*, 1 Misc. (N. Y.) 432; *Hockersmith v. Hanley*, 29 Ore. 27, 44 Pac. 497.

¹⁴³ *Hartnell v. Baker*, (Del.) 56 Atl. 672; see also, *Eureka Fire Hose Co. v. Reynolds*, 86 N. Y. S. 753.

formed all conditions precedent to his right to a delivery of the property.¹⁴⁴ Thus, where payment of the purchase price is a condition precedent to his right to delivery, he must show a tender of the price,¹⁴⁵ or circumstances excusing a tender.¹⁴⁶ But where payment was not to be made in advance of delivery, the purchaser need not show a tender in order to enable him to recover for non-delivery;¹⁴⁷ yet where payment was to be made on delivery, the purchaser in an action for damages for non-delivery must generally show that he was able, ready and willing to pay,¹⁴⁸ although if the seller notifies him of his inability to deliver them it seems that the buyer need not show that he was able, ready and willing to pay.¹⁴⁹ And it is the general rule that where, under an executory contract, the seller positively notifies the buyer that he will not deliver the goods, or absolutely disables himself from so doing, neither a tender of the price nor proof of the buyer's readiness and willingness to accept and pay for them is necessary to sustain such an action for damages.¹⁵⁰ The buyer may also have an action for a breach of warranty in a proper case, or, when sued for the price, he may give in evidence the breach of warranty in

¹⁴⁴ *Cresswell Ranch & Co. v. Martindale*, 27 U. S. App. 277, 63 Fed. 84; *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266; *Pape v. Ferguson*, 28 Ind. App. 298, 62 N. E. 712; *Stephenson v. Cady*, 117 Mass. 6; *King v. Faist*, 161 Mass. 449, 37 N. E. 456; *Bronson v. Wiman*, 8 N. Y. 182; *Lowry v. Barelli*, 21 Ohio St. 324; *Faber v. Houghman*, 36 Ore. 428, 59 Pac. 547.

¹⁴⁵ *Sivell v. Hogan*, 115 Ga. 667; *Pusey v. McElveen Commission Co.*, 93 Ga. 773, 21 S. E. 150; *Pakas v. Hollingshead*, (N. Y. City Ct. Gen. T.) 60 N. Y. S. 991; *Lawrence v. Everett*, (C. Pl. Gen. T.) 11 N. Y. S. 881.

¹⁴⁶ *Burbank v. Wood*, 3 Jones L. (48 N. Car.) 30; *Clark v. Bache*, 186 Pa. St. 343, 40 Atl. 484; see also, as to what will excuse, *Lieberman v. Isaacs*, 43 Minn. 186, 45 N. W. 8; *Lea v. Ennis*, 6 Houst. (Del.) 433; *Harriss v. Williams*, 3 Jones L. (N. Car.) 483, 67 Am. Dec. 253. Thus,

he need not make a tender of actual cash where the seller has peremptorily refused to deliver "because the price had gone up." *U. B. Blacklock & Co. v. W. D. Clark & Bros.*, 133 N. Car. 306, 45 S. E. 642.

¹⁴⁷ *Crystal Palace Flouring-Mills Co. v. Butterfield*, 15 Colo. App. 246, 61 Pac. 479; *Guilford v. Mason*, 22 R. I. 422.

¹⁴⁸ *Phillips v. Williams*, 39 Ga. 597; *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826; *Beard v. Sloan*, 30 Ind. 279; *Simmons v. Green*, 35 Ohio St. 104; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531.

¹⁴⁹ *Missouri & Coal Co. v. Pomeroy*, 80 Ill. App. 144.

¹⁵⁰ *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Bunge v. Koop*, 48 N. Y. 225; *Follansbee v. Adams*, 86 Ill. 13; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Parker v. Pettit*, 43 N. J. L. 512; see also, *Dingley v. Oler*, 117 U. S. 503, 6 Sup. Ct. 850.

mitigation of damages.¹⁵¹ The question as to when, if at all, a parol warranty may be shown has already been considered,¹⁵² and the authorities cited below, with those elsewhere referred to in this chapter, will furnish sufficient illustrations of the application of the rules of evidence in cases involving an alleged breach of warranty.¹⁵³

¹⁵¹ See, *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. 40; *E. A. Moore Furniture Co. v. W. & J. Sloane*, 166 Ill. 457, 46 N. E. 1128; *Muller v. Eno*, 14 N. Y. 597; *Laporte v. Brock*, 99 Iowa 485, 68 N. W. 810, 61 Am. St. 245; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Bradley v. Rea*, 14 Allen (Mass.) 20; *Ogden v. Beatty*, 137 Pa. St. 197, 20 Atl. 620; *Bouker v. Randlea*, 31 N. J. L. 335; *Walker v. Hoisington*, 43 Vt. 608; *Dayton v. Hoogland*, 39 Ohio St. 675; *Hayden v. Houghton*, (Tex. Civ. App.) 24 S. W. 803; *Street v. Blay*, 2 B. & Ad. 456. Or, in some cases, he may rescind and recover the price paid.

¹⁵² See, Vol. I, §§ 580, 611; see also, *Lake Erie &c. R. R. Co. v. Young*, 135 Ind. 426, 35 N. E. 177, 41 Am. St. 433, 599; *Green v. Batson*, 71 Wis. 54, 36 N. W. 849, 5 Am. St. 197; *Nichols S. & Co. v. Crandall*, 77

Mich. 401, 43 N. W. 974, 6 L. R. A. 412, and *Diebold Safe & L. Co. v. Houston*, 55 Kans. 104, 39 Pac. 1035, 28 L. R. A. 53.

¹⁵³ *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 23 Am. St. 783, and note; *Phillips v. Crosby*, 69 N. J. L. 612, 55 Atl. 814; *Cole v. Laird*, 121 Iowa 146, 96 N. W. 744; *Massillon Engine &c. Co. v. Shirmer*, 122 Iowa 699, 98 N. W. 504; *National &c. Co. v. Iowa &c. Co.*, 108 Ill. App. 95; *Carter v. Dorrough*, 119 Ga. 474, 46 S. E. 658; *Skinner v. E. D. Kerwin &c. Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Kavanaugh v. City of Wausau*, (Wis.) 98 N. W. 550; *Elwood &c. Co. v. Hasting*, 21 Ill. App. 408; *Andrews v. Schreiber*, 93 Fed. 367; *Mack v. Snell*, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 539; *Swayne v. Waldo*, 73 Iowa 749, 33 N. W. 78, 5 Am. St. 712.

CHAPTER CXXII.

SEDUCTION.

Sec.	Sec.
2630. Generally.	2639. Woman's testimony.
2631. Burden of proof.	2640. Promise of marriage.
2632. Presumptions.	2641. Character and reputation.
2633. Questions of law or fact.	2642. Pecuniary standing.
2634. Admissions.	2643. Damages.
2635. Relevant—Circumstances.	2644. Mitigation of damages.
2636. Other evidence for plaintiff.	2645. Aggravation of damages.
2637. Defenses.	2646. Exemplary damages.
2638. Proximate cause.	

§ 2630. **Generally.**—In civil actions for damages for seduction, the action is founded on the theory of loss of service and the plaintiff was originally awarded damages on the theory of only compensating the father for the loss of the child's services as a servant to him, to which might be added the expense, labor and care of her confinement. This, however, has been changed, in most jurisdictions, and the father may recover, not only for loss of services and expenses of nursing, but for all he naturally feels from the nature of such an injury. A father may recover such damages as will compensate him for loss of that comfort and consolation which he had a right to feel in the purity and virtue of his daughter. The jury may take into consideration his loss of hope for his child, his mental anguish for the disgrace of his daughter and his anxiety as to what will become of her in the future. The jury may consider the moral influence of the example of the seduced daughter upon the other children of the family, and the loss of social standing and position of the whole family by reason of the daughter's disgrace. The jury may consider the father's mortification, humiliation and sense of dishonor and all that a father feels from the nature of the loss.¹ The father may maintain

¹ *Barbour v. Stephenson*, 32 Fed. Askey, 8 C. & P. 7, 34 E. C. L. 270; *R. 66*; *Russell v. Chambers*, 31 *Phelin v. Kenderline*, 20 Pa. St. 354; *Minn. 54*, 16 N. W. 458; *Andrews v. Grable v. Margrave*, 4 Ill. 372, 38

an action for the seduction of his minor daughter, although she is not a member of his household, but in the actual employ of another, if he has not relinquished his control of her services,² and the facts that the daughter is a minor and unmarried at the time of the seduction and that the father is entitled to her services and attentions, are held to create a conclusive presumption that the relation of master and servant exists between them.³ The common law rule, that a woman could not maintain an action for seduction in her own name, and that the action could only be maintained when the relation of master and servant existed, has been modified in many states by statute, giving the woman the right to maintain the action in her own name.⁴

§ 2631. *Burden of proof.*—Where the plaintiff brings the suit in her own name, to establish seduction, she must not only show sexual intercourse, but she must also show that the defendant accomplished his purpose by some artifice, or that she was induced to submit to the

Am. Dec. 88; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. R. 793; *Taylor v. Shelkett*, 66 Ind. 297; *Emery v. Gowen*, 4 Me. 33, 16 Am. Dec. 223. *Pecuniary Loss*—*Coon v. Moffitt*, 2 Pen. (N. J.) 169, 4 Am. Dec. 392; *Comer v. Taylor*, 82 Mo. 340, 341; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696. See, for history of the expansion of the action, and for its elements, note in *Bradshaw v. Jones*, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. 659, et seq.

²*Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4; *Boyd v. Byrd*, 8 Blackf. (Ind.) 113; 44 Am. Dec. 740, holds that: "Until the majority of the daughter, the relation of master and servant must be supposed between her father and her, inasmuch as he has the legal right to control her conduct, is bound for her support, and may, at any time, revoke his leave of absence, and retain her

services. *Kennedy v. Shea*, 110 Mass. 147, 14 Am. R. 584; *Blanchard v. Halsey*, 120 Mass. 487, 26 Am. R. 535; *Nickleson v. Stryker*, 10 Johns. (N. Y.) 115, 6 Am. Dec. 318; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. R. 441.

³*Howland v. Howland*, 114 Mass. 517, 19 Am. R. 381; *Hudkins v. Haskins*, 22 W. Va. 645.

⁴*Burns' Revised Statutes of Indiana*, § 264, provides: "Any unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damage as may be assessed in her favor." *Alabama Civil Code* (1886), § 2585; *California Civil Code*, § 374, 375; *Iowa Code*, § 2555; *Miss. Rev. Code*, § 1508; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. R. 232; *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. 144; *Dodd v. Focht*, 72 Iowa 579, 34 N. W. 425; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242, 69 Am. St. 567; *Franklin v. McCorkle*, 16 Lea (Tenn.) 609, 57 Am. R. 244.

act because of the defendant's deception. She must show some deception, false promises, deceit or artifice in order to recover where she voluntarily submits.⁵ If the daughter is of age, and the father brings the suit it must be shown that she resided in her father's family and some slight service must be proved. But any service rendered in the family, or otherwise by her, however slight, will be sufficient for this purpose and will entitle the plaintiff to recover at least nominal damages.⁶ If the daughter is a member of the household, or under age and the father has the control of her services, the father need not show actual loss of services for some service will be presumed.⁷ A father cannot, however, recover for the wrong the daughter has sustained but he must rely upon his actual loss and can only recover for such.⁸

§ 2632. **Presumptions.**—The chastity of the woman is presumed until the contrary is shown, but evidence of her unchaste character, and, in many jurisdictions, of single acts of unchastity before the alleged seduction may be shown in mitigation of damages,⁹ and to destroy or rebut this presumption. The law, it is said, also presumes that there is a loss of social standing after the seduction.¹⁰ So, as already

⁵ *Egan v. Murray*, 80 Iowa 180, 45 N. W. 563; *Baird v. Bochner*, 72 Iowa 318, 33 N. W. 694; *Hawn v. Banghart*, 76 Iowa 683, 39 N. W. 251; *Bailey v. O'Bannon*, 28 Mo. App. 39; *Johnson v. Holliday*, 79 Ind. 151; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Bradshaw v. Jones*, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. 655, and note.

⁶ *Emery v. Gowen*, 4 Me. 33, 16 Am. Dec. 233; *Martin v. Payne*, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Blanchard v. Ilsley*, 120 Mass. 487, 26 Am. R. 535; *Clark v. Fitch*, 2 Wend. (N. Y.) 459, 20 Am. Dec. 659; *Anthony v. Norton*, 60 Kans. 341, 56 Pac. 529, 72 Am. St. 360; *Manly v. Field*, 7 C. B. N. S. 96, 97 E. C. L. 96.

⁷ *Snider v. Newell*, 132 N. C. 614, 39 N. W. 251, 14 Am. St. 261.

44 S. E. 354; *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. 819; *Hudkins v. Haskins*, 22 W. Va. 645; *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4; *Mauder v. Venn*, M. & M. 323, 22 E. C. L. 323; *Evans v. Walton*, L. R. 2 C. P. 615. See also, *Middleton v. Nichols*, 62 N. J. L. 636, 43 Atl. 575; *Blapchard v. Ilsley*, 120 Mass. 487, 21 Am. R. 535.

⁹ *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928; *Comer v. Taylor*, 82 Mo. 341.

¹⁰ Vol. I, §§ 169, 171; *Gunder v. Tibbitts*, 153 Ind. 591, 55 N. E. 762; *Robinson v. Powers*, 129 Ind. 430, 483, 28 N. E. 1112; *Bell v. Rinker*, 29 Ind. 267; *Hodges v. Bales*, 102 Ind. 494, 1 N. E. 692; *Updegraff v. Bennett*, 8 Iowa 72; *Smith v. State*, 118 Ala. 117, 24 So. 55; *Polk v. State*, 40 Ark. 482, 48 Am. R. 17.

shown, there is often a presumption of right to services. It has also been held that there is a presumption that the girl's father is living and that her mother cannot, ordinarily, maintain an action without showing that he is dead.¹¹

§ 2633. **Questions of law or fact.**—Whether the defendant used artifices, deception or the like, and thereby accomplished the alleged seduction, is a question of fact for the jury.¹² So, where the woman's chastity is in issue, this is also a question of fact for the jury.¹³ But there are, of course, cases in which the court may grant a new trial or even direct a verdict where there is no evidence sufficient to sustain a verdict for the plaintiff, or where the evidence is without conflict and reasonable minds could not differ as to the inferences therefrom.¹⁴

§ 2634. **Admissions.**—Admissions of the defendant are usually competent against him, and letters which amount to a conversation between the parties have been held competent for the purpose of showing an admission.¹⁵ Statements of the defendant which admit the paternity of the child are admissible against him.¹⁶ Statements of the plaintiff, however, in regard to conduct with other men, in order to be admissible against her must, it has been held, be limited to a time before the alleged seduction.¹⁷ Admissions of the woman that the father of the child is other than the defendant have been held competent,¹⁸ but they may be rebutted by other statements made to other parties at other times. Where the parent is plaintiff it has been held that he may prove by his seduced daughter that the defend-

¹¹ *Hobson v. Fullerton*, 4 Ill. App. 282. But see *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. R. 431; *Abbott v. Hancock*, 123 N. Car. 99, 31 S. E. 268.

¹² *Hopkins v. Mathias*, 66 Iowa 333, 23 N. W. 732.

¹³ *Dalman v. Konnig*, 54 Mich. 320, 20 N. W. 61.

¹⁴ In a recent case the woman claimed to have been hypnotized and not to have remembered the illicit intercourse until she had again been hypnotized by a third person, but the court held that the evidence was insufficient to sustain

a verdict for the plaintiff. *Austin v. Barker*, 85 N. Y. S. 465.

¹⁵ *Lee v. Cooley*, 13 Ore. 433, 11 Pac. 70; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

¹⁶ *Palmby v. McCleary*, 12 Ont. 192; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242, 69 Am. St. 567.

¹⁷ *Clifton v. Granger*, 86 Iowa 573, 53 N. W. 316. But this can not in all cases be true as to admission of the plaintiff at least in regard to the particular act in issue.

¹⁸ *Graham v. McReynolds*, 6 Pickle (Tenn.) 673, 18 S. W. 272.

ant admitted the sexual intercourse and proposed to her to procure an abortion, and that the physician may be used to show that the defendant consulted him as to the best way of destroying the child,¹⁹ but he should be allowed on redirect examination to explain his admission.²⁰

§ 2635. **Relevant circumstances.**—The courts are very liberal in admitting evidence to show the relation and conduct of the parties and all the circumstances surrounding the relationship and intimacy of the parties,²¹ both before and after the alleged seduction; and such evidence may be introduced as a defense or in mitigation of damages.²² Evidence of defendant's conduct toward the woman prior to the alleged seduction is admissible in corroboration, and frequent visits, familiarities and other similar incidents may be shown.²³ Evidence that the defendant was familiar with the plaintiff may be shown by proof of kissing and hugging her, and these familiarities may be shown in a proper case, whether they were innocent or not.²⁴ The fact that the victim was feeble-minded might reduce the necessity for strict proof of the act itself.²⁵ Evidence of the circumstances surrounding the act will be admitted, as that the girl took poison at the instance of the defendant,²⁶ or that the defendant procured or ad-

¹⁹ *Badder v. Keefer*, 91 Mich. 611, 52 N. W. 60; also *Badder v. Keefer*, 100 Mich. 272, 58 N. W. 1007; *Fox v. Stevens*, 13 Minn. 272.

²⁰ *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736.

²¹ *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451; *Hatch v. Fuller*, 131 Mass. 574; *Lee v. Colley*, 13 Ore. 433, 11 Pac. 70; *Sherwood v. Titman*, 55 Pa. St. 77; *Thompson v. Clendenen*, 1 Head (Tenn.) 287; *Delvee v. Boardman*, 20 Iowa 446; *Brown v. Kingsley*, 38 Iowa 220; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768; *Watson v. Watson*, 58 Mich. 507, 25 N. W. 497; *Egan v. Murray*, 80 Iowa 180, 45 N. W. 563.

²² *Kennedy v. Shea*, 110 Mass. 147, 14 Am. R. 584; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768; *Wilson v. Shepler*, 86 Ind. 275; *Johnson v. Holliday*, 79 Ind. 151; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686.

²³ *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Lockwood v. Betts*, 8 Conn. 130; *Gelse v. Schultz*, 69 Wis. 521, 34 N. W. 913; *Baird v. Boehner*, 77 Iowa 622, 42 N. W. 454.

²⁴ *Watson v. Watson*, 58 Mich. 507, 25 N. W. 497.

²⁵ *Delvee v. Boardman*, 20 Iowa 446.

²⁶ *Gray v. Durland*, 50 Barb. (N. Y.) 100; *Lawyer v. Fritcher*, 54 Hun (N. Y.) 586, 7 N. Y. S. 909.

vised an abortion.²⁷ And, in general, the relation of the parties may be entered into fully.²⁸

§ 2636. **Other evidence for plaintiff.**—Evidence of the exact time when the plaintiff became pregnant is admissible in her behalf.²⁹ Also evidence which shows that the defendant committed or attempted to have an abortion committed upon the plaintiff is admissible,³⁰ although it has been held that the defendant cannot be asked on cross-examination if he did not commit an abortion.³¹ Even where others testify to having criminal intercourse with the woman, yet if the jury are satisfied that the defendant seduced her and is the father of the child, they must find for the plaintiff, but of course these facts might reduce the damages.³² Threats of defendant to dismiss the female from his service unless she gratified him have been held admissible in evidence.³³ The plaintiff has also been permitted to show the flight of the defendant when charged with the act.³⁴ So, continued visits and attentions to a female for several months, followed by improper intercourse, is sufficient evidence to warrant the inference of seduction.³⁵

§ 2637. **Defenses.**—Evidence of connivance upon the part of the father in an action by him is admissible as a defense.³⁶ Where the woman is plaintiff, evidence of her prior unchaste character is admissible.³⁷ Where, however, the father brings the action it is held that

²⁷ *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Badder v. Keefer*, 91 Mich. 611, 52 N. W. 60; *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23; *Hewitt v. Prime*, 21 Wend. (N. Y.) 79.

²⁸ *Conway v. Nicol*, 34 Iowa 533; *Thompson v. Clendening*, 1 Head (Tenn.) 287.

²⁹ *Baird v. Boehner*, 77 Iowa 622, 42 N. W. 454.

³⁰ *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23.

³¹ *Badder v. Keefer*, 91 Mich. 611, 52 N. W. 60.

³² *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100.

³³ *Brown v. Kingsley*, 38 Iowa 220.

³⁴ *Parker v. Monteith*, 7 Ore. 277. But not when a long time after-

ward. *Hopkins v. Mathias*, 66 Iowa 333, 23 N. W. 732.

³⁵ *Clark v. Fitch*, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768.

³⁶ *Vossell v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Parker v. Elliott*, 6 Munf. (Va.) 587; *Reddie v. Scoolt*, Peake N. P. 316; *Zerfing v. Mourer*, 2 Greene (Iowa) 520. The careless indifference of a father in respect to his daughter goes in mitigation of damages. But actual consent and connivance is usually an absolute bar to his action.

³⁷ *Wilson v. Ensworth*, 85 Ind. 399; *Haymond v. Saucer*, 84 Ind. 3;

evidence is not admissible which shows that the woman was willingly seduced³⁸ or was unchaste³⁹ or that the defendant has since married the seduced woman.⁴⁰ Evidence which shows that the woman, without being deceived, and without any false promises, deceit or artifice, voluntarily submitted to the connection, is admissible as a defense to an action by her.⁴¹ So, where the father sues, evidence that the father had no right to her services and that there was no loss of services is admissible on behalf of the defendant, but in an action by a father to recover for loss of service by the abduction and seduction of his daughter it was held no defense that he had apparently consented to dispense with her services where such consent was obtained by fraud and misrepresentation.⁴² So, although there is some conflict among the authorities, it is held that evidence that the intercourse complained of was accomplished by force, although it might constitute rape, is not a defense to an action, by the father, at least, for loss of services.⁴³

§ 2638. **Proximate cause.**—Proof of slight service is sufficient, but the injury to the parent or master must be shown to be the direct and proximate result of the seduction. Evidence of loss of health caused by mental suffering, which is not the consequence of the seduction, but which is produced by later agencies, such as shame, has been held too remote to be admitted.⁴⁴ But where it naturally results from the act

West v. Druff, 55 Iowa 335, 7 N. W. 636; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671. This rule is modified in many instances, and where an unchaste woman has reformed and the offense amounts to a new seduction, then the prior unchastity is not a defense. *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Zitzer v. Merkel*, 24 Pa. St. 408; *Updegraff v. Bennett*, 8 Iowa 72.

³⁸ *Harrison v. Price*, 22 Ind. 165; *Bartlett v. Kochel*, 88 Ind. 425; *Smith v. Milburn*, 17 Iowa 30; *Barbour v. Stephenson*, 32 Fed. 66, affirmed in 140 U. S. 48.

³⁹ *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4; *Wallace v. Clark*, 2 Overt. (Tenn.) 93, 5 Am. Dec. 654.

⁴⁰ *Dowling v. Crapo*, 65 Ind. 209;

Eichar v. Kistler, 14 Pa. St. 282, 53 Am. Dec. 551.

⁴¹ *Egan v. Murray*, 80 Iowa 180, 45 N. W. 563; *Hawn v. Banghart*, 76 Iowa 683, 39 N. W. 251; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696.

⁴² *Lawyer v. Fritcher*, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. 521.

⁴³ *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. E. 79; *De Haven v. Helvie*, 126 Ind. 82, 25 N. E. 874; *Kennedy v. Shea*, 110 Mass. 147, 14 Am. R. 584; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768; *Barbour v. Stephenson*, 32 Fed. 66.

⁴⁴ *Knight v. Wilcox*, 14 N. Y. 413;

complained of it would seem to be a proper matter to be considered by the jury.⁴⁵

§ 2639. **Woman's testimony.**—When the father brings the action the alleged seduced woman is a competent witness,⁴⁶ and she may be in many jurisdictions where she brings the action herself, but the defense may take advantage of her contradictory statements made upon former occasions.⁴⁷ And the jury, in order to determine her credibility, may consider her relation to the defendant, his influence over her, conflicting statements as to the paternity of the child, and the age and general physical condition of the defendant at the time of the alleged seduction.⁴⁸ When the father of the seduced daughter has brought the suit, and the question of the chastity of the daughter is at issue, it has been held that she cannot be required to testify as to acts of unchastity with others, as this would tend to criminate herself.⁴⁹ In an action by a parent, the child may testify to the promises made by the defendant during the continuance of his guilty visits.⁵⁰

§ 2640. **Promise of marriage.**—In an action for the seduction of the plaintiff's daughter, in many jurisdictions, evidence of a promise of marriage is inadmissible,⁵¹ but in others it is held competent.⁵² So, in an action where the woman seduced is plaintiff, it is competent to show that she yielded to defendant's solicitations under promise of marriage.⁵³ It has been held, however, that a promise to marry the

Abrahams v. Kidney, 104 Mass. 222, 6 Am. R. 220.

⁴⁵ See *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Gemmell v. Brown*, 25 Ind. App. 6, 56 N. E. 691.

⁴⁶ *Duncan v. Welty*, 20 Ind. 44.

⁴⁷ *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273. *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736, holds that where the woman testifies that the defendant took her riding several times, and names a certain man as an eye witness of the rides, such witness should be allowed to contradict the statement.

⁴⁸ *Duncan v. Welty*, 20 Ind. 44; *Fox v. Stevens*, 13 Minn. 272.

⁴⁹ *Reed v. Williams*, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157.

⁵⁰ *Fox v. Stevens*, 13 Minn. 272.

⁵¹ *Comer v. Taylor*, 82 Mo. 341; *Gillet v. Mead*, 7 Wend. (N. Y.) 193, 22 Am. Dec. 578; *Foster v. Scofield*, 1 Johns. (N. Y.) 297; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Kip v. Berdan*, 20 Spen. (N. J.) 239; *Davidson v. Goodall*, 19 N. H. 423; *Dodd v. Norris*, 3 Campb. 519.

⁵² *Odell v. Stephens*, 12 Ind. 384; *Stevenson v. Belknap*, 6 Iowa 97, 71 Am. Dec. 392; *Phelin v. Kenderdine*, 20 Pa. St. 354; *Keplinger v. Sherrick*, Wright (Ohio) 103.

⁵³ *Badder v. Keefer*, 91 Mich. 611, 52 N. W. 60; *Lee v. Hefley*, 21 Ind. 98; *Franklin v. McCorkle*, 84 Tenn. (16 Lea) 609, 97 Am. R. 244; *Hawk v. Harris*, 112 Iowa 543, 84 N. W. 664.

woman if pregnancy results from the intercourse does not make it a case of criminal seduction.⁵⁴

§ 2641. **Character and reputation.**—In an action for seduction it is not necessary for it to appear that the female was of previous good repute for chastity, and it does not follow that a single or even repeated acts of prior illicit intercourse will defeat a prosecution for criminal seduction.⁵⁵ But unchaste character and prior familiarity upon the part of the female with other men about the same time may be shown to lessen damages.⁵⁶ It has been held, however, that the general character of the woman cannot be attacked, as the question is as to her character for chastity⁵⁷ and that this cannot be shown by her reputation among a particular class of people.⁵⁸ It has been held that specific acts of intercourse with other men may be shown even if these acts were not known to the public and in no way prejudiced her reputation.⁵⁹ The defense will not, however, be permitted to require the plaintiff to testify concerning her intercourse with certain men,⁶⁰ but she may be impeached by proving statements by her as to her intercourse with other men.⁶¹ And the plaintiff, cannot, ordinarily, introduce evi-

⁵⁴ *People v. Smith*, 132 Mich. 58, 92 (Tenn.) 485, 5 Am. Dec. 654; *Herring v. Jester*, 2 Houst. (Del.) 66. But see *People v. De Fore*, 64 Mich. 699, 31 N. W. 585, 8 Am. St. 863.

⁵⁵ *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Patterson v. Hayden*, 17 Ore. 238, 21 Pac. 129, 11 Am. St. 822; *Watson v. Watson*, 53 Mich. 168, 18 N. W. 605, 51 Am. R. 111; *Robinson v. Powers*, 129 Ind. 480, 28 N. E. 1112, holds that where a woman of previous unchaste character may reform, and afterward be seduced, and recover such damages as she may have sustained if she in fact reformed and was afterward seduced. See also, note in *Bradshaw v. Jones*, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. 664-669.

⁵⁶ *Mott v. Goddard*, 1 Root (Conn.) 472; *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736. Cases cited in last note, supra, and in Vol. I, §§ 169, 171, 1716.

⁵⁷ *Wallace v. Clark*, 2 Overt.

⁵⁸ *Drish v. Davenport*, 2 Stew. (Ala.) 266; *Hawn v. Banghart*, 76 Iowa 683, 39 N. W. 251.

⁵⁹ *Love v. Masoner*, 6 Baxt. (Tenn.) 24, 32 Am. R. 522. See *Lea v. Henderson*, 1 Coldw. (Tenn.) 146.

⁶⁰ *Smith v. Yaryan*, 69 Ind. 445, 35 Am. R. 232; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236; *Hoffman v. Kemmerer*, 44 Pa. St. 452; *Doyle v. Jessup*, 29 Ill. 460; *Vaughn v. Perrine*, 3 N. J. L. 299, 4 Am. Dec. 411.

⁶¹ *Dalman v. Koning*, 54 Mich. 320, 20 N. W. 61. Where the woman is the plaintiff she may be cross-examined concerning her intercourse with other men in order to establish the paternity of the child. *Smith v. Yaryan*, 69 Ind. 445, 35 Am. R. 232.

dence as to her good reputation until after it has been attacked.⁶² The previous unchastity of the female, as already indicated, may be shown in mitigation of damages,⁶³ but evidence of the woman's general character or her unchastity after the seduction is not admissible.⁶⁴ When the plaintiff's chastity is at issue, it has also been held that conversations which took place before the alleged seduction and tend to show her unchaste character may be shown by the defendant.⁶⁵ Evidence of particular instances of lascivious conduct has also been held competent.⁶⁶ As the injury which the father sustains depends largely upon the previous character of the daughter for chastity, the defendant may show in mitigation of damages that she did not have a good character for chastity before the defendant's intercourse with her. Thus it has been held that the defendant may show that the daughter was notoriously unchaste prior to his intercourse, and that she was such a disgrace to her family that no pain or disgrace was added by the defendant's act.⁶⁷ Evidence of the character of other members of the family is not, ordinarily, admissible in mitigation of damages,⁶⁸ and this has been held as to the father where he brings the action.⁶⁹ But the contrary has also been held.⁷⁰ The defendant cannot show his good

⁶² *Zitzer v. Merkel*, 24 Pa. St. 408; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273; *Wilson v. Sproul*, 3 Pen. & W. (Pa.) 49; *Haynes v. Sinclair*, 23 Vt. 108.

⁶³ *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736; *Reed v. Williams*, 37 Tenn. 580, 73 Am. Dec. 157; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Smith v. Milburn*, 17 Iowa 30; *Bell v. Rinker*, 29 Ind. 267; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100.

⁶⁴ *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *Thompson v. Clendenning*, 1 Head (Tenn.) 287; *McKern v. Calvert*, 59 Mo. 243; *Ayer v. Colgrove*, 81 Hun (N. Y.) 322, 30 N. Y. S. 788.

⁶⁵ *West v. Druff*, 55 Iowa 335, 7 N. W. 636.

⁶⁶ *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273; Vol. I, §§ 171, 176.

⁶⁷ *Reed v. Williams*, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Hoffman v. Kemmerer*, 44 Pa. St. 452; *West v. Druff*, 55 Iowa 335, 7 N. W. 636; *Carder v. Forehand*, 1 Mo. 704, 14 Am. Dec. 317.

⁶⁸ *Thompson v. Clendenning*, 1 Head (Tenn.) 287; *Lewis v. State*, 89 Ga. 396, 15 S. E. 489.

⁶⁹ *Dain v. Wyckoff*, 18 N. Y. 45, 72 Am. Dec. 493.

⁷⁰ See Vol. I, § 169, n. 152; *Robinson v. Burton*, 5 Har. (Del.) 335; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9.

character where there has been no attempt to impeach it.⁷¹ Some cases, however, hold that he may show his reputation for chastity.⁷²

§ 2642. **Pecuniary standing.**—The defendant's condition as to property may be inquired into with a view toward assessing damages.⁷³ Thus in an action by a father the jury is free to award exemplary or punitive damages and the defendant's financial condition may be shown.⁷⁴ But in an action by a woman for her own seduction, evidence of her financial condition has been held inadmissible.⁷⁵ In other cases, however, evidence of the financial and social standing of the plaintiff has been held competent.⁷⁶

§ 2643. **Damages.**—Where the father brings an action to recover damages for the seduction of his child, the jury may consider, not only the loss of service which the parent sustained, the expense incurred because of the seduction, pregnancy and giving birth to the child, but the anxiety, suffering of mind and humiliation caused him by the disgrace attending such seduction and loss of virtue of the daughter,⁷⁷ and some courts hold that the corrupting influence upon the morals of his other children and the disgrace of the family may

⁷¹ *Watson v. Watson*, 53 Mich. 163, 18 N. W. 605, 51 Am. R. 111; *Delvee v. Boardman*, 20 Iowa 446; *Zitzer v. Merkel*, 12 Pa. 408. See also *Herring v. Jester*, 2 Houst. (Del.) 66; *McKern v. Calvert*, 59 Mo. 243.

⁷² *Hein v. Holdridge*, 78 Minn. 468, 81 N. W. 522; *Schuek v. Hagar*, 24 Minn. 339. The court, however, concedes that this is contrary to the weight of authority.

⁷³ *Gemmill v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Wilson v. Shepler*, 86 Ind. 275; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8; *Robinson v. Burton*, 5 Har. (Del.) 335; *Herring v. Jester*, 2 Houst. (Del.) 66; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806; *Clem v. Holmes*, 33 Gratt.

(Va.) 722, 36 Am. R. 793. But see *Hodsoll v. Taylor*, L. R. 9 Q. B. 79; *Dain v. Wycoff*, 7 N. Y. 191; *Watson v. Watson*, 53 Mich. 163, 18 N. E. 605, 51 Am. R. 111.

⁷⁴ *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768.

⁷⁵ *West v. Druff*, 55 Iowa 335, 7 N. W. 636.

⁷⁶ *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Grable v. Margrave*, 4 Ill. 373, 38 Am. Dec. 88; *Parker v. Monteith*, 7 Oreg. 277.

⁷⁷ *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266; *Wilds v. Bogan*, 57 Ind. 453; *Emery v. Gowen*, 4 Me. 33, 16 Am. Dec. 223; *Hatch v. Fuller*, 131 Mass. 574; *Taylor v. Shelkett*, 66 Ind. 297; *Leucker v. Stelleu*, 89 Ill. 545, 31 Am. R. 104; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Clem v. Holmes*, 33 Gratt. (Va.) 722, 36 Am. R. 793.

be taken into consideration by the jury.⁷⁸ Evidence is generally admissible which shows the circumstances, the relation and conduct of the parties with each other both before and after the alleged seduction either in mitigation or aggravation of damages.⁷⁹ It is often necessary, in order that the jury may be able to fix the damages with fairness, that evidence be presented which will give the jury a knowledge of the situation and circumstances of the parties.⁸⁰ The question of damages is one which is left almost entirely with the jury and the courts are liberal in allowing evidence which will aid the jury.⁸¹ Evidence which tends to show that pregnancy or venereal disease is a result of the seduction is generally admissible on the question of damages. So evidence of loss of health is often admissible as being the natural, probable and direct consequence of the defendant's act. And this is true even if no pregnancy or sexual disease followed the act, for it is held that shame, humiliation and mental distress will materially affect her capacity for faithful service, even if there be no fear of exposure or abandonment.⁸² The jury may take into consideration, when the action for damages for seduction is brought by the woman, the loss of time by plaintiff, expenses incurred by her because of confinement, board and lodging while sick, physical suffering, mental anguish, loss of social standing in the community, injury to character and shame caused by the seduction.⁸³

⁷⁸ *Barbour v. Stephenson*, 32 Fed. 66; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768. See also, *Felkner v. Scarlet*, 29 Ind. 154. But compare *Comer v. Taylor*, 82 Mo. 341.

⁷⁹ *Lavery v. Crooke*, 52 Wis. 612, 38 Am. R. 768; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Wilson v. Shepler*, 86 Ind. 275; *Ayer v. Colgrove*, 81 Hun (N. Y.) 322, 30 N. Y. S. 788.

⁸⁰ *Wilson v. Shepler*, 86 Ind. 275; *Johnson v. Holliday*, 79 Ind. 151; *Robinson v. Burton*, 5 Har. (Del.) 335.

⁸¹ *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928; *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762.

⁸² *Blagge v. Ilsley*, 127 Mass. 191, 34 Am. R. 361; *Abrahams v. Kidney*, 104 Mass. 222, 6 Am. R. 220; *White v. Nellis*, 31 Barb. (N. Y.) 279, 31 N. Y. 405, 88 Am. Dec. 282; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458.

⁸³ *Gray v. Bean*, 27 Iowa 221; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100; *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451; *Hawn v. Banghart*, 76 Iowa 683, 39 N. W. 251; *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *Egan v. Murray*, 80 Iowa 180, 45 N. W. 563; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458.

§ 2644. **Mitigation of damages.**—In an action for seduction, the defendant will not be allowed to show in mitigation of damages that he offered to marry the seduced girl,⁸⁴ but where the parent is plaintiff the defendant may show any conduct upon his part amounting to negligence, even if not to assent or connivance, in mitigation of damages.⁸⁵ Other illustrations of evidence in mitigation of damages, such as previous unchastity and the like, have already been given. The action of the father, however, is independent of the daughter's action, and a former recovery by the daughter cannot be used in action by the father to reduce the damages.⁸⁶

§ 2645. **Aggravation of damages.**—Evidence of the relationship between the parties, the situation of the family and the injury to feelings, is usually admissible.⁸⁷ So it has also been held that circumstances which are the natural consequence of the principal act may be shown in aggravation of damages, although they did not happen until after suit was brought.⁸⁸ Evidence of the conduct of the defendant subsequent to the alleged seduction, in seeking to continue his illicit relation with the female, is admissible to prove the charge of seduction or in aggravation of damages.⁸⁹ Evidence of his acts, persuasions and promises may also be admissible in order to show the guilty motive and aggravate the damages.⁹⁰ Evidence that the defendant procured an abortion on the woman may be considered in aggravation of damages,⁹¹ and it is sometimes held that the plaintiff may prove in aggravation that the seduction was accomplished by a promise to marry,⁹²

⁸⁴ *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100. ⁸⁵ *Y.* 79. See also, *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

⁸⁶ *Travis v. Barger*, 24 Barb. (N. Y.) 614; *Zerfing v. Mourer*, 2 Gr. (Iowa) 520; *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696; *Richardson v. Fouts*, 11 Ind. 466.

⁸⁷ *Pruitt v. Cox*, 21 Ind. 15; *Brown v. Kingsley*, 38 Iowa 220; *Klopfer v. Bromme*, 26 Wis. 373; *Lipe v. Eisenlerd*, 32 N. Y. 229.

⁸⁸ *Wilson v. Shepler*, 86 Ind. 275; *Wilson v. Sproul*, 3 P. & W. (Pa.) 49; *Thompson v. Clendening*, 38 Tenn. 287.

⁸⁹ *Hewitt v. Prime*, 21 Wend. (N.

⁹⁰ *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458.

⁹¹ *Stevenson v. Belknap*, 6 Clarke (Iowa) 97, 71 Am. Dec. 392. *Brown v. Kingsley*, 38 Iowa 220, holds that threats of the defendant to dismiss the plaintiff from his employ may be shown to show the seduction. *Egan v. Murray*, 80 Iowa 180, 45 N. W. 563; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273.

⁹² *Klopfer v. Bromme*, 26 Wis. 372; *White v. Murtland*, 71 Ill. 250, 22 Am. R. 100.

⁹³ *Whalen v. Layman*, 2 Blackf.

that the defendant made wanton charges of unchastity⁸³ or gave great publicity to the wrong.⁸⁴

§ 2646. **Exemplary damages.**—Exemplary damages may also be recovered in actions for seduction and this matter is left largely within the discretion of the jury.⁸⁵ The circumstances in evidence surrounding the seduction are proper to be considered to aid the jury in fixing the amount,⁸⁶ and the jury may, generally, assess such damages based upon the facts as will not only compensate the plaintiff for the wrong but will punish the defendant or be an example for others.⁸⁷

(Ind.) 194, 18 Am. Dec. 157; *Burks v. Shain*, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; *Klopfer v. Bromme*, 26 Wis. 372. But see *Clark v. Fitch*, 2 Wend. (N. Y.) 459, 20 Am. Dec. 659; *Stevenson v. Belknap*, 6 Clarke (Iowa) 97, 71 Am. Dec. 392; *Mains v. Cosner*, 62 Ill. 465.

⁸³ *Haymond v. Saucer*, 84 Ind. 3; *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

⁸⁴ *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451.

⁸⁵ *Hogan v. Cregan*, 29 N. Y. Super. Ct. 138; *Ingersoll v. Jones*, 5 Barb. (N. Y.) 661; *Tullidge v. Wade*, 3 Wils. 18, holds that although the

plaintiff's loss may not be twenty shillings, yet the jury may give liberal damages as an example for the defendant and others.

⁸⁶ *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. R. 768; *Davidson v. Abbott*, 52 Vt. 570, 36 Am. R. 767; *Conway v. Nicol*, 34 Iowa 533; *Morgan v. Ross*, 74 Mo. 318; *Kendrick v. McCrary*, 11 Ga. 603; *Baird v. Boehner*, 77 Iowa 622, 42 N. W. 454; *Taylor v. Shelkett*, 66 Ind. 297; *Simons v. Busby*, 119 Ind. 13, 21 N. W. 451.

⁸⁷ *Knight v. Wilcox*, 18 Barb. (N. Y.) 212; *Badgley v. Decker*, 44 Barb. (N. Y.) 577.

CHAPTER CXXIII.

TRESPASS.

Sec.	Sec.
2647. Generally.	2654. Evidence under the general issue.
2648. Burden of proof.	2655. <i>Liberum tenementum</i> .
2649. Gist of the action—What plaintiff must prove.	2656. Justification of trespass.
2650. Possession.	2657. Written instruments and recitals.
2651. Possession—Evidence of.	2658. Declarations and admissions.
2652. Title.	2659. Aggravation of damages.
2653. Evidence generally — Relevancy.	2660. Mitigation of damages.

§ 2647. **Generally.**—The action of trespass has been defined as a form of action which lies to recover damages for an injury sustained by the plaintiff as the immediate consequence of some wrong done forcibly to his person or property.¹ The nature of the action is more fully stated in a modern text-book on common law pleading as follows: "The action of trespass lies for the recovery of the damages for an injury to the person, property or relative rights of another: (a) Where the injury was committed with force, actual or implied. (b) Where the injury was immediate, and not merely consequential. (c) In case of injury to property, where the property was in the actual or constructive possession of the plaintiff at the time of the injury."² The distinction between trespass and trespass on the case was explained in the chapter on "Case," and the definition and general statement of the nature of the action of trespass in this section will serve the present purpose. It may be well to note, however, that, although force directly or immediately, rather than indirectly and consequentially, resulting in the injury complained of, is a distinguishing feature of trespass, yet the force may be implied in some instances where there is no actual force.³ So, the degree of force used is generally immaterial so far as

¹ 2 Bouv. Law Dict. (Rawles Ed.) 1138.

² Shipman's Com. L. Pl. (2d ed.) 50.

³ See *Daniels v. Pond*, 21 Pick. (Mass.) 367; *Wells v. Howell*, 19

Johns. (N. Y.) 385; *Jordan v. Wyatt*, 4 Gratt. (Va.) 151; *Green*

the mere right to maintain the action therefor is concerned,⁴ although it may, of course, have an important bearing upon the question of damages. Actions for injuries to the person have already been sufficiently considered in the chapter on assault and battery and in other chapters, and this chapter, therefore, will be confined mainly to actions for injury to property, and particular attention will be given to trespass *quare clausum fregit*, or trespass to lands or real property.

§ 2648. **Burden of proof.**—The burden is generally upon the plaintiff to prove all the facts essential to his cause of action, so far, at least, as they are put in issue by the pleadings.⁵ But the burden, in one sense at least, of proving justification is upon the defendant.⁶ And it has been said⁷ that “it may be stated that it rests on him who persists in remaining on land, or in possession wrongfully;”⁸ where each is claiming the property by pleadings, the burden is on the plaintiff,⁹ unless the plaintiff is in possession of the property in which case the burden falls on the defendant.¹⁰

§ 2649. **Gist of the action—What plaintiff must prove.**—The gist of the action is the injury done to the plaintiff’s possession.¹¹ The sub-

v. Goddard, 2 Salk. 641; Emmett v. Lyne, 1 Bos. & P. (N. R.) 255; Chamberlain v. Hazelwood, 5 Mees & W. 515; Weedon v. Timbrell, 5 Term R. 357.

⁴ State v. Armfield, 5 Ired. L. (N. Car.) 207; Harvey v. Brydges, 14 M. & W. 437.

⁵ See Robinson v. White, 42 Me. 209; Downer v. Tarbell, 61 Vt. 530, 17 Atl. 482; Pennington v. Lewis, (Del.) 56 Atl. 378; Clay v. Boyer, 10 Ill. 506; Carter v. Simpson, 7 Johns. (N. Y.) 535; Willis v. Hudson, 72 Tex. 598, 10 S. W. 713.

⁶ See section on justification, *infra*. See also, Campbell v. King, 32 Mo. App. 38; Hudson v. Miller, 97 Ill. App. 74; Keirn v. Warfield, 60 Miss. 799. So, under plea of *liberum tenementum*, Brest v. Lever, 7 M. & W. 593; 2 Greenleaf Ev., § 626.

⁷ 26 Am. & Eng. Ency. of Law (1st ed.) 665.

⁸ Citing Finch v. Alston, 2 Stew. & P. (Ala.) 83; Ladd v. Shattock, 90 Ala. 134; Campbell v. King, 32 Mo. App. 38; Downer v. Tarbell, 61 Vt. 530; Tillotson v. Preston, 7 Johns. (N. Y.) 285.

⁹ Citing Tabor v. Judd, 62 N. H. 288; Waldron v. Portland & C. R. Co., 35 Me. 422. See also, Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311; Hays v. Ison, (Ky.) 72 S. W. 733.

¹⁰ Citing Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Townsend v. Kerns, 2 Watts (Pa.) 180; Caskey v. Lewis, 15 B. Mon. (Ky.) 27.

¹¹ High v. Pancake, 42 W. Va. 602, 26 S. E. 536; Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Wilson v. Haley & Co., 153

stance of the declaration is, says Greenleaf, "that the defendant has forcibly and wrongfully injured the property in the possession of the plaintiff; and under the general issue the plaintiff must prove: (1) That the property was in his possession at the time of the injury, and this rightfully, as against the defendant; and (2) that the injury was committed by the defendant with force."¹² Title or right of property may be, and often is, in issue or controversy in actions of trespass, but, as above stated, the gist of the action is the injury to the possession.

§ 2650. Possession.—As already intimated, the possession of the plaintiff may be actual or constructive.¹³ It is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to the plaintiff, or when it is in the care and custody of his servant or agent or in the hands of a bailee for custody, carriage, or the like, as depository, mandatory, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or title to the beneficial use and enjoyment of the property, but, on the contrary, the owner may take it into his own hands at his pleasure. Where this is the case, the general owner may sue in trespass, as for an injury to his own actual possession, and evidence of the facts above stated will sustain the averment.¹⁴ The general property draws

U. S. 39, 14 Sup. Ct. 768; *Rucker v. M'Neely*, 4 Blackf. (Ind.) 179; *Pfistner v. Bird*, 43 Mich. 14, 4 N. W. 625; *Finch v. Brian*, 44 Mich. 517, 7 N. W. 81; *Yocum v. Zahner*, 162 Pa. St. 468, 29 Atl. 778; *Buchi v. Cone*, 25 Fla. 1, 6 So. 160; *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511; *Ward v. Macauley*, 4 Term R. 489; *Moon v. Avery*, 42 Minn. 405, 44 N. W. 257.

¹² 2 Greenleaf Ev., § 613.

¹³ *Wilson v. Phoenix & Co.*, 40 W. Va. 413, 21 S. E. 1035; *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 274; *Irwin v. Patchen*, 164 Pa. St. 51, 30 Atl. 436. See *Ryan v. Sun Sing*, 164 Ill. 259, 45 N. E. 497; *Garrett v. Sewell*, 108 Ala. 521, 18 So. 737.

¹⁴ *Lotan v. Cross*, 2 Campb. 464; *Bertie v. Beaumont*, 16 East 33; *Gordon v. Harper*, 7 Term R. 9; *Aiken v. Buck*, 1 Wend. (N. Y.) 466; *Putnam v. Wyley*, 8 Johns. (N. Y.) 432; *Hubbell v. Rochester*, 8 Cow. (N. Y.) 115; *Root v. Chandler*, 10 Wend. (N. Y.) 110; *Oser v. Storms*, 9 Cow. (N. Y.) 687; *Wickham v. Freeman*, 12 Johns. (N. Y.) 183; *Corfield v. Coryell*, 4 Wash. (U. S.) 387; *Hingham v. Sprague*, 15 Pick. (Mass.) 102; *Starr v. Jackson*, 11 Mass. 519; *Walcott v. Pomeroy*, 2 Pick. (Mass.) 121; *Warren v. Cockran*, 30 N. H. 379; *Lane v. Thompson*, 43 N. H. 320; *Schloss v. Cooper*, 27 Vt. 623; *Strong v. Adams*, 30 Vt. 221; *Bailey v. Massey*, 2 Swan (Tenn.) 167; *Browning v. Skillman*, 4 Zahr. (N.

to it the possession, where there is no intervening adverse right of enjoyment.¹⁵ And this action may also be maintained by a bailee having constructive possession or by the actual possessor, upon proof of his possession *de facto*, and an authority coupled with an interest in the thing, as carrier, factor, pawnee, or sheriff.¹⁶ Proof of an actual and exclusive possession by the plaintiff, even though it be by wrong, is sufficient to support this action against a mere stranger or wrong-doer, who has neither title to the possession in himself, nor authority from the legal owner.¹⁷ But if the plaintiff in an action for trespass *quare clausum fregit* does not hold the title and hence have constructive possession, he must show that he had actual possession at the time of the alleged trespass.¹⁸ And a mere right of entry is not sufficient, and to enable the true owner to recover for injury done subsequent to the ouster there must be a re-entry.¹⁹

§ 2651. Possession—Evidence of.—Evidence clearly showing legal seisin is *prima facie* proof of possession.²⁰ But mere occupancy

J.) 351; Thomas v. Snyder, 23 Pa. St. 515; Bulkley v. Dolbeare, 7 Conn. 233.

¹⁵ O'Neal v. Simonton, 109 Ala. 167, 19 So. 412.

¹⁶ 1 Chitty Pl. 190, 191; Wilbraham v. Snow, 2 Saund. 47; Fowler v. Down, 1 Bos. & P. 45; Colwell v. Reeves, 2 Campb. 575. See also, Leisherness v. Berry, 38 Me. 80; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Gibbs v. Chase, 10 Mass. 125; George v. Claggett, 7 Term R. 355; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476.

¹⁷ Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Graham v. Peat, 1 East 244; Harker v. Birkbeck, 3 Burr. 1556, 1563; Catteris v. Cowper, 4 Taunt. 547; Revett v. Brown, 5 Bing. 9; Townsend v. Kerns, 2 Watts (Pa.) 180; Barnstable v. Thatcher, 3 Metc. (Mass.) 239; Shrewsbury v. Smith, 14 Pick. (Mass.) 297; Fiske v. Small, 12 Shepl. (Me.) 453; Brown v. Ware, 12 Shepl. (Me.) 411; Sweetland v.

Stetson, 115 Mass. 49; Clancey v. Houdlette, 39 Me. 451; Tyson v. Shueey, 5 Md. 540; Linard v. Crossland, 10 Tex. 462; Hubbard v. Little, 9 Cush. (Mass.) 475; Frisbee v. Marshall, 122 N. Car. 760, 30 S. E. 21. But see Northern Pac. R. Co. v. Lewis, 162 U. S. 366, 16 Sup. Ct. 831.

¹⁸ Olson v. Minnesota & N. W. R. Co., 89 Minn. 280, 94 N. W. 871; Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Pennington v. Lewis, (Del.) 56 Atl. 378.

¹⁹ Johnson v. Chicago & C. Co., 86 Fed. 269. See also, Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272; Allen v. Thayer, 17 Mass. 299; Bigelow v. Jones, 10 Pick. (Mass.) 161; Wood v. Lafayette, 68 N. Y. 181; White v. Yawkey, 108 Ala. 270, 19 So. 360; Liford's Case, 11 Co. 51.

²⁰ Kennebec Purchase v. Call, 1 Mass. 483; Printz v. Cheeney, 11 Iowa 469.

without any claim to an estate in the land has been held not to be seisin.^{20*} Both possession and title need not be shown²¹ to give the plaintiff a right of action against an intruder,²² for mere possession is usually sufficient.²³ Possession is a question of fact for the jury.²⁴ Where the only question is as to the possession, evidence as to the extent of the occupancy of prior tenant is generally immaterial.²⁵ Possession will be presumed to continue unless the contrary appears.²⁶ And evidence of ownership is usually prima facie proof of possession.²⁷

§ 2652. **Title.**—The plaintiff need not prove title where it is admitted by the defendant's pleading²⁸ but otherwise it is usually necessary,²⁹ except where the defendant admits his possession and fails to show title in himself or except as against a wrong-doer.³⁰ Title sufficient to maintain the action may be shown by deed, or sometimes by acts, as of possession.³¹ Thus, evidence of possession for many years under claim of title is usually prima facie proof of title,³² and this

^{20*} *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272.

²¹ *Shoup v. Shields*, 116 Ill. 488, 6 N. E. 502.

²² *Dexter v. Billings*, 110 Pa. St. 135, 1 Atl. 180; *Field v. Apple River Log Driving Co.*, 67 Wis. 569, 31 N. W. 17.

²³ *Walker v. Willson*, 8 Bosw. (N. Y.) 586; *Todd v. Jackson*, 26 N. J. L. 525; *Lawson v. Campbell*, 4 Greene (Iowa) 413; *Burlington & C. R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. 747; *McCormick v. Chicago & C. R. Co.*, 47 Iowa 345; *Parker v. Hotchkiss*, 25 Conn. 321; *Boyington v. Squires*, 71 Wis. 276, 37 N. W. 227.

²⁴ *Firth v. Veeder*, 58 Hun (N. Y.) 605, 12 N. Y. S. 579; *Zundel v. Baldwin*, 114 Ala. 328, 21 So. 420; *Allison v. Little*, 93 Ala. 150, 9 So. 388. See also, *Clark v. Hull*, 184 Mass. 164, 68 N. E. 60.

²⁵ *Smith v. Bingham* (Sup. Ct.), 9 N. Y. S. 97; *Woodbeck v. Wilders*, 18 Cal. 131.

²⁶ *Stean v. Anderson*, 4 Harr. (Del.) 209.

²⁷ *Eno v. Christ*, 25 Misc. (N. Y.) 24. See also, *Carpenter v. Logee*, 24 R. I. 383, 53 Atl. 288.

²⁸ *Tison v. Broward*, 17 Fla. 465.

²⁹ *Clay v. Boyer*, 10 Ill. 506; *Willsons v. Bibb*, 1 Dana (Ky.) 7; 25 Am. Dec. 118. The plaintiff out of possession must usually show title. *Johnson v. Chicago & C. Co.*, 30 C. C. A. 35, 86 Fed. 269, 271.

³⁰ *Shoup v. Shields*, 116 Ill. 488, 6 N. E. 502; *Dexter v. Billings*, 110 Pa. St. 135, 1 Atl. 180; *Dewey v. Bordwell*, 9 Wend. (N. Y.) 65; *Field v. Apple & C. Co.*, 67 Wis. 569, 31 N. W. 17.

³¹ *Pacific Express Company v. Dunn*, 81 Tex. 85, 16 S. W. 792; *Kilborn v. Rewee*, 8 Gray (Mass.) 415; *Louk v. Woods*, 15 Ill. 256.

³² *Burlington & C. R. Co. v. Beebe*, 14 Neb. 463, 16 N. W. 747; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851.

may be shown by parol.³² But it may be rebutted, in a proper case, by showing title in another.³⁴

§ 2653. **Evidence generally—Relevancy.**—The general rules in regard to relevancy of evidence apply in actions of trespass as well as in other cases,³⁵ and evidence that is irrelevant is inadmissible.³⁶ But circumstantial as well as direct evidence is admissible in a proper case, and the plaintiff may not only show his possession or title and the act of the defendant constituting the alleged trespass, but also, in general, the circumstances characterizing the act and proper matter showing the injury and damages and in aggravation of damages. So, on the other hand, the defendant may introduce evidence legitimately tending to disprove the plaintiff's case, or in mitigation of damages, or, under a proper plea, in justification, and this, in turn the plaintiff may deny or rebut by his evidence, but he cannot at common law give new matter except under a proper reply or new assignment.³⁷

§ 2654. **Evidence under the general issue.**—The general issue at common law is "not guilty." Under the general issue, the plaintiff may, in general, show possession, that the possession is legal, and that he has title,³⁸ and the defendant may give any matter which contradicts or legitimately tends to disprove the allegations that the plaintiff is bound to prove.³⁹ As a general rule the defendant may intro-

³² *Pacific Exp. Co. v. Dunn*, 81 Tex. 85, 16 S. W. 792.

³⁴ *Gulf &c. R. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43.

³⁵ *Crawford v. Bynum*, 7 Yerg. (Tenn.) 381; *Beaty v. Baltimore &c. R. Co.*, 6 W. Va. 388; *Lee v. Lord*, 76 Wis. 582, 45 N. W. 601; *Coody v. Gress Lumber Co.*, 82 Ga. 793; *Allison v. Little*, 85 Ala. 512, 5 So. 221; *Southington &c. Soc. v. Gridley*, 20 Conn. 200; *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 322.

³⁶ See authorities cited in last note, *supra*; also *Chenowith v. Hicks*, 5 Ind. 224; *Heartz v. Klinkhammer*, 39 Minn. 438, 40 N. W.

826; *Keane v. Old Colony R. Co.*, 161 Mass. 203, 36 N. E. 788.

³⁷ See *Sayre v. Earl of Rochford*, 2 W. Bl. 1165; *King v. Phippard*, Carth. 280; *Moore v. Taylor*, 5 Taunt. 69; *Taylor v. Cole*, 3 Term R. 292, 296; 1 Chitty Pl. 512, et seq.; *Gould Pl.* §§ 26-30, 110.

³⁸ *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117; *Stone v. Hubbard*, 17 Pick. (Mass.) 217; *Printz v. Cheeney*, 11 Iowa 469; *Altemose v. Hufsmith*, 45 Pa. St. 121.

³⁹ *Rawson v. Morse*, 4 Pick. (Mass.) 27; *Murray v. Webster*, 5 N. H. 391; *Sutherland v. Ingalls*, 63 Mich. 620, 30 N. W. 342; *Central R. Co. v. Hetfield*, 29 N. J. L. 206; *Monumoi v. Rogers*, 1 Mass. 159;

duce evidence of any legitimate matters which go to show that he did not do the acts complained of, but defenses which admit that he was prima facie a trespasser must usually be specially pleaded. He may show that he did not take the plaintiff's goods, or enter his close, as the case may be, or that the plaintiff has no property or right to possession and that it is in himself or one under whom he claims;⁴⁰ but he cannot, ordinarily, show a license or justification unless he specially pleads it, except, perhaps, in some instances, merely in mitigation.⁴¹

§ 2655. *Liberum tenementum*.—The plea of *liberum tenementum* admits the fact that the plaintiff was in possession of the close described in the declaration, and that the defendant did the acts complained of, and raises only the question whether the close described was the defendant's freehold or not.⁴² His title must usually be proved whether by deed or other documentary evidence, or by an actual, adverse and exclusive possession for twenty years; inasmuch as, under this issue, he undertakes to show a title in himself, which shall do away with the presumption arising from the plaintiff's possession.⁴³ It has also been held that evidence of a tenancy in common with the plaintiff is not admissible under this issue.⁴⁴ This plea is little used at the present time, and it has been thought by some

Saunders v. Wilson, 15 Wend. (N. Y.) 338; Baker v. Pearce, 4 Har. & M. (Md.) 502.

⁴⁰ Storr v. James, 84 Md. 282, 35 Atl. 965; Alliance Trust Co. v. Nettleton, 74 Miss. 584, 21 So. 396; Dodd v. Kyffin, 7 Term R. 350. See also, Anthony v. Gilbert, 4 Blackf. (Ind.) 348. But see as to proving title in a stranger, under whom he does not justify, where the plaintiff is in actual possession, Carter v. Johnson, 2 M. & Rob. 263; Philpot v. Holmes, 1 Peake Add. Cas. 97; also Ferris v. Brown, 3 Barb. (N. Y.) 105; Fuller v. Rounceville, 9 Fost. (N. H.) 554.

⁴¹ See Williams v. Hathaway, 20 R. I. 534, 40 Atl. 418; Lambert v.

Robinson, 162 Mass. 34, 37 N. E. 753; Hill v. Morey, 26 Vt. 178; Milman v. Dolwell, 2 Campb. 378; Knapp v. Salsbury, 2 Campb. 500.

⁴² Crocker v. Crompton, 1 B. & C. 489; Lempriere v. Humphrey, 3 Ad. & El. 181; Caruth v. Allen, 2 McCord L. (S. Car.) 226; Doe v. Wright, 10 Ad. & El. 763; Ryan v. Clarke, 13 Jur. 100. (See, however, McBurney v. Cutler, 18 Barb. (N. Y.) 203.) See also, Ryan v. Clark, 14 Q. B. 65; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 277.

⁴³ Brest v. Lever, 7 M. & W. 593.

⁴⁴ Voyce v. Voyce, Gow 201; Roberts v. Dame, 11 N. H. 226. But see Sullings v. Carter, 105 Mich. 392, 63 N. W. 411.

not to be a good plea, but after full consideration, it was held to be a good plea in a recent case in Illinois.⁴⁵

§ 2656. **Justification of trespass.**—Matter in justification of a trespass to real estate, such as the fact of a license from the owner,⁴⁶ or legal authority to do the acts complained of in opening a highway,⁴⁷ is not admissible in evidence, unless specially pleaded. So, generally, evidence of a license⁴⁸ or other justification,⁴⁹ for trespass is not, ordinarily, admissible unless specially pleaded. Thus, it has been held that the defense of justification to a civil action for assault and battery, whether of self-defense,⁵⁰ or of some other legal excuse for the acts done,⁵¹ such as the authority of a parent to correct a child, or the right of an owner of property to eject a trespasser from his premises, must be set up by special plea, or evidence to establish such justification is inadmissible.⁵²

§ 2657. **Written instruments and recitals.**—A deed or other instrument under which one of the parties holds or claims is usually admissible, even though it may be defective, to show color of title, or

* *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272. See also, *Kentucky Land &c. Co. v. Crabtree*, (Ky.) 70 S. W. 31.

* *Snowden v. Willas*, 19 Ind. 10; *Chase v. Long*, 44 Ind. 427.

* *Johnson v. Cuddington*, 35 Ind. 43.

* *Gambling v. Prince*, 2 Nott & McC. (S. Car.) 138; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473; *Rugles v. Lesure*, 24 Pick. (Mass.) 187; *Sawyer v. Newland*, 9 Vt. 383; *Cox v. Dove*, Mart. Dec. (N. Car.) 43; *Rawson v. Morse*, 4 Pick. (Mass.) 127; *Ward v. Bartlett*, 12 Allen (Mass.) 419; *Gronour v. Daniels*, 7 Blackf. (Ind.) 108; *Milman v. Dolwell*, 2 Campb. 378. But see *Razor v. Quails*, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658. Although not admissible in justification under the general issue it may be admissible in mitigation. *Williams v. Hathaway*, 20 R. I. 543, 40 Atl. 418

* *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Strout v. Berry*, 7 Mass. 385; *Butterworth v. Soper*, 13 Johns. (N. Y.) 443; *Drake v. Barrymore*, 14 Johns. (N. Y.) 166; *Collins v. Perkins*, 31 Vt. 624; *Briggs v. Mason*, 31 Vt. 433; *Ferris v. Brown*, 3 Barb. (N. Y.) 105; *Hunter v. Harris*, 4 Blackf. (Ind.) 126; *Strong v. Hobbs*, 20 Vt. 185; *Stow v. Scribner*, 6 N. H. 24; *Simpson v. Watrus*, 3 Hill (N. Y.) 619; *Demick v. Chapman*, 11 Johns. (N. Y.) 132. But see *Wolf v. Holton*, 61 Mich. 550, 28 N. W. 524; *State v. Beckner*, 132 Ind. 371, 26 N. E. 553.

* *Norris v. Casel*, 90 Ind. 143; *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724.

* *Norris v. Casel*, 90 Ind. 143.

* *Norris v. Casel*, 90 Ind. 143; *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724; *Abbott Tr. Ev.* (2d ed.), 821, § 11.

a common source of title or as bearing on the nature and extent of his claim,⁵³ but not unless it is material or relevant.⁵⁴ The recital in a deed from the grantee of the defendant to the plaintiff of the value paid for trees on the land conveyed which the defendant is alleged to have cut is not evidence of such payment against the defendant who was neither a party nor privy to the deed.⁵⁵ But recitals against interest in a deed under which a party claims are often admissible and recitals in ancient documents and patents have likewise been held competent.⁵⁶ In a recent case, in which the action was *quare clausum fregit*, there was a consideration of the admissibility of recitals and particular recitals in a petition to the legislature were held inadmissible.⁵⁷

§ 2658. **Declarations and admissions.**—In actions of trespass, as in other cases, declarations, although not against interest, may be admissible as part of the *res gestae*.⁵⁸ But self-serving statements are not, as a rule, admissible unless they are part of the *res gestae*.⁵⁹ Admissions of a party, or, under limitations elsewhere considered, of one through whom he claims, or even declarations of others against interest, under the limitations elsewhere stated, are admissible in actions of trespass as well as in other cases.⁶⁰

§ 2659. **Aggravation of damages.**—Evidence showing the circumstances of the trespass is usually admissible to show the character of the act and upon the question of damages.⁶¹ But independent matter

⁵³ Wright v. Dunn, 73 Tex. 293, 11 S. W. 330; Grimes v. Butts, 65 Ill. 347; Higdon v. Kennemer, 112 Ala. 351, 20 So. 470; Henson v. Taylor, 108 Ga. 567, 33 S. E. 911; Wylie Railer, 8 Kans. App. 856, 55 Pac. 523.

⁵⁴ Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Doan v. Wilcutt, 16 Gray (Mass.) 368; Robinson v. Edwards, 70 Me. 158; Moody v. Moeller, 72 Tex. 635, 10 S. W. 727, 13 Am. St. 839.

⁵⁵ Shelby Iron Co. v. Ridley, 135 Ala. 513, 33 So. 331. See also, Fitzpatrick v. Bridgman, 130 Ala. 450, 30 So. 500; Vol. II, § 1278.

⁵⁶ See Vol. I, § 268; Vol. II, § 1278.

⁵⁷ Davis v. Moyles, (Vt.) 56 Atl. 174.

⁵⁸ See Vol. I, §§ 537, 538, 553, 554, 555.

⁵⁹ Jones v. M'Neil, 2 Bailey L. (S. Car.) 466; Vol. I, § 329.

⁶⁰ Kellenberger v. Sturtevant, 7 Cush. (Mass.) 465; Gilbert v. Felton, 5 Gray (Mass.) 406; Copley v. Rose, 2 N. Y. 115; Moras v. Salisbury, 48 N. Y. 636; Pike v. Hayes, 14 N. H. 19, 40 Am. Dec. 171; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530; Gordon v. Cook, 47 Mich. 248, 10 N. W. 357. See Vol. I, Chapters XI, XII, XX.

⁶¹ Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Taner v. Hutson, 5

which may be the subject of a separate action cannot, in most jurisdictions, be shown in aggravation of damages,⁶² and acts committed after the commencement of the action cannot, ordinarily, be shown.⁶³ Nor can consequential injuries that are too speculative or remote.⁶⁴ But where the principal act and the consequences constitute, in effect, one transaction or the trespass is the proximate cause of the consequences that afterwards ensue they may usually be shown, under a proper complaint or declaration, in evidence in aggravation of damages.⁶⁵ So, evidence of motive is frequently admissible in aggravation of damages.⁶⁶

§ 2660. **Mitigation of damages.**—Evidence of facts and circumstances which induced the trespass and tend to show some excuse or good reason for the defendant's act is generally admissible in mitigation.⁶⁷ So, evidence of motive is admissible in a proper case to mit-

Ind. 322, 61 Am. Dec. 96; Ratliff v. Huntly, 5 Ired. L. (N. Car.) 545; Young v. Mertens, 27 Md. 114; Stevens v. Stevens, 96 Ga. 374; Barnum v. Vandusen, 16 Conn. 200; Golding v. Williams, Dudley L. (S. Car.) 92.

* Sampson v. Coy, 15 Mass. 493; Fisher v. Conway, 21 Kans. 18, 30 Am. R. 419; Lawrence v. Phelps, 2 Root (Conn.) 334. But see Druse v. Wheeler, 22 Mich. 439.

* Keane v. Old Colony R. Co., 161 Mass. 203, 36 N. E. 788; Chappell v. State, 86 Ala. 54, 5 So. 419. But see Wolf v. Wolf, 158 Pa. St. 621, 28 Atl. 164.

* See Sims v. Glazener, 14 Ala. 695, 48 Am. Dec. 120; Thomas v. Isett, 1 Greene (Iowa) 470; Wrightsville &c. R. Co. v. Holmes, 85 Ga. 668, 11 S. E. 658; Mitchell v. Wood, 17 Kans. 26; Fore v. Western &c. R. Co., 101 N. Car. 526, 8 S. E. 335.

* Damron v. Roach, 4 Humph. (Tenn.) 134; Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. 291; Welch v. Piercy, 7 Ired. L. (N.

Car.) 365; Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610; Garrett v. Sewell, 108 Ala. 521, 18 So. 737.

* Sunnyside Coal &c. Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541; Nickerson v. Allen, 110 La. Ann. 194, 34 So. 410; Ogden v. Gibbons, 5 N. J. L. 598; Holt v. Hayes, (Tenn.) 73 S. W. 111; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227; Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276; Benson Min. &c. Co. v. Alta &c. Co., 145 U. S. 428, 12 Sup. Ct. 877; Gentry v. United States, 119 Fed. 70.

* Wells v. Head, 4 C. & P. 568, 19 E. C. L. 531; Reed v. Bias, 8 W. & S. (Pa.) 189; Boling v. Wright, 16 Ala. 664; Huftalin v. Misner, 70 Ill. 55; Sawyer v. Jarvis, 13 Ired. L. (N. Car.) 179; Wasson v. Canfield, 6 Blackf. (Ind.) 407; Simpson v. McCaffrey, 13 Ohio 508; Boggan v. Bennett, 102 Ala. 400, 14 So. 742; Carter v. Bedortha, 124 Mich. 548, 83 N. W. 277; Rhodes v. Bunch, 3 McCord L. (S. Car.) 66. But the evidence must not be too remote. Willis v. Forrest, 2 Duer (N. Y.) 310.

igate as well as to enhance the damages. Thus, in an action for an alleged wilful trespass, evidence tending to show the defendant's good faith and honest belief that he was exercising a legal right, including evidence that he acted on the advice of reputable counsel, was held admissible in mitigation, under the general denial.⁶⁸ In an action of trespass *quare clausum fregit* evidence that the defendant had a right to the possession of the close at the time of his entry and that the plaintiff had originally taken possession of it by disseisin and trespass, is admissible in mitigation of damages.⁶⁹ So, a delivery to the plaintiff of a portion of wood and timber unlawfully cut and carried away by the trespasser has been allowed to be proved in mitigation of the damages.⁷⁰ And where soil and grass were inadvertently removed from the plaintiff's land, evidence that, on complaint, they were replaced was held admissible in mitigation of damages.⁷¹ Evidence of payments in part satisfaction may also be received to diminish the plaintiff's claim *pro tanto*.⁷² But it has been held that an unaccepted offer to return personal property wrongfully seized will not mitigate the damages.⁷³ Although one who has wrongfully taken property cannot ordinarily show in mitigation of damages that he has himself applied the property to the owner's use without his consent,⁷⁴ yet where the property has been so applied, by the act of a third person and the operation of law, that may be taken into account in estimating the damages,⁷⁵ and if it is applied with the owner's consent, he can, generally, only recover for the detention up to the time of giving the license.⁷⁶ Thus, in an action for wrongfully entering the plaintiff's premises, and taking personal property therefrom, it was held that evidence that all the personal property was taken by

⁶⁸ *United States v. Homestake Min. Co.*, 54 C. C. A. 303, 117 Fed. 481. See also, *Brown v. May*, 1 Munf. (Va.) 288.

⁶⁹ *M'Donald v. Lightfoot*, Morr. (Iowa) 450; *Caston v. Perry*, 2 Bailey L. (S. Car.) 104.

⁷⁰ *Loewenberg v. Rosenthal*, 18 Ore. 178, 22 Pac. 201.

⁷¹ *Flynt v. Chicago &c. R. Co.*, 38 Mo. App. 94; *Fields v. Williams*, 91 Ala. 502.

⁷² *Chamberlin v. Murphy*, 41 Vt. 110.

⁷³ *Powers v. Florance*, 7 La. Ann. 524.

⁷⁴ *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Bird v. Womack*, 69 Ala. 390. See also, *Dollam v. Fidler*, 6 Watts & S. (Pa.) 323.

⁷⁵ *Collins v. Perkins*, 31 Vt. 624; *Kaley v. Shed*, 10 Metc. (Mass.) 317; *Perry v. Chandler*, 2 Cush. (Mass.) 237; *Higgins v. Whitney*, 24 Wend. (N. Y.) 379; *Sherry v. Schuyler*, 2 Hill (N. Y.) 204; *Stewart v. Martin*, 16 Vt. 397; *Hopple v. Higbee*, 23 N. J. L. 342.

⁷⁶ *Goodrich v. Foster*, 20 N. H. 177.

the true owner was admissible in mitigation.⁷⁷ Evidence that the property belonged to a third person who was entitled to the possession has also been held admissible in mitigation.⁷⁸ But evidence that a house that was destroyed was a house of ill fame,⁷⁹ or of invalid proceedings of a county board has been held inadmissible.⁸⁰

⁷⁷ *Pabst Brew. Co. v. Greenberg*, 111, 49 Vt. 507. But see *Simpson v. 55 C. C. A. 151*, 117 Fed. 135. *McCaffrey*, 13 Ohio 508; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am.

⁷⁸ *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348. See also, *Ballard v. R. 830.*
Leavell, 5 Call (Va.) 531.

⁷⁹ *Barnard v. Haworth*, 9 Ind. 103.

⁸⁰ *Johnson v. Farwell*, 7 Me. 370, But see *Baumgartner v. Hasty*, 100 22 Am. Dec. 203; *Weston v. Grav-* Ind. 575, 50 Am. R. 830.

CHAPTER CXXIV.

TROVER.

Sec.	Sec.
2661. Generally.	2666. Evidence of conversion—Demand.
2662. Burden of proof and presumptions—Plaintiff's evidence.	2667. Defenses.
2663. Plaintiff's title or right to possession—When sufficient.	2668. Title in third person.
2664. Possession—When sufficient.	2669. Declarations and admissions.
2665. What constitutes conversion.	2670. Damages.
	2671. Evidence as to value.
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§ 2661. **Generally.**—The nature and the elements of the action of trover have been stated and described as follows: "The action of trover, or trover and conversion, lies to recover damages for the conversion by the defendant to his own use of specific personal property, in which, at the time of the conversion, the plaintiff had a general or special property, and of which he was in the actual possession, or to which he was entitled to the immediate possession. In detail: (a) The object of the action is the recovery of the value of the property as damages for its conversion, and not the recovery of the property itself. (b) It lies for the conversion of property which was (1) Personal and (2) specific. (c) The plaintiff must have had a general or special property in the thing, and he must have been in the actual possession, or entitled to the immediate possession. (d) The property must have been converted by the defendant."¹ The common law action of trover is also described by Chief Justice Mansfield as follows: "In form the action of trover is a fiction, in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it, and if he did not, yet by bringing this action the plaintiff waives the trespass, no damages are recoverable for the act of taking, all must be for the act of converting."² Originally, it was

¹ Shipman Com. L. Pl. (2d ed.) 68. James, 7 Cow. (N. Y.) 329; Cooper

² 1 Chitty Pl. 146. See also Fowler v. Chitty, 1 Burr. 20.
v. Down, 1 B. & P. 44; Smith v.

an action of trespass on the case to recover damages against a person who had found goods, and refused to deliver them on demand of the owner, but converted them to his use. As the action of detinue was subject to disadvantages, the action of trover, by a fiction of law, that is, alleging a fictitious finding, was at length adopted as the proper form of action to recover the value of the plaintiff's personal property from any person who had obtained possession of it by any means whatever, and had sold or used the same or refused to surrender it when properly demanded. The injury lies in the conversion, or in the conversion and injury to the right of possession or deprivation of the property, which is the gist of the action, and the statement of the finding, or trover, is not material or traversable.³

§ 2662. Burden of proof and presumptions—Plaintiff's evidence. The burden is upon the plaintiff to show his property, general or special, as the case may be, and possession or right to possession and a conversion by the defendant.⁴ In order to recover substantial damages he should be prepared to show the value of the goods. The plaintiff's property or title should be shown as he has chosen to allege it in the declaration.⁵ If he relies upon written evidence to establish the property and fails in so doing, it has been held that he cannot recur to, and rely on, a mere possessory title.⁶ Where the title is acquired by bill of sale, or other like written instrument, it should be produced, or its absence accounted for;⁷ but where it has been acquired by oral sale, the writings pertaining thereto, subsequently accepted, need not be produced.⁸ If title or possession is shown it is generally presumed

³ Shipman Com. L. Pl. (2d ed.) 69; Winner v. Penniman, 35 Md. 163, 6 Am. R. 385; Clark v. Draper, 19 N. H. 419; Davis v. Hurt, 114 Ala. 146, 21 So. 468; Payne v. Elliot, 54 Cal. 339, 35 Am. R. 80; Coffin v. Anderson, 4 Blackf. (Ind.) 395.

⁴ Blakey v. Douglas, (Pa.) 6 Atl. 398; Swope v. Paul, 4 Ind. App. 463, 464, 31 N. E. 42.

⁵ Yoner v. Neidig, 1 Yeates (Pa.) 19; Gregory &c. R. Co. v. Selleck, 43 Conn. 320; Debow v. Colfax, 10 N. J. L. 151; Besherer v. Swisher, 3 N. J. L. 316; Shannon v. Owen, 1 M. & R. 392. When title is in issue and the right to possession is determined

thereby, the burden is on the plaintiff to prove his title by a preponderance of evidence: Gam v. Cordrey, (Del.) 53 Atl. 334; Kruse v. Seeger &c. Co., 16 N. Y. S. 529; Spaulding v. Jennings, 173 Mass. 65, 53 N. E. 204.

⁶ Sheriff v. Cadell, 2 Esp. 617.

⁷ Slatterle v. Pooley, 6 M. & W. 664; Dunn v. Hewitt, 2 Den. (N. Y.) 637; Bissell v. Pearce, 28 N. Y. 252.

⁸ Dunn v. Hewitt, 2 Den. (N. Y.) 637; Blood v. Harrington, 8 Pick. (Mass.) 552; Sanders v. Stokes, 30 Ala. 432; Adams v. Davis, 16 Ala. 748.

to continue until the contrary is shown.* And there are many cases in which it is held sufficient in the first instance for the plaintiff to show the conversion of property in his possession by the defendant.¹⁰ Indeed, it is said by Judge Cooley that it is only when the plaintiff is compelled to show his title, in order to make out his right to immediate possession, that it can be important for him to go further.¹¹ This question will be considered further, however, in connection with the question of proving title in a third person as a defense.

§ 2663. **Plaintiff's title or right to possession—When sufficient.** There must generally be shown in the plaintiff a right to the present possession of the goods. If he has only a special property there must, it is said, ordinarily be evidence of actual possession;¹² but the general property usually draws to it the right of possession or has possession annexed to it by construction of law.¹³ If, however, there is an intermediate right of possession in another person as lessee, the general owner cannot, ordinarily, maintain this action. Thus, it has been held that a lessor of chattels cannot have an action of trover against one who has taken them from the possession of his lessee, so long as the right of the lessee remains in force.¹⁴ But if the interest of the tenant or possessor is determined, whether by forfeiture or otherwise, the general owner may sue in a proper case. Thus, where

* *Gale v. Gale*, 70 Vt. 540, 41 Atl. 969; *Laubenhelmer v. Bach*, 19 Mont. 177, 47 Pac. 803; Vol. I, § 109, and numerous authorities cited in note 120.

¹⁰ See *Armory v. Delmirie*, 1 Stra. 505; *McLaughlin v. Waite*, 9 Cow. (N. Y.) 670; *Daniels v. Ball*, 11 Wend. (N. Y.) 577, note; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Bartlett v. Hoyt*, 29 N. H. 317; *Jeffries v. Great Western R. Co.*, 5 El. & Bl. 802.

¹¹ *Cooley Torts*, 445, citing *Foster v. Chamberlain*, 41 Ala. 158.

¹² *Coxe v. Harden*, 4 East 211; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 407; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352.

¹³ *Gordon v. Harper*, 7 Term R. 9, 2 Saund. 47a, n. (1); *Carter v. Kingman*, 103 Mass. 518; *Ayer v. Bart-*

lett, 9 Pick. (Mass.) 156; *Foster v. Gorton*, 5 Pick. (Mass.) 185; *McConeghy v. McCaw*, 31 Ala. 447; *White v. Yawkey*, 108 Ala. 270, 19 So. 360; *Clark v. Rideout*, 39 N. H. 238.

¹⁴ *Smith v. Plomer*, 15 East 607; *Wheeler v. Train*, 3 Pick. (Mass.) 255; *Pain v. Whittaker, Ry. & M.* 99; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535. But an intervening right by way of lien, such as that of a carrier, will not deprive the general owner of this remedy against a wrong-doer: *Gordon v. Harper*, 7 Term R. 9; *Nicolls v. Bastard*, 2 C. M. & R. 659; *Lehr v. Taylor*, 90 Pa. St. 381; *Forth v. Pursley*, 82 Ill. 152. See 2 *Greenleaf Ev.*, § 640, upon which this section is largely based.

the tenant had unlawfully sold the machinery demised with a mill;¹⁵ and where a stranger cut down and removed a tree, during a term,¹⁶ it was held that the general owner might maintain this action against the purchaser or stranger. Upon the same general principle of right to the immediate possession, it has been held that the purchaser of goods not sold on credit can not maintain an action of trover, until he has paid or tendered the price;¹⁷ even though he has the key of the apartment where the goods are stored, if the vendor still retains the general control of the premises.¹⁸ Where a purchaser of lands, who is permitted to occupy until default of payment, the title remaining in the vendor for his security, cuts down and sells timber without leave from the vendor, the latter may have trover against the purchaser.¹⁹ Trover also lies where the bailee of goods for a special purpose transfers them to another in contravention of that purpose.²⁰ The bailee of materials to be manufactured may also have this action against a stranger, though the goods were taken by the defendant from the possession of a third person, whom the plaintiff had hired to perform the work.²¹ So, a ship-owner may maintain trover for the goods shipped, against the sheriff who attaches them, without payment or tender of the freight due.²² Where the owner has parted with the right of possession for a time under some contract of lease or bailment he cannot, ordinarily, sue in trover. "In such a case, if the term has not expired or the bailment been terminated at the time conversion takes place, the owner cannot sue in trover, because not having had the right to possession his only injury is in his reversionary interest, and in suing for that he must count on the special case and not on a conversion."²³ So, if one purchases property to be paid for on delivery, and pays in part only, he cannot bring trover against a subsequent vendee from his

¹⁵ *Farrant v. Thompson*, 5 B. & A. 826; *Ashmead v. Kellogg*, 23 Conn. 70.

¹⁶ *Berry v. Heard*, Cro. Car. 242; *Blaker v. Anscombe*, 4 B. & P. 25.

¹⁷ *Bloxam v. Saunders*, 4 B. & C. 941; *Miles v. Gorton*, 4 Tyrw. 295.

¹⁸ 2 *Greenleaf Ev.*, § 640; *Milgate v. Kebble*, 3 Man. & Gr. 100.

¹⁹ *Moerr v. Wait*, 3 Wend. (N. Y.) 104.

²⁰ *Wilkinson v. King*, 2 Campb. 335; *Loeschman v. Machin*, 2 Stark. 276.

²¹ *Eaton v. Lynde*, 15 Mass. 242; *Bryant v. Clifford*, 13 Metc. (Mass.) 138. See also, *Hollenback v. Todd*, 19 Ill. App. 452.

²² *DeWolf v. Dearborn*, 4 Pick. (Mass.) 466; *Teal v. Felton*, 12 How. (U. S.) 284.

²³ *McGowan v. Chapen*, 2 Murph. (N. Car.) 61; *Hillard v. Dortch*, 3 Hawks (N. Car.) 246; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Marshall v. Davis*, 1 Wend. (N. Y.) 109; *Arthur v. Gayle*, 38 Ala. 259.

vendor, as his part payment did not invest him with the right of possession.²⁴ An executor or administrator usually has the property of the goods of his testator or intestate vested in him before his actual possession; and therefore may maintain trover or trespass against one who has previously taken them. And it has been held that although he does not prove the will, or receive letters of administration, for a long time after the death of the testator or intestate, yet the property will be adjudged to have been in him, by relation, immediately upon the decease of the testator or intestate.²⁵

§ 2664. **Possession—When sufficient.**—A sufficient right of property may appear when the plaintiff shows that he has gained an apparently rightful possession. "Such a possession is evidence of property, and whoever, by force or fraud, intercepts it without being able to show any right in himself, is liable to this action. Indeed, the possession gained is not only evidence of right as against such a person, but it is conclusive evidence, unless he is able in some manner to so connect himself with the right of the real owner as to be entitled to defend in such owner's interest. Thus, if one has a bare possession, and this is taken from him by one having no right, the latter may defend against an action of trover by showing that he had been notified by the owner to retain the property for him.²⁶ And where the plaintiff's possession was not rightful as against the owner, a surrender of the possession to the owner would be a complete defense to a suit in trover.²⁷ There must also be many cases in which a mere showing of the wrongful character of the plaintiff's possession would defeat his action, as where a thief sues the officer for the stolen property taken from him in making the arrest, or a trespasser brings suit against one who stops him while carrying off the goods he has wrongfully taken. These are cases in which it cannot be said that in law a possession has been gained; and one who disturbs this wrongful manual possession may defend in the right of the owner, whether expressly authorized to do so or not."²⁸

²⁴ *Owens v. Weedman*, 82 Ill. 409; *Bloxam v. Saunders*, 4 B. & C. 941; *Wilmshurst v. Bowker*, 5 Bing. (N. C.) 541.

²⁵ 2 *Greenleaf Ev.*, § 641; *Doe v. Porter*, 3 Term R. 13, 16; *Long v. Hebb*, Sty. 341; *Patten v. Patten*, 1 *Alcock & Napier* 493, 504; *Wilson v. Shearer*, 9 Metc. (Mass.) 504.

²⁶ *Thorne v. Tilbury*, 3 H. & N. 534.

²⁷ *Ogle v. Atkinson*, 5 Taunt. 759; *King v. Richards*, 6 Whart. (Pa.) 418.

²⁸ *Cooley Torts*, 446; *Laclouch v. Towle*, 3 Esp. 114; *Cheesman v. Exall*, 6 Exch. 341.

§ 2665. **What constitutes conversion.**—"A conversion may be: (1) By wrongfully taking and carrying away goods, or assuming a dominion over them, or otherwise depriving the owner of them. (2) By wrongfully assuming the property in, or dominion over, or right to dispose of, or misusing goods, of which actual possession has been lawfully obtained. (3) By merely wrongfully detaining goods lawfully obtained, without an actual conversion, as explained above, after a demand of possession by the person entitled. (4) In the latter case, and in that case only, a demand and a refusal to restore the goods are necessary before bringing the action, for without a demand the detention is no conversion."²⁰

§ 2666. **Evidence of conversion—Demand.**—A proper demand by the owner for the property of which he has the right of possession, and the refusal of the party in possession to surrender it, is evidence of a conversion,²⁰ especially if the refusal is accompanied by an assertion on the part of the holder that the title is in himself or a third person.²¹ But this is not the only evidence by which a conversion may be proved, and evidence of the voluntary destruction or sale of the property of another without authority,²² or its wrongful application by the defendant to his own use,²³ is sufficient for that purpose. On the other hand a demand and refusal are not necessarily conclusive evidence of a conversion;²⁴ but evidence may be given in a proper case showing an excuse for not surrendering the property. Evidence of exercising dominion over another's property and excluding him therefrom in de-

²⁰ Shipman Com. L. Pl. (2d ed.) 68. See also as to what constitutes conversion, notes in 24 Am. St. 797 et seq.; 32 Am. St. 724 et seq.; 1 L. R. A. 303, 318; 9 L. R. A. 817.

²¹ Coffin v. Anderson, 4 Blackf. (Ind.) 395; Robinson v. Skipworth, 23 Ind. 311, 316; Bunker v. Roddy, 70 Ind. 26; Citizens' St. R. Co. v. Robbins, 144 Ind. 671, 683, 42 N. E. 916.

²² Coffin v. Anderson, 4 Blackf. (Ind.) 395; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491, 495, 51 N. E. 105.

²³ Jesurun v. Kent, 45 Minn. 222, 47 N. W. 784; May v. O'Neal, 125 Ala. 620, 28 So. 12; Cunningham v.

Baker, 84 Ind. 597; Citizens' St. R. Co. v. Robbins, 144 Ind. 671, 42 N. E. 916.

²⁴ Homer v. Thwing, 3 Pick. (Mass.) 492; Scollans v. Rollins, 179 Mass. 346, 60 N. E. 938; 88 Am. St. 386; Gordon v. Stockdale, 89 Ind. 240; Louisville &c. R. Co. v. Balch, 105 Ind. 93, 4 N. E. 288; Harlan v. Brown, 4 Ind. App. 319, 30 N. E. 928.

²⁵ Verral v. Robinson, 2 C. M. & R. 495; Williams v. Smith, 153 Pa. St. 462, 25 Atl. 1122; Sprague's Collecting Agency v. Spiegel, 107 Ill. App. 508; Locke v. Merchants' National Bank, 66 Ind. 353; Gordon v. Stockdale, 89 Ind. 240.

fiance of his rights, is competent and may conclusively establish a conversion of the property.³⁵ If a wrongful taking or a sale or appropriation to his own use of the plaintiff's property by the defendant without the plaintiff's knowledge or consent is shown, constituting an actual conversion, proof of a demand is not necessary.³⁶ And it may still be shown that the conversion had taken place long before the demand was made.³⁷ But it has been held that if it is to the interest of the owner to treat the date of the demand as the date of the conversion, and he was not guilty of laches in making the demand, the defendant will not be permitted to take advantage of his own wrong by showing that he had appropriated or sold the property a long time before.³⁸ The fact that the holder of a mortgage on personal property offered it for sale without taking the legal steps necessary to give him authority to sell it, and, after buying it in, sold it to a stranger, has been held sufficient proof of its conversion.³⁹ So has the fact that goods covered by a chattel mortgage which contained no power of sale were taken possession of by the mortgagee without foreclosure and sold to a third person who appropriated them to his own use.⁴⁰ But where the defendant had lawful possession of the goods and has been guilty of no act constituting a conversion except by wrongfully detaining them after demand, then a demand must be shown,⁴¹ unless, perhaps,

³⁵ *Gordon v. Stockdale*, 89 Ind. 240; *Western Union Telegraph Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240; *Harlan v. Brown*, 4 Ind. App. 319, 321, 30 N. E. 928; *Platt v. Tuttle*, 23 Conn. 233; *Baker v. Beers*, 64 N. H. 102; *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116; *McPheters v. Page*, 83 Me. 234, 22 Atl. 101, 23 Am. St. 772; *Davis v. Hurt*, 114 Ala. 146, 21 So. 468; *State v. Omaha Nat. Bank*, 59 Neb. 483; *Forsdick v. Collins*, 1 Stark. 138.

³⁶ *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. 550; *Hayes v. Massachusetts &c. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303 and note. See also, notes in 1 L. R. A. 318 and 9 L. R. A. 817, as to when demand is

or is not necessary; *Knowlton v. School City &c.*, 75 Ind. 103; *Cox v. Albert*, 78 Ind. 241; *Buntin v. Pritchett*, 85 Ind. 247; *Terrell v. Butterfield*, 92 Ind. 1, 10; *Armacost v. Lindley*, 116 Ind. 295, 19 N. E. 138.

³⁷ *Cunningham v. Baker*, 84 Ind. 597; *Citizens' &c. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916.

³⁸ *Citizens' &c. R. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916.

³⁹ *Koehring v. Aultman &c. Co.*, 7 Ind. App. 475, 485, 34 N. E. 30.

⁴⁰ *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63.

⁴¹ *King v. Franklin*, 132 Ala. 559, 31 So. 467; *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 Pac. 94; *Hereford v. Purch.* (Ariz.) 68 Pac. 547; *Sloan v. Lick Creek &c. Co.*, 6 Ind. App. 584, 33 N. E. 997; *Boxell*

where it has been waived or it is otherwise shown that it would have been futile.⁴²

§ 2667. **Defenses.**—The general issue in trover at common law is “not guilty.” “In this country, as formerly in England,” says Greenleaf,⁴³ “this plea still puts the whole declaration in issue.”⁴⁴ Under it, therefore, the defendant may prove by any competent evidence, that the title to the goods was in himself, either absolutely, as general owner, or as joint owner with the plaintiff, or specially as bailee, or by way of lien;⁴⁵ or that he took the goods for tolls, or for rent in arrear;⁴⁶ or he may disprove the plaintiff’s title by showing a paramount title in a stranger, or otherwise;⁴⁷ or he may prove facts showing a license;⁴⁸ or, a subsequent ratification of the taking;⁴⁹ or, that the plaintiff has discharged other joint parties with the defendant, in the wrongful act complained of.”⁵⁰ Where acts constituting the alleged conversion are proved it is not necessary to establish any wrongful intent,⁵¹ and evidence that the defendant, in doing what he did, acted as an officer of a corporation,⁵² or as agent for the person or corporation that had wrongfully taken plaintiff’s property,⁵³ or the like, and did not know that his principal was not the absolute owner of the prop-

v. Robinson, 82 Minn. 26, 84 N. W. 635; Bond v. Ward, 7 Mass. 123, 5 Am. Dec. 28; Dean v. Cushman, 95 Me. 454, 50 Atl. 85, 55 L. R. A. 959.

⁴² Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Grant v. Miller, 107 Ga. 804, 33 S. E. 671; Rosenau v. Syring, 25 Ore. 386, 35 Pac. 844.

⁴³ 2 Greenleaf Ev., § 648.

⁴⁴ Selw. N. P. 1068 (2d Am. ed.), 13 (Eng.) ed. 1309; 1 Chitty Pl. (16th Am. ed.) *530; Bull. N. P. 48; Kerwood v. Ayres, 59 Kans. 343, 53 Pac. 134; Nichols v. Minnesota &c. Co., 70 Minn. 528, 73 N. W. 415.

⁴⁵ Skinner v. Upshaw, 2 Ld. Raym. 752; Bull. N. P. 45.

⁴⁶ Wallace v. King, 1 H. Bl. 13; Kline v. Husted, 3 Caines (N. Y.) 275; Shipwick v. Blanchard, 6 Term R. 298.

⁴⁷ Dawes v. Peck, 8 Term R. 330; Schermerhorn v. Van Volkenburgh, 11 Johns. (N. Y.) 529; Kennedy v.

Strong, 14 Johns. (N. Y.) 128; Rotan v. Fletcher, 15 Johns. (N. Y.) 207.

⁴⁸ Clarke v. Clarke, 6 Esp. 61; Bird v. Astock, Bulstr. 280.

⁴⁹ Hewes v. Parkman, 20 Pick. (Mass.) 90.

⁵⁰ Dufresne v. Hutchinson, 3 Taunt. 117.

⁵¹ Kidder v. Biddle, 13 Ind. App. 653, 659, 42 N. E. 293; Fort v. Wells, 14 Ind. App. 531, 43 N. E. 155.

⁵² Kidder v. Biddle, 13 Ind. App. 653, 42 N. E. 293.

⁵³ Johnson v. Martin, 87 Minn. 370, 92 N. W. 221, 59 L. R. A. 733, and authorities cited; Shearer v. Evans, 89 Ind. 400; Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; Kidder v. Biddle, 13 Ind. App. 653, 42 N. E. 293; Fort v. Wells, 14 Ind. App. 531, 43 N. E. 155.

erty which was in his possession, is no defense. This rule is applicable where one who has acted as agent for the thief in disposing of stolen property has afterward been sued for its conversion.⁵⁴ In most jurisdictions all matters which tend to disprove the alleged conversion are admissible in evidence under an answer of general denial, and it may be shown under such an answer that plaintiff's title to the property is fraudulent and void as against the defendant,⁵⁵ or that the property was taken from his possession by legal process.⁵⁶

§ 2668. **Title in third person.**—There is some conflict among the authorities as to whether title in a third person may be shown as a defense in an action of trover, especially under the general denial, and in the same text book we sometimes find a statement in one place that it may be shown and in another place that it may not be.⁵⁷ There are many authorities which state in general terms that the wrongdoer cannot show the title of a third person, under whom he does not claim, as a defense,⁵⁸ and there are others in which it is held that he may do so.⁵⁹ Where the plaintiff was out of possession at the time of the alleged conversion there is good reason for holding, as most of the authorities do hold, that the defendant may set up title in a third person as a de-

⁵⁴ *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *Fort v. Wells*, 14 Ind. App. 531, 43 N. E. 155.

⁵⁵ *Ford v. Griffin*, 100 Ind. 85; *Swope v. Paul*, 4 Ind. App. 463, 31 N. E. 42.

⁵⁶ *Cleveland &c. R. Co. v. Wright*, 25 Ind. App. 525, 58 N. E. 559. See also, *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463.

⁵⁷ See, for instance, 7 *Lawson Rights and Rems.*, §§ 3664, 3665.

⁵⁸ *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Daniels v. Ball*, 11 Wend. (N. Y.) 57; *Carter v. Bennett*, 4 Fla. 283; *Burke v. Savage*, 13 Allen (Mass.) 408; *Cook v. Patterson*, 35 Ala. 102; *Lowremore v. Barry*, 19 Ala. 130, 54 Am. Dec. 188; *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230; *Kane v. Hutchisson*, 93 Mich.

488, 53 N. W. 624; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. R. 350; *Brown v. Ware*, 25 Me. 411; *Miller v. Waite*, 60 Neb. 431, 83 N. W. 355; *Cooley Torts*, 444, 445; note in 100 Am. Dec. 742.

⁵⁹ *Boyce v. Williams*, 84 N. Car. 275, 37 Am. R. 618; *Swope v. Paul*, 4 Ind. App. 463; *Stephenson v. Little*, 10 Mich. 433; *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Davis v. Hoppock*, 6 Duer (N. Y.) 254; *Simar v. Shea*, 85 N. Y. S. 457. See also *Rotan v. Fletcher*, 15 Johns. (N. Y.) 206; *Clapp v. Glidden*, 39 Me. 448; *Stearns v. Vincent*, 50 Mich. 209, 15 N. W. 86, 45 Am. R. 37; *Benner v. Feige*, 51 Mich. 569, 17 N. W. 60.

fense,⁶⁰ and this may distinguish some of the authorities, but, in some of the cases cited in the note referring to decisions holding that such a defense might be set up the possession seems to have been taken from the plaintiff himself and it was held that as the defendant might be compelled to pay the true owner the value of the property and the satisfaction of the judgment in the action in question would not vest a good title in the defendant, he ought to be allowed to set up the title of the true owner.

§ 2669. **Declarations and admissions.**—As elsewhere shown, declarations of a party in possession are usually admissible to explain the nature of the possession, as that he holds subordinate to another, or the like, or they may be admitted as part of the *res gestae* where made at the time of taking possession.⁶¹ Such declarations or admissions are not only competent to rebut a title set up by the party who made them, but they may be affirmative evidence of title in the party for whom the person in possession declares that he holds.⁶² So, relevant acts and declarations of the defendant with respect to the property converted, are admissible against him in an action of trover.⁶³

§ 2670. **Damages.**—It has been held that a complaint or declaration which does not state that the property alleged to have been converted was of any value, or that the plaintiff sustained any damage by

⁶⁰ *Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496; *Smoot v. Cook*, 3 W. Va. 172, 100 Am. Dec. 741; *Graham v. Warner's Ex'rs*, 3 Dana (Ky.) 146, 28 Am. Dec. 65; *Krewson v. Purdorn*, 13 Ore. 563, 11 Pac. 281; *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 375; *Pennsylvania R. Co. v. Hughes*, 39 Pa. St. 521; *Légrand v. Swayze*, 4 N. J. L. 326; *Robinson v. Peru Plow Co.*, 1 Okla. 140; *Schryer v. Fenton*, 15 App. Div. (N. Y.) 158. See also, *Marks v. Robinson*, 82 Ala. 69; *Glenn v. Garrison*, 17 N. J. L. 1; *Leake v. Loveday*, 4 Man. & G. 972.

⁶¹ Vol. I, §§ 264, 265, 553; *Carne v. Nicoll*, 1 Bing. N. Cas. 430, 27 E. C. L. 446; *Peaceable v. Watson*, 4

Taunt. 16; *Davis v. Pearce*, 2 Term R. 53; *Hadden v. Powell*, 17 Ala. 318; *Thomas v. DeGraffenreid*, 17 Ala. 602; *Spence v. Smith*, 18 N. H. 587.

⁶² *Holloway v. Rakes*, 2 Term R. 55; *Doe v. Jones*, 1 Campb. 367; *Doe v. Austin*, 9 Bing. 41; 23 E. C. L. 256; *Willies v. Farley*, 3 C. & P. 395, 14 E. C. L. 366; *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Arkwright*, 5 C. & P. 575, 24 E. C. L. 462; *White v. Dinkins*, 19 Ga. 285; *Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205.

⁶³ *Adams v. Kellogg*, 63 Mich. 105, 29 N. W. 679. See also *Kennedy v. Strong*, 14 Johns. (N. Y.) 123.

reason of the conversion, is bad;⁶⁴ but damages may be inferred from evidence of the plaintiff's ownership and of the conversion,⁶⁵ and nominal damages may be recovered in a proper case, even though there is no evidence of the actual value of the property,⁶⁶ at least where it appears that the property was of some value.⁶⁷ The burden of proving the value, in order to recover substantial damages, is upon the plaintiff;⁶⁸ but it has been held that where the defendant fails to produce the property and there is nothing to show that it was not of the best quality of its class, the jury may presume or infer that it was, and fix the value, under the evidence, accordingly.⁶⁹

§ 2671. **Evidence as to value.**—The general rules in regard to evidence of value apply in actions of trover as well as in other cases, and, as they have been fully considered elsewhere,⁷⁰ it will be sufficient in this connection to call attention to a few of the authorities and certain applications of such general rules in actions of trover. It may be said generally that all proper evidence fairly tending to show the value should be admitted.⁷¹ Thus, evidence of the price paid and the price for which the property sold is often admissible.⁷² So, as elsewhere shown, opinion evidence either of experts or, in some cases, of ordi-

⁶⁴ *Allen v. Toner*, 24 Ind. App. 121, 56 N. E. 250; *Ryan v. Hurley*, 119 Ind. 115, 21 N. E. 463.

⁶⁵ *Ryan v. Hurley*, 119 Ind. 115, 21 N. E. 463.

⁶⁶ *Douglass v. Hobe*, 36 App. Div. (N. Y.) 638.

⁶⁷ *Kellogg v. Hamilton*, (Miss.) 10 So. 479.

⁶⁸ *Electric Lighting Co. v. Rust*, 131 Ala. 484, 31 So. 486; *Nickey v. Zonker*, 22 Ind. App. 211, 220, 53 N. E. 478; *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. 858; *Greenville First Nat. Bank v. Montgomery*, 70 Miss. 550, 13 So. 240; *Sabine & Co. v. Perry*, (Tex. Civ. App.) 54 S. W. 327.

⁶⁹ *Tea v. Gates*, 10 Ind. 164; *Ryburn v. Pryor*, 14 Ark. 505; *Beecher v. Deniston*, 13 Gray (Mass.) 354; *Clark v. Miller*, 4 Wend. (N. Y.) 628; *Bailey v. Shaw*, 24 N. H. 297, 55

Am. Dec. 241; *Armory v. Delmirie*, 1 Stra. 505.

⁷⁰ See Vol. I, §§ 180-182, 676, 685; Vol. II, §§ 1051, 1109, 1112.

⁷¹ See *Lawton v. Chase*, 108 Mass. 238; *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63; *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 319; *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498; *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Illinois Cent. R. Co. v. Le Blanck*, 74 Miss. 626, 21 So. 748; *Illingworth v. Greenleaf*, 11 Minn. 235; *Scott v. Burch*, 6 Har. & J. (Md.) 67.

⁷² *Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032; *Hangen v. Hachemeister*, 114 N. Y. 566, 21 N. E. 1046; *Hawyer v. Bell*, 141 N. Y. 140, 36 N. E. 6; *Beach v. Raritan & Co.*, 37 N. Y. 457; *Gauche v. Mil-*

nary witnesses, is admissible, and market value may be proved in the manner elsewhere stated,⁷³ including, in a proper case, market reports or prices current.⁷⁴ And evidence of the value of the property at a different time, not too remote, is generally received at least when no better evidence can be obtained.⁷⁵ As to choses in action, stock, bonds and property that fluctuates in value, the inquiry is not always confined to the exact time of the conversion, but this subject is sufficiently treated in the first volume of this work and in the chapter in this volume on the subject of damages.

§ 2672. Mitigation of damages.—The defendant may show in mitigation that the goods or chattels converted were returned to and accepted by the plaintiff,⁷⁶ but it has been held that the burden of proof is upon the defendant to show acceptance or consent to the return,⁷⁷ and that a mere unaccepted offer to return will not, ordinarily, mitigate the damages,⁷⁸ although in some jurisdictions the courts permit the goods, especially such as bonds or the like, to be brought into court

brath, 94 Wis. 674, 69 N. W. 999; *Baker v. Seavey*, 163 Mass. 522, 40 N. E. 863, 47 Am. St. 475; *Hutchinson v. Poyer*, 78 Mich. 337, 44 N. W. 327; ante, Vol. I, § 182.

⁷³ See references in first note to this section, especially Vol. I, §§ 182, 325, and Vol. II, § 1302.

⁷⁴ *Seligman v. Rogers*, 113 Mo. 642, 21 S. W. 94; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. R. 202.

⁷⁵ *Pitt v. Texas Storage Co.*, (Tex. Civ. App.) 18 S. W. 465; *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645; Vol. I, § 182, n. 277 and authorities cited. But compare *Yater v. Mullen*, 23 Ind. 562; *Towne v. St. Anthony Elevator Co.*, 8 N. Dak. 200, 77 N. W. 608.

⁷⁶ *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Barrelett v. Bellgard*, 71 Ill. 280; *Lothrop v. Golden*, (Cal.) 57 Pac. 394; *Greenthal v. Lincoln*, 68 Conn. 384, 36 Atl. 318; *Pollak v. Davidson*, 87 Ala. 551, 6 So. 312; *Coburn v. Watson*, 48 Neb. 257, 67 N. W. 171;

Prinz v. Moses, (Kans.) 66 Pac. 1009; *Proctor v. Irvin*, 22 Mont. 547, 57 Pac. 183; *Gove v. Patson*, 61 N. H. 136; *Torry v. Black*, 58 N. Y. 185; *Kansas City First Nat. Bank v. Rush*, 85 Fed. 539; *Moon v. Raphael*, 2 Bing. (N. C.) 310, 2 Scott 289, 20 E. C. L. 345. So, the fact that the plaintiff has regained possession in other ways at less expense than the value of the property has been held proper to be considered in mitigation: *Baldwin v. Porter*, 12 Conn. 473; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Dodson v. Cooper*, 37 Kans. 346, 15 Pac. 200; *Muenster v. Fields*, 89 Tex. 102, 32 S. W. 852.

⁷⁷ *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931.

⁷⁸ *Carpenter v. Dresser*, 72 Me. 377, 39 Am. R. 337; *Norman v. Rogers*, 29 Ark. 365; *Stickney v. Allen*, 10 Gray (Mass.) 352; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. R. 685; *Bringard v. Stellwagen*, 41 Mich. 54, 1 N. W. 909.

and surrendered in mitigation of damages.⁷⁹ A subsequent appropriation of the property to the plaintiff's benefit, as where it is taken on process against the plaintiff in favor of a third person and applied to the payment of the plaintiff's debt, may generally be shown in mitigation.⁸⁰ The value of a chose in action, such as a bill, note, or bond, is *prima facie* the face value thereof, and, as a general rule, any evidence which legitimately goes to diminish the face value may be introduced by the defendant.⁸¹ But where the action is against the maker of a bill or note or the like he cannot mitigate the damages by showing his insolvency.⁸² Yet where he brings an action against a third person for its conversion and negotiation, and satisfies his liability thereon to the person to whom it was negotiated by the defendant, although for a less sum than its face, it has been held that he can recover from the defendant only the amount so paid.⁸³

⁷⁹ *Rutland &c. R. Co. v. Middlebury Bank*, 32 Vt. 639; *Gibson v. Humphrey*, 1 Cromp. & M. 544; *Tucker v. Wright*, 3 Bing. 601, 13 E. C. L. 64; *Chilton v. Carrington*, 15 Bigelow v. Heintze, 53 N. J. L. 69, 21 Atl. 109; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. R. 282; *Farr v. State Bank*, 87 Wis. 223, 58 N. W. 377, 41 Am. St. 40; *Rogers v. Cromble*, 4 Me. 274; *Gilbert v. Peck*, 43 Mo. App. 577.

⁸⁰ *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775; *Jones v. Cobb*, 84 Me. 153, 24 Atl. 798; *Stow v. Yarwood*, 14 Ill. 424; *Wanamaker v. Bowes*, 36 Md. 42; *Ball v. Liney*, 48 N. Y. 6, 8 Am.

R. 511; *Yale v. Saunders*, 16 Vt. 243; *Plevin v. Henshall*, 10 Bing. 24, 25 E. C. L. 17; *Biggins v. Goode*, 2 Cromp. & J. 364.

⁸¹ *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. 704; *Fisher v. George S. Jones Co.*, 108 Ga. 490, 34 S. E. 172; *McPeters v. Phillips*, 46 Ala. 496; *Callanan v. Brown*, 31 Iowa 333; *First Nat. Bank v. Dickson*, 5 Dak. 286, 40 N. W. 351; *Zeigler v. Wells*, 23 Cal. 179, 83 Am. Dec. 87; *Wills v. Wells*, 2 Moo. 247, 8 Taunt. 264, 4 E. C. L. 98.

⁸² *Stephenson v. Thayer*, 63 Me. 143; *Robbins v. Packard*, 31 Vt. 570, 76 Am. Dec. 134. See also *Craig v. McHenry*, 35 Pa. St. 120.

⁸³ *Hynes v. Patterson*, 95 N. Y. 1.

CHAPTER CXXV.

WASTE.

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2675. Questions of law or fact.	2679. Defenses.
2676. Plaintiff's title and what he must show.	2680. Damages.

§ 2673. **Generally.**—Waste is an act done by a tenant without license or authority whereby a lasting damage is done to the freehold.¹ The action of waste has been changed or abrogated in many jurisdictions and is now little used. At common law almost any evidence which would show an act or omission that diminished the value of the estate or its income, or increased the burdens upon it, was admissible in proof of waste.² This is slightly modified in most states and evidence will not be heard to show an act of a tenant unless it is or may be prejudicial to the inheritance, or to those who are entitled to the reversion or remainder.³ Evidence is admissible which shows a lasting damage to the inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. Even if the act is a benefit to the life tenant, if it can be shown to be a permanent loss to the owner in fee, it is considered waste.⁴ In Amer-

¹ Calvert v. Rice, 11 Ky. Law R. 1001, 12 Ky. Law R. 252; Proffitt v. Henderson, 29 Mo. 325; Keeler v. Eastman, 11 Vt. 293; Duvall v. Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350; Lander v. Hall, 69 Wis. 326, 34 N. W. 80; Davenport v. Magoon, 13 Ore. 3, 57 Am. R. 1; Jackson v. Brownson, 7 Johns. (N. Y.) 227; note in 14 Am. St. 632. As to waste by tenant in common of a mine, see note in 91 Am. St. 869. As to waste or devastavit by executor or administrator see Steele v. Holladay, 20 Ore. 70, 25 Pac. 69, 10 L. R. A. 670.

² Bond v. Lockwood, 33 Ill. 212.

³ Pyncheon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; Ward v. Sheppard, 3 N. Car. 283, 2 Am. Dec. 625; Hall v. Rohr, 10 Ohio Dec. 690, 23 Wkly. Law Bul. 121; Crockett v. Crockett, 2 Ohio St. 180.

⁴ Dawson v. Coffman, 28 Ind. 220;

ica the strict rules concerning waste as defined in England cannot be followed in all cases, owing to the situation of the country and the unsettled conditions existing in many localities.⁵

§ 2674. **Presumption and burden of proof**—The presumption, in the absence of anything to the contrary is in favor of a tenant for life of lands sought to be charged with waste, and the burden is generally upon the party alleging waste.⁶ But it has been held that where the defendant alleges that the value of the land would be enhanced by clearing it of timber, the burden of proof in one sense, at least, rests upon him to show such facts.⁷ So, where the defendant by way of defense alleged that he had permission to commit certain waste, the burden was held to be upon him to show such permission, and where a state statute provides that such permission must be in writing, the defendant must establish such written permission and the burden is not upon the plaintiff to show a want of such permission.⁸

§ 2675. **Questions of law or fact**.—The question whether there has been waste or not is a question of fact for the jury, and evidence of the use of the property and that the method of cultivation follows the practice and has the sanction of good farmers is admissible.⁹ Evidence of mere ill-husbandry,¹⁰ the cutting of the annual crop,¹¹ the gathering of the fruit,¹² or the changing of the crops, is not ordinarily

Proffitt v. Henderson, 29 Mo. 325;
Keeler v. Eastman, 11 Vt. 293;
Washburn Real Property (5th ed.),
page 147; McGregor v. Brown, 10 N.
Y. 114.

⁵ Ward v. Sheppard, 3 N. Car. 283,
2 Am. Dec. 625; Crockett v.
Crockett, 2 Ohio St. 180; Hall v.
Rohr, 10 Ohio Dec. 690, 23 Wkly.
Law Bul. 121; Pynchon v. Stearns,
11 Metc. (Mass.) 304, 45 Am. Dec.
207; Bond v. Lockwood, 33 Ill. 212;
McCord v. Oakland Quicksilver
Mining Co., 64 Cal. 134, 27 Pac. 863,
49 Am. R. 686.

⁶ Appeal of Lynn, 7 Casey (Pa.)
44, 72 Am. Dec. 721; Glass v. Glass,
6 Pa. Co. Ct. R. 408.

⁷ Moses v. Johnson, 88 Ala. 517, 7
So. 146, 16 Am. St. 58.

⁸ Davis v. Clark, 40 Mo. App. 515.

⁹ Webster v. Webster, 33 N. H. 18,
66 Am. Dec. 705; Lynn's Appeal, 31
Pa. St. 44, 72 Am. Dec. 721; Jack-
son v. Brownson, 7 Johns. (N. Y.)
227, 5 Am. Dec. 258; Keeler v. East-
man, 11 Vt. 293; King v. Miller, 99
N. Car. 583, 6 S. E. 660; Drown v.
Smith, 52 Me. 141, also holding that
the question as to what extent wood
and timber may be cut without
waste is a question for the jury.

¹⁰ Richards v. Torbert, 3 Houst.
(Del.) 172. But see Chase v. Hazel-
ton, 7 N. H. 171.

¹¹ Snyder v. Depew, 1 Lack. Leg.
Rec. 477.

¹² Robinson v. Russell, 24 Cal. 467.

sufficient to show waste. But evidence of the tilling of a farm contrary to the established usage, as not rotating the crops, has been held admissible to prove waste.¹³ So, it has been held that clearing of land which shows bad husbandry may be shown to prove waste.¹⁴ The changing of crops or converting meadow land into plow land will not show waste, unless it can also be shown to be detrimental to the inheritance.¹⁵ Whether the cutting of timber constitutes waste depends upon circumstances in each case. The tenant may, however, be justified in cutting timber where there is little or no tillable land and the cutting is for clearing purposes and not to sell.¹⁶

§ 2676. Plaintiff's title and what he must show.—The plaintiff must show his right or title, and this, it has been held, must be a legal title.¹⁷ He must also show the waste as alleged in the declaration. As said, in substance, by Professor Greenleaf, the plaintiff must be prepared to prove (1) the title of the plaintiff; (2) the demise, if there be one, or other title of the tenant; (3) the quality, quantity, and amount of the waste, and the place in which it was committed.¹⁸ So, as stated by the same author, under the general issue of not guilty, in an action on the case for waste, the entire declaration being open, the plaintiff must prove (1) his title, and the holding by the defendant, as alleged; (2) the waste complained of; and (3) the damages.¹⁹

§ 2677. Opinion evidence.—A witness may testify as to his acquaintance with a certain farm, both when the tenant took possession and at the time of the trial; such a witness may describe the condition of the farm at both times and he may give his opinion as to the value of the farm when the tenant took possession and what the farm would have been worth if kept in ordinarily good repair and cared for as the ordinary farmer would care for his premises. Such a witness may also testify as to his opinion of the cost necessary to place the

¹³ *Wilds v. Layton*, 1 Del. Ch. 226, 73 Ind. 43; *Tiedeman Real Prop.*, 12 Am. Dec. 91; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 579, 601. § 74.

¹⁴ *Chase v. Hazelton*, 7 N. H. 171.

¹⁵ *Crockett v. Crockett*, 2 Ohio St. 180; *Jones v. Whitehead*, 9 Pa. Law J. 9, 4 Clark (Pa.) 330; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

¹⁶ *Ward v. Sheppard*, 3 N. Car. 283, 2 Am. Dec. 625; *Cannon v. Barry*, 59 Miss. 289; *Robertson v. Meadors*,

¹⁷ *Gillett v. Treganza*, 13 Wis. 527; *Whitney v. Morrow*, 34 Wis. 644; *Law v. Wilgees*, 5 Biss. C. C. 13. But it seems that at common law it was not put in issue by the general issue. 2 Greenleaf Ev., § 652.

¹⁸ 2 Greenleaf Ev., § 653.

¹⁹ 2 Greenleaf Ev., § 656.

premises in good repair.²⁰ The opinion of witnesses has, however, been held inadmissible to show that the cutting down of trees on the land was not injurious to the inheritance and therefore not waste.²¹ But evidence of the neighbors that the tenant has done no more than was necessary to make a living from the land has been held admissible.²²

§ 2678. **Parol evidence.**—Parol evidence is not admissible to prove permission to cut timber where there is a state statute providing that such permission to be valid must be in writing.²³ But, in the absence of any such statute or writing it would seem to be admissible unless it comes within the statute frauds. Such evidence is, of course, admissible, in ordinary cases, to show the acts constituting the waste and the resulting damages.

§ 2679. **Defenses.**—Evidence is admissible by way of defense which shows that the loss was occasioned directly by the act of God, or a public enemy, or without any fault upon the part of the tenant.²⁴ So, it seems, that the defendant may show that the act was done for the benefit of the land according to the custom of the country and did not, therefore, constitute waste.²⁵ He may also show, in a proper case, at least under a special plea, facts in justification or excuse, such as a license from the plaintiff or the like. But it has been held that where the tenant has at his own expense made valuable improvements when not required so to do, he cannot prove such fact by way of defense or recoupment when he is sued for waste.²⁶

§ 2680. **Damages.**—Proper evidence is admissible to show the damages sustained. Thus, evidence of the relative value of the land

²⁰ *Ferguson v. Stafford*, 33 Ind. 169.

²¹ *McGregor v. Brown*, 6 Seld. (N. Y.) 114.

²² *King v. Miller*, 99 N. Car. 583, 6 S. E. 660.

²³ *McGregor v. Brown*, 6 Seld. (N. Y.) 114, holds that in an action by a landlord against a tenant for waste in cutting timber, evidence of a parol contract or consent by the landlord is inadmissible;

such permission would be a mere license, and would require a written instrument to give it validity. See also, *Davis v. Clark*, 40 Mo. App. 515.

²⁴ Fully discussed in the *Am. & Eng. Ency. of Law* (1st ed.) under the title of waste.

²⁵ *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Dashwood v. Magniac*, (1891) 3 Ch. 306.

²⁶ *Miller v. Shields*, 55 Ind. 71.

with the wood, on or off, the depreciation of the wood if left standing, the amount of wood upon the land, the number of acres of wood left standing, and the like has been held admissible in determining the amount of the damages done.²⁷ In an action by the remainderman, however, he can prove only such damages as he has sustained, as, for instance, in an action against one who has acted under permission from the life tenant for waste, the matter the remainderman can inquire into should be confined strictly to the damage done the inheritance.²⁸

²⁷ *Harder v. Harder*, 26 Barb. (N. Conn. 350; *Kent v. Bentley*, 10 Ohio Y.) 409. C. C. 132; *McCullough v. Irvine's*

²⁸ *Van Deusen v. Young*, 29 N. Y. Exrs., 1 Harris (Pa.) 438.
9; *Town of Hamden v. Rice*, 24

CHAPTER CXXVI.

WILLS.

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2691. Same—Declarations of testator.	

§ 2681. **Generally.**—Many matters that might otherwise come within the scope of this chapter have been treated elsewhere. Thus, the question as to when and to what extent parol evidence is admissible in will cases has been fully treated in the chapter on parol evidence,¹ and will not be treated here, in so far, at least, as it has to do with the construction of wills. So, the subjects of expert and opinion evidence,² insanity,³ hearsay evidence,⁴ declarations,⁵ and *res gestae*⁶ have been so fully treated that little remains to be said in regard to them in this connection. But there are many other questions that arise in cases where wills are offered for probate or in cases where

¹ Vol. I, Ch. XXVI.

⁴ Vol. I, Ch. XIV.

² Vol. I, Ch. XXIX; Vol. II, § 1077.

⁵ Vol. I, § 533.

³ Vol. I, §§ 126, 681; Vol. II, Ch.

⁶ Vol. I, Ch. XXV.

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wills are contested and especially in regard to the execution and proof of wills, attesting witnesses, testamentary capacity, undue influence, revocation and the like, which will be treated in this chapter.

§ 2682. **Admissibility of wills in evidence.**—A domestic will that has been duly admitted to probate, with a complete copy of the record thereof, if properly authenticated by the clerk and attested by his signature and official seal, is admissible in evidence in most jurisdictions without further proof.⁷ The record of the proofs given in evidence must generally be introduced along with the will itself even in a suit to contest the validity of the will.⁸ But neither a foreign will⁹ nor a domestic will¹⁰ is ordinarily admissible in evidence as an instrument of title to establish any rights claimed thereunder until it has been duly admitted to probate. Yet there are cases in which it may be admissible as an ancient document¹¹ or as the foundation of some equity or the like,¹² and it has been held that it may be admissible in an action by a devisee although not probated until after the action had been commenced.¹³

§ 2683. **Probate and contest.**—In a proceeding for probate of a will the first fact to be proved as a rule, is the death of the testator, and proof of his domicile may also be necessary in order to show that the court has jurisdiction; but either of these facts may be established, in a proper case, by circumstantial as well as direct evidence. It

⁷ Abbott Trial Ev. (2d ed.) 138, § 59. See also Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698; Kostecky v. Scherhart, 99 Iowa 120, 68 N. W. 591; Holman v. Riddle, 8 Ohio St. 384.

⁸ Summers v. Copeland, 125 Ind. 466, 471, 25 N. E. 555.

⁹ Thieband v. Sebastian, 10 Ind. 454; State v. Joyce, 48 Ind. 310, 319; Pitts v. Meiser, 72 Ind. 469.

¹⁰ Rogers v. Stevens, 8 Ind. 464; Hopkins v. Quinn, 93 Ind. 228; Moore v. Stephens, 97 Ind. 271; Inge v. Johnston, 110 Ala. 650, 20 So. 757; Harris v. Douglas, 64 Ill. 466; Jones v. Dove, 6 Ore. 188; Dublin v. Chadbourn, 16 Mass. 433; Cousens v. Ad-

vent Church, 93 Me. 292, 45 Atl. 43; Swazey v. Blackman, 8 Ohio 5; Douglass v. Miller, 4 Ohio Dec. 414, 3 N. P. 220. A lost will must be proved and established according to law before it can be used as evidence to sustain or otherwise affect the title to property bequeathed by it. Mauck v. Melton, 64 Ind. 414.

¹¹ See Giddings v. Smith, 15 Vt. 344; Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485.

¹² Olleman v. Kilgore, 52 Iowa 38, 2 N. W. 612; Pettit v. Black, 13 Neb. 142, 12 N. W. 841.

¹³ Otto v. Doty, 61 Iowa 23, 15 N. W. 578.

must also be made to appear that the instrument offered as a will was duly executed as required by law, and some evidence of testamentary capacity is usually required.¹⁴ Provision is usually made for the contest of a will within a limited time after its admission to probate, and the proceeding under some statutes, is said to be in the nature of an appeal,¹⁵ but it is not strictly an appeal¹⁶ and does not review the action of the court below on error.¹⁷ The whole matter, however, is largely regulated by statute.

§ 2684. Due execution—Burden of proof—Questions of law or fact.—The burden of proving the due execution of a will by a preponderance of the evidence is upon the proponent or party propounding such will for probate.¹⁸ "Burden of proof," says Professor Page, "means the necessity of maintaining the affirmative side of the issue by a preponderance of the evidence, estimated by its impression on the mind of the tribunal which decides questions of fact, than the adversary adduces. If the evidence is evenly balanced, the party upon whom the burden of proof rests must fail. It is in this sense that this phrase is here used. Another meaning given to 'burden of proof,' by good authority, is the necessity of establishing one's side of the issue *prima facie* in the first instance. Ordinarily there is no inconsistency between these two definitions. The party who is bound to

¹⁴ *Rice v. Hall*, 120 Ill. 597, 12 N. E. 236; *Martin v. Perkins*, 56 Miss. 204; *Delafield v. Parish*, 25 N. Y. 9; *Wallis v. Hodgeson*, 2 Atk. 56; *Harris v. Ingledew*, 3 P. Wms. 93.

¹⁵ *Haynes v. Haynes*, 33 Ohio St. 598.

¹⁶ *Bradford v. Andrews*, 20 Ohio St. 208; for the provision in the latest Ohio statute, see *Thompson Ohio Tr. Ev.*, § 1117.

¹⁷ *Watson's Will*, 131 N. Y. 587, 30 N. E. 56; *Converse v. Starr*, 23 Ohio St. 491; *Clark v. Ellis*, 9 Ore. 128.

¹⁸ *Will of John Kellum*, Matter of, 52 N. Y. 517; *Overby v. Gordon*, 13 App. (D. C.) 392; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Morrell v. Morrell*, 157 Ind. 179, 60 N. E. 1092; *Barlow v. Waters*, (Ky.) 28 S. W. 785; *McFadin v. Catron*, 120 Mo.

252, 25 S. W. 506; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Murry v. Hennessey*, 48 Neb. 608, 57 N. W. 470; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Swain v. Edmunds*, 54 N. J. Eq. 438, 37 Atl. 1117; *Thomas' Will*, 111 N. Car. 409, 16 S. E. 226; *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308; *Roberts v. Welch*, 46 Vt. 164; *Williams v. Robinson*, 42 Vt. 658, 1 Am. R. 359. See also, *McMechen v. McMechen*, 17 W. Va. 583, 41 Am. R. 682; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831, 837; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Luper v. Werts*, 19 Ore. 122, 23 Pac. 850; *Mears v. Mears*, 15 Ohio St. 90; *Bar-tee v. Thompson*, 8 Baxt. (Tenn.) 511.

establish his side of the issue *prima facie* is also bound to maintain the issue on his part by a preponderance of the evidence. But in some classes of cases special statutes direct specifically which party shall open the case, how far he shall proceed, and what evidence on his part shall make a *prima facie* case for him. Such statutes do not change the pre-existing rules as to which party must establish the issue on his part by a preponderance of the evidence, unless they expressly so state. There is no implication as to the preponderance of the evidence to be drawn from a statute which merely directs the conduct of the trial. In cases where such statutes control, it is, therefore, possible for one side to be obliged to open and to make out a *prima facie* case, while the other side is bound to maintain the issue on its part by a preponderance of evidence. The general rule of procedure, or the special statutes apply in this particular case, determine which side must open and make out a *prima facie* case. On neither of these points can there be any change during the progress of the trial. When it is said that the burden of the proof shifts, it is evidently another way of saying that now one side, and now the other has a preponderance of the evidence adduced up to that time."¹⁹ What is necessary in law to constitute due execution, or, in other words, what facts are necessary to the due execution of a will is a question of law to be determined by the court.²⁰ But whether in the particular case these facts exist, is ordinarily a question of fact for the tribunal which is to decide the facts.

§ 2685. Same—Right to open and close—Practice.—In most jurisdictions the proponent, where he offers a will for probate, or even upon the trial of a will contest after probate, has the right to open and close since he has the burden of proof as to the validity of the will, under the theory entertained in most jurisdictions.²¹ But, after a will has

¹⁹ Page Wills, 437. See also, to the effect that the burden of ultimately establishing his case does not shift from the proponent, *Morrell v. Morrell*, 157 Ind. 179, 187, 60 N. E. 1092.

²⁰ *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Bramel v. Bramel*, (Ky.) 39 S. W. 520.

²¹ *Mathews v. Forniss*, 91 Ala. 157, 8 So. 661; *Overby v. Gordon*, 13 App. (D. C.) 392; *Bardell v. Brady*, 172

Ill. 420, 50 N. E. 124; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Tate v. Tate*, 89 Ill. 42; *Rigg v. Wilton*, 13 Ill. 15; *Sheehan v. Kearney*, (Miss.) 21 So. 41, 35 L. R. A. 102; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Green v. Green*, 5 Ohio 278; *Brown v. Griffiths*, 11 Ohio St. 329; *Banning v. Banning*, 12 Ohio St. 437; *Gable v. Rauch*, 50

once been probated, it would seem, upon principle, that, at least if the probate is not in common form, or ex parte, and if the probate is to be considered at all on the proceeding to contest, the burden and the right to open and close might well be held to be upon the party who attacks its validity, and this is the rule in some jurisdictions.²² So, as intimated in the last preceding section, the burden as to some issues may be upon the contestant in nearly all jurisdictions, and the order and manner of introducing evidence and the extent to which either party is required to go in the first instance is sometimes regulated by statute or local practice. Ordinarily, however, on the probate of a will the usual practice is for the proponent to produce the subscribing witnesses, make formal proof of due execution of the will in compliance with the statute, and introduce some evidence, at least, of testamentary capacity.

§ 2686. Evidence of execution.—In order to prove the due execution of a will it must be made to appear that the statutory requirements were followed, as, for instance, under most statutes, that the will as such was signed by the testator,²³ or by some one in his presence, with his consent,²⁴ and was attested and subscribed in his presence by two or more competent witnesses.²⁵ The execution is usually proved by calling one or more of the subscribing or attesting witnesses as the statute provides, and other evidence upon the subject may also be admissible, especially where such witnesses are dead or their testimony cannot be obtained, but this subject will be more fully considered hereafter.²⁶ The competency of the attesting witnesses

S. Car. 95, 27 S. E. 555; Brock, in re, 37 S. Car. 348, 16 S. E. 38; Vol. I, § 138. See also Mendenhall's Will, in re, 43 Ore. 542, 73 Pac. 1033.

²² See Vol. I, § 138, n. 23, and authorities cited. See also Bolles v. Harris, 34 Ohio St. 38; Dew v. Reid, 52 Ohio St. 519, 40 N. E. 718; Mears v. Mears, 15 Ohio St. 90; Wagner v. Ziegler, 44 Ohio St. 59, 4 N. E. 705; Brown v. Burdick, 25 Ohio St. 260.

²³ Moore v. Stephens, 97 Ind. 271. As to the place where the testator must sign, see Reed v. Watson, 27 Ind. 443, 449.

²⁴ Herbert v. Berrier, 81 Ind. 1, or

under some statute, that it was so acknowledged by him; Brownfield v. Brownfield, 43 Ill. 147; Critz v. Pierce, 106 Ill. 167.

²⁵ 2 Greenleaf Ev. (16th ed.), § 678. See also, Perea v. Barela, 6 N. Mex. 239, 27 Pac. 507; Roberts v. Welch, 46 Vt. 164. Knowledge of the contents by the testator must be shown in some jurisdictions, but it is generally presumed, and the attestation clause is sometimes held to be prima facie evidence of facts recited.

²⁶ See elaborate note to Stevens v. Leonard (154 Ind. 67), 77 Am. St. 459-480.

will generally be presumed until the contrary is shown,²⁷ and if they were competent at the time of attesting the will their subsequent incompetency will not prevent the will from being proved.²⁸ It has been held that the testator's name must have been signed to the will before the attesting witnesses signed their names;²⁹ but it is sufficient, in most jurisdictions if he acknowledges in their presence his signature already attached to the will.³⁰ It has also been held that when the testator's name is signed by another at his request, a mistake in writing the wrong given name does not affect the validity of the execution of the will, if the fact that he was the person who executed it is duly proved.³¹ And it has been held that the witnesses are in the presence of the testator within the meaning of the law if they are where he can see them sign when they attest the will, although it is not proved that he actually did see them.³² Under some statutes the witnesses need not know the contents of the will, nor even know that it is the will of the testator,³³ nor is it necessary that they shall attest the will at his express request.³⁴ It is not necessary under most statutes that both witnesses shall sign at the same time, nor that each should sign in the presence of the other,³⁵ provided the fact that each signed in the testator's presence is duly proved;³⁶ but where one merely attested an indorsement which the testator wrote on the back of the will several years after he had signed the will and caused it to be attested by the other witness, it was held that this was not a valid execution of the will.³⁷ In Indiana the attesting clause need not recite

²⁷ *Herbert v. Berrier*, 81 Ind. 1, 4; Ind. 408; *Turner v. Cook*, 36 Ind. Perine v. Grand Lodge, 48 Minn. 82, 129. 91, 50 N. W. 1022.

²⁸ *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 51 Am. St. 121; *Slingloff v. Bruner*, 174 Ill. 561, 568, 51 N. E. 772; *Holt's Will*, In re, 56 Minn. 33, 57 N. W. 219; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155, 157; *Patten v. Tallman*, 27 Me. 17; *Brograve v. Winder*, 2 Ves. Jr. 636.

²⁹ *Reed v. Watson*, 27 Ind. 443.

³⁰ *Manning v. Gasharie*, 27 Ind. 399, 408; *Turner v. Cook*, 36 Ind. 129.

³¹ *Rook v. Wilson*, 142 Ind. 24, 41 N. E. 311.

³² *Riggs v. Riggs*, 135 Mass. 238, 46 Am. R. 464; *McElfresh v. Guard*, 32

³³ *Brown v. McAllister*, 34 Ind. 375; *Turner v. Cook*, 36 Ind. 129; *Bundy v. McKnight*, 48 Ind. 502, 509. See also, *Raudebaugh v. Shelly*, 6 Ohio St. 307.

³⁴ *Herbert v. Berrier*, 81 Ind. 1; *Dyer v. Dyer*, 87 Ind. 13; *Bundy v. McKnight*, 48 Ind. 502.

³⁵ *Hayes v. West*, 37 Ind. 21; *Johnson v. Johnson*, 106 Ind. 475, 7 N. E. 201; *Willis v. Mott*, 36 N. Y. 486; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675.

³⁶ *Hayes v. West*, 37 Ind. 21.

³⁷ *Patterson v. Ransom*, 55 Ind. 402.

a compliance with the provisions of the statute, but it is sufficient if the witnesses merely subscribe their names as such even though the attesting clause does not expressly state the character in which they sign,³⁸ and the fact that a memorandum was written below the testator's name and signed by his wife before the attesting witnesses signed does not invalidate the execution of a will.³⁹ So, it has been held that the insertion of an additional clause in a will by direction of the testator in the presence of the witnesses after the will has been duly executed and attested makes such clause a part of the will, and it is not necessary that the testator and the witnesses shall again sign it.⁴⁰ But unattested provisions afterward inserted are not usually entitled to probate.⁴¹ As a general rule any evidence tending to show that the formalities prescribed by law were not observed in the execution of a will is admissible to disprove due execution, as for instance, evidence that one of the witnesses signed before the testator, who attached his name to the will afterward in the absence of such witness,⁴² or that the testator's signature was attested by a single witness,⁴³ or that he did not acknowledge the will or signature as required by statute,⁴⁴ or that one of two persons whose names appear on the will as witnesses signed for the sole purpose of attesting the signature to a memorandum indorsed on the will itself.⁴⁵ So is evidence that the testator or one of the alleged subscribing witnesses was not present at the time and place of the alleged execution of the will.⁴⁶

§ 2687. **Presumption of due execution.**—In a recent case it is said: "When a paper propounded as a will is shown to have been signed by the alleged testator and the requisite number of witnesses, in the absence of any satisfactory evidence to the contrary the presumption is that all the formalities have been complied with."⁴⁷ This

³⁸ *Herbert v. Berrier*, 81 Ind. 1; *Potts v. Felton*, 70 Ind. 166; *Olerick v. Ross*, 146 Ind. 282, 45 N. E. 192.

³⁹ *Potts v. Felton*, 70 Ind. 166, 172.

⁴⁰ *Wright v. Wright*, 5 Ind. 389.

⁴¹ *Stevens v. Stevens*, 6 Dem. (N. Y.) 262, 3 N. Y. S. 131; *Trelear v. Lean*, 14 Prob. Div. 49. And may operate as a revocation or vitiate the whole will. *Glancy v. Glancy*, 17 Ohio St. 134.

⁴² *Reed v. Watson*, 27 Ind. 443, 450.

⁴³ *McCarty v. Waterman*, 84 Ind. 550; *Moore v. Stephens*, 97 Ind. 271.

⁴⁴ *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140.

⁴⁵ *Patterson v. Ransom*, 55 Ind. 402.

⁴⁶ *Risse v. Gasch*, 43 Neb. 287, 61 N. W. 616; *Barbour v. Moore*, 10 App. (D. C.) 30.

⁴⁷ *Brock, In re*, 37 S. Car. 348, 16 S. E. 38. See also, *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98; *Gould v.*

presumption is especially to be indulged where the attestation clause is perfect, and recites the performance of all the facts necessary to the validity of the will,⁴⁸ although the presence of an attestation clause does not ordinarily dispense with direct evidence of the facts of execution where this is available.⁴⁹ But where a will recited that certain acts were done, and omitted certain essential facts, it was held that there was no presumption that these omitted facts were done. Where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument or of the circumstances of execution, the presumption that it was properly executed will generally uphold it in the absence of clear and satisfactory proof to the contrary.⁵⁰ So, if the subscribing witnesses to a will are dead, or absent from the jurisdiction of the court before which the will is offered for probate so that their testimony cannot be obtained, proof of the genuineness of the signatures of such attesting witnesses and of the testator is generally sufficient, with the aid of this presumption that the remaining acts were properly done, to establish the validity of the will.⁵¹ So, as a general rule, where it is shown that the testator signed the will, it is presumed that he knew its contents and signed it understandingly.⁵²

Chicago &c. Seminary, 189 Ill. 282, 59 N. E. 536; Greenough v. Greenough, 11 Pa. St. 489, 51 Am. Dec. 567; Croft v. Pawlet, 2 Stra. 1109.

⁴⁸ Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581, affirming 53 Ill. App. 133; Farley v. Farley, 50 N. J. Eq. 434, 26 Atl. 178; Skinner v. Lewis, 40 Ore. 571, 67 Pac. 951; Barnes v. Barnes, 66 Me. 286; Carpenter v. Denoon, 29 Ohio St. 379; Rugg v. Rugg, 83 N. Y. 594; Claffin, In re, 73 Vt. 129, 50 Atl. 815.

⁴⁹ Raleigh &c. R. Co. v. Glendon &c. Co., 113 N. Car. 241, 18 S. E. 208.

⁵⁰ O'Hagan's Will, 73 Wis. 78, 40 N. W. 649; Hunt, In re, 110 N. Y. 278, 18 N. E. 106; Thomas, Goods of, 1 Sw. & Tr. 255, 5 Jur. N. S. 104; Twombly, Estate of, 120 Cal. 350, 52 Pac. 815; Sullivan, In re, 114 Mich. 189, 72 N. W. 135; this presumption was recognized in the recent case of Mendenhall's Will, 43 Ore. 542, 73 Pac. 1033, but it was

held that it had been overcome in that case by convincing evidence to the contrary.

⁵¹ Barnewall v. Murrell, 108 Ala. 366, 18 So. 831; Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683; More v. More, 211 Ill. 268, 71 N. E. 988; Hobart v. Hobart, 154 Ill. 610, 39 N. E. 581; Taylor v. Cox, 153 Ill. 220, 38 N. E. 656; Scott v. Hawk, 107 Iowa 723, 77 N. W. 467; Allison's Estate, 104 Iowa 130, 73 N. W. 489; Nickerson v. Buck, 12 Cush. (Mass.) 332; Sullivan, In re, 114 Mich. 189, 72 N. W. 135; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144; Page Wills 442.

⁵² Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. 265; Sheer v. Sheer, 159 Ill. 591, 43 N. E. 334; Sullivan's Will, In re, 114 Mich. 189, 72 N. W. 135; Boehm v. Kress, 179 Pa. St. 386, 36 Atl. 226; Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253; as to rebuttal of this pre-

Evidence that the will was drawn and the execution supervised by one who was experienced in such subjects is competent, as a presumption or inference of fact may arise or be drawn therefrom that the execution was properly accomplished.⁵³ So, evidence that the testator himself was an experienced lawyer has likewise been held admissible to raise this presumption,⁵⁴ or justify such inference. These presumptions and inferences may, however, be rebutted.

§ 2688. **Execution—Declarations.**—The general rule in most jurisdictions is that the declarations of a testator are admissible only when they are contemporaneous with and explanatory of the facts of execution,⁵⁵ or, in other words, when they are, in a sense, part of the *res gestas*. The weight of authority is clearly to the effect that declarations made at any substantial period of time after execution, though comparatively short, are narratives of past events, and are not admissible to establish due execution,⁵⁶ nor to show that the will was a forgery or the like.⁵⁷ So, declarations of the testator made before the execution of the will, as to his intentions, are not usually admissible upon the question of the execution of the will.⁵⁸ But there are some authorities which hold that declarations of the testator are admissible at least in corroboration of other evidence as to his execution of a will.⁵⁹ And, since declarations are usually admissible to show

sumption, see *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145.

⁵³ *Sullivan's Will*, In re, 114 Mich. 189, 72 N. W. 135; *Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; *Gable v. Rauch*, 50 S. Car. 95, 27 S. E. 555.

⁵⁴ *Stewart v. Stewart*, 56 N. J. Eq. 761; 40 Atl. 438; *Nelson's Will*, 141 N. Y. 152, 36 N. E. 3.

⁵⁵ *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872; *Waterman v. Whitney*, 11 N. Y. 157; *Gordon's Will*, 50 N. J. Eq. 397, 26 Atl. 268; *Breck v. State*, 4 Ohio C. C. 160. See also *Marston v. Marston*, 17 N. H. 503, 43 Am. Dec. 611. So, of course, declarations of third persons are usually inadmissible. See *Stocksdale v. Cullison*, 35 Md. 322; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Roberts v. Trawick*, 13 Ala. 68; *Hylton v.*

Hylton, 1 Gratt. (Va.) 161; *Collins v. Nicols*, 1 Har. & J. (Md.) 399. But an admission of a devisee or the like may be competent against himself.

⁵⁶ *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 772; *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095; *Gordon's Will*, 50 N. J. Eq. 397, 26 Atl. 268.

⁵⁷ *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095; *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33. See note in *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164.

⁵⁸ *Throckmorton v. Holt*, 12 App. (D. C.) 552; *Swope v. Donnelly*, 190 Pa. St. 417, 42 Atl. 882; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056.

⁵⁹ *Lane v. Hill*, 68 N. H. 275, 44

mental condition and states of feeling, a testator's declarations made after execution are admissible in a proper case to show that he knew that the instrument which he was executing was a will.⁶⁰ So, letters of a testator have been held admissible to show his knowledge of the will and its contents.⁶¹

§ 2689. **Testamentary capacity—Burden of proof.**—There is sharp conflict among the authorities upon the question as to whether the proponent of the will or the contestant has the burden of proof upon the question of mental or testamentary capacity. One recent writer says that the weight of authority seems to be that the burden of proof is upon the party alleging incapacity; that is, upon the contestant.⁶² Another says that the weight of authority is to the effect that the burden is upon the proponent.⁶³ The truth is that different courts of the

Atl. 393, 73 Am. St. 591; Throckmorton v. Holt, 12 App. (D. C.) 552; Scott v. Hawks, 105 Iowa 467, 75 N. W. 368. See also Reel v. Reel, 1 Hawks (N. Car.) 248, 9 Am. Dec. 632; Davis v. Rogers, 1 Houst. (Del.) 74.

*Nelson's Will, 141 N. Y. 152, 36 N. E. 3; Sullivan's Will, In re, 114 Mich. 189, 72 N. W. 135. See also, Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298; Comstock v. Hadlyme &c. Soc., 8 Conn. 254, 20 Am. Dec. 100.

"Wheelock's Will, In re, (Vt.) 56 Atl. 1013.

*Page Wills 448; Barnewall v. Murrell, 108 Ala. 306, 18 So. 831; Jenkins v. Tobin, 31 Ark. 306; Scott's Estate, 128 Cal. 57, 60 Pac. 527; Steele v. Helm, 2 Marv. (Del.) 237; Smith v. Day, 2 Pennew. (Del.) 245, 45 Atl. 396; Blough v. Parry, 144 Ind. 463, 40 N. E. 70; Tyson v. Tyson, 37 Md. 567; Higgins v. Carlton, 28 Md. 115; Sheehan v. Kearney, (Miss.) 21 So. 41; Perkins v. Perkins, 39 N. H. 163; Burn's Will, In re, 121 N. Car. 336, 28 S. E. 519; McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. 870; Delafield v. Parish, 25 N.

Y. 9; Howard v. Moot, 64 N. Y. 262; Messner v. Elliott, 184 Pa. St. 41, 39 Atl. 46; Linton's Appeal, 104 Pa. St. 228; Key v. Holloway, 7 Baxt. (Tenn.) 575; Burton v. Scott, 3 Rand. (Va.) 399; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21. See also Barnes v. Barnes, 66 Me. 286; Blake v. Rourke, 74 Iowa 519, 38 N. W. 392; Boone v. Ritchie, (Ky.) 53 S. W. 518; Carl v. Gabel, 120 Mo. 283, 25 S. W. 214. In some jurisdictions the rule is that where the proponent makes out a prima facie case by the subscribing witnesses, the burden is upon the contestant to show lack of testamentary capacity. Ehtwistle v. Meikle, 180 Ill. 9, 54 N. E. 217.

*Gardiner Wills 130; Livingstone's Appeal, 63 Conn. 68, 26 Atl. 470; Barber's Estate, In re, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Evans v. Arnold, 52 Ga. 169; Johnston v. Stevens, (Ky.) 23 S. W. 957; Baldwin v. Parker, 99 Mass. 79; Crowninshield v. Crowninshield, 2 Gray (Mass.) 524; Hall v. Perry, 87 Me. 569, 33 Atl. 160; Thomson, In re, 92 Me. 563, 43 Atl. 511; Moriarity v. Moriarity, 108 Mich. 249, 65 N. W. 964; Prentis v. Bates, 93 Mich.

highest standing have taken opposite views, and numerically the authorities are about equally divided, although a majority, perhaps, hold that the burden is upon the contestant at least where the formal execution of the will has been shown and the subscribing witnesses have testified to the sanity and testamentary capacity of the testator. Where the burden is held to be upon the contestant it is held that the verdict must be in favor of proponents, if the evidence adduced is so evenly balanced that there cannot be said to be a preponderance either way.⁶⁴ This is the rule, in such jurisdictions, even where the testator was a monomaniac, and the burden of proof is on the party alleging incapacity to show that the will was affected thereby.⁶⁵ The burden of proof has also been held to be on the contestants to establish incapacity of permanent type before the proponent is called upon to show that the will was made in a lucid interval,⁶⁶ and even then, it has been held that the proponent is not required to show a return to sanity or the execution of the will in a lucid interval by a preponderance of the evidence, for, if evidence is evenly balanced the party having the burden of proof cannot recover.⁶⁷

§ 2690. **Same—Question of law or fact—Presumptions.**—What is necessary in law, or the legal test or standard, so far as there is any, of testamentary capacity is a question of law for the court. But ordinarily, at least, whether the testator had or had not testamentary capacity at the time of the execution of the will is a question of fact, or a mixed question of law and fact, to be determined by the jury or tribu-

234, 53 N. W. 153; *Layman's Will*, In re, 40 Minn. 371, 42 N. W. 286; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *Patten v. Cilley*, 67 N. H. 520, 42 Atl. 47; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Chrisman v. Chrisman*, 16 Ore. 127, 18 Pac. 5; *Williams v. Robinson*, 42 Vt. 658; *Baldwin's Estate*, In re, 13 Wash. St. 666, 43 Pac. 934; *McMechen v. McMechen*, 17 W. Va. 683. See *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, where many of the conflicting cases are reviewed.

⁶⁴ *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948.

⁶⁵ *Young v. Miller*, 145 Ind. 652, 44

N. E. 757; *Edwards v. Davis*, 30 Wkly. L. Bul. 283; *Taylor v. Trich*, 165 Pa. St. 586, 30 Atl. 1053. See also *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271.

⁶⁶ *Murphree v. Senn*, 107 Ala. 424, 18 So. 264.

⁶⁷ *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Young v. Miller*, 145 Ind. 652, 44 N. E. 757. But in other jurisdictions it is held that the burden shifts after one side has made a prima facie case. See *Hollenbeck v. Cook*, 180 Ill. 65, 54 N. E. 154; *Sturdevant*, Appeal of, 71 Conn. 392, 42 Atl. 70; but see *Shingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772. See *Keely v. Moore*, (U. S.) 25 Sup. Ct. 169.

nal by which facts are to be decided.⁶⁸ The phrase "unsound mind," as used in some of the statutes is employed with reference to the well-understood legal definition of testamentary capacity⁶⁹ and in most jurisdictions the test for determining whether a will should be set aside because of unsoundness of the testator's mind is whether the testator at the time the will was executed,⁷⁰ possessed mind enough to know the extent of his property, the number and names of the persons who were the natural objects of his bounty and perhaps in a general way, their deserts and their capacity and necessities and to understand the disposition he was making of his property, or a sufficiently active memory to retain these matters in his mind long enough to have his will prepared and executed.⁷¹ Every person is presumed to be of sound mind until the contrary is proved, and testamentary capacity is usually presumed in favor of a testator.⁷² It is necessary, in order to disprove the validity of a will on the ground of the testator's unsoundness of mind, to establish not only some degree of mental infirmity and impairment of memory, as the fact that the testator suffered from mental perversion or aberration at times,⁷³ or was weakened by disease,⁷⁴ or suffered from delusions,⁷⁵ or believed in witchcraft,⁷⁶

⁶⁸ *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Petrie v. Petrie*, 126 N. Y. 683, 27 N. E. 958; *Morris v. Morton*, (Ky.) 20 S. W. 287; *Slingeroff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Holzman v. Hibben*, 100 Ind. 338.

⁶⁹ *Young v. Miller*, 145 Ind. 652, 44 N. E. 757.

⁷⁰ *Blough v. Parry*, 144 Ind. 463, 493, 40 N. E. 70.

⁷¹ *Eastis v. Montgomery*, 95 Ala. 486, 11 So. 204, 36 Am. St. 227, and note; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. 734; also note in *Williams v. Chicago & C. R. Co.*, 112 Mo. 463, 31 Am. St. 422; *Lowder v. Lowder*, 58 Ind. 538; *Dyer v. Dyer*, 87 Ind. 13; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099;

28 Am. & Eng. Ency. of Law (2nd ed.) 70, 73, showing where this test is adopted and where other tests are adopted; *Page Wills* 114, § 97.

⁷² *Moore v. Allen*, 5 Ind. 521; *Rush v. Megee*, 26 Ind. 69; *Herbert v. Berrier*, 81 Ind. 1; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70; *Teegarden v. Lewis*, 145 Ind. 98, 44 N. E. 9; *Greenleaf Ev.* (16th ed.), Vol. I, § 42, Vol. II, § 689; 1 *Jones Ev.*, § 187.

⁷³ *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333; *Burkhart v. Gladish*, 123 Ind. 337, 342, 24 N. E. 118.

⁷⁴ *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

⁷⁵ *Lowder v. Lowder*, 58 Ind. 538. Unless the delusions entered into and infected the disposition of his property by will, *Rush v. McGee*, 36 Ind. 69, 80; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

⁷⁶ *Addington v. Wilson*, 5 Ind. 137.

or was suffering intense pain,⁷⁷ but also to show that his mental infirmity was of such degree and extent as amounted to testamentary incapacity. It is not necessary that the testator should actually know the extent and value of his property at the time his will is made, but only that he has at that time the capacity to know and understand.⁷⁸ The fact that the testator was under guardianship as an insane person, however, at the time his will was made has been held to raise a presumption of testamentary incapacity, which must be removed by evidence to the contrary, or the contestants will be entitled to have the will set aside.⁷⁹ But it does not necessarily invalidate his will.⁸⁰

§ 2691. **Same—Declarations of testator.**—As a general rule, any declarations of the testator which legitimately tend to show the condition of his mind at the time that he made his will are admissible to determine his mental capacity at that date.⁸¹ This is true no matter

⁷⁷ *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27.

⁷⁸ *Blough v. Parry*, 144 Ind. 463, 489, 40 N. E. 70; *Roller v. Kling*, 150 Ind. 159, 164; 49 N. E. 498; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Livingston, In re*, (Conn.) 37 Atl. 770; *Kerr v. Lunsford*, 31 W. Va. 659.

⁷⁹ *Fenton, Matter of*, 97 Iowa 192, 66 N. W. 99; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Brady v. McBride*, 39 N. J. Eq. 495; *Stevens v. Stevens*, 127 Ind. 560; 26 N. E. 1078; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069; *Roller v. Kling*, 150 Ind. 159, 163, 49 N. E. 948; *Abbott Tr. Ev.* (2nd ed.) 152, § 66; *Greenleaf Ev.* (16th ed.), Vol. II, § 690.

⁸⁰ *Ames's Will*, 40 Ore. 495, 67 Pac. 737; *Lucas v. Parsons*, 27 Ga. 593; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Slinger's Will*, 72 Wis. 22, 37 N. W. 236; and authorities in last note, *supra*.

⁸¹ *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Ball v. Kane*, 1 Pennw. (Del.) 90, 39 Atl. 778; *Barbour v. Moore*, 4 App. (D. C.) 535; *Mallery v. Young*, 94 Ga. 804, 22 S. E. 142; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *American Bible Soc. v. Price*, 115 Ill. 623, 5 N. E. 126; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717; *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 328; *Sheehan v. Kearney* (Miss.), 21 So. 41; *Potter's Will*, 161 N. Y. 84, 55 N. E. 387; *Waterman v. Whitney*, 11 N. Y. 157; *Burn's Will*, 121 N. Car. 336, 28 S. E. 519; *McTaggart v. Thompson*, 14 Pa. St. 149; *McIntosh v. Moore* (Tex. Civ. App.), 53 S. W. 611; *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819; *Barney's Will*, 71 Vt. 217, 44 Atl. 75; *Patee v. Whitcomb*, 72 N. H. 249, 56 Atl. 1013; as to declarations of beneficiaries and others, see, *Blattner v. Wels*, 19 Ill. 246; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Ormsby v. Webb*,

whether the testator's declarations were made at the time of the execution of the will or at other times before or after, provided that the time was so near to the time of execution and the circumstances are such that the declarations offered tend to show testator's mental condition at that time.⁸² But such declarations are not, ordinarily, admissible as proof of the matters therein stated.⁸³

§ 2692. **Testamentary capacity—Evidence generally.**—A comparatively wide latitude is generally allowed in the admission of evidence on the issue or question of testamentary capacity.⁸⁴ Thus, evidence that the testator did not own a portion of the property devised by the will,⁸⁵ or that recitals contained in the will as to advances made to the testator's children are untrue and the product of delusions,⁸⁶ or that the disposition of his property made in the will is unnatural, in view of the claims upon him of persons who are not provided for by the will,⁸⁷ is admissible at least in connection with other evidence, to prove mental unsoundness. The fact that a mother disinherited her only child, and the fact that he was needy and had a family of young children have also been held proper for the jury to consider in deter-

134 U. S. 47, 10 Sup. Ct. 478; Lefevre, *Matter of*, 102 Mich. 568, 61 N. W. 3.

⁸² *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717; *Knox's Will*, *In re*, 123 Iowa 24, 98 N. W. 468; *Lefevre's Estate*, *In re*, 102 Mich. 568, 61 N. W. 3; *Sheehan v. Kearney*, (Miss.) 21 So. 41; *Rambler v. Tryon*, 7 S. & R. (Pa.) 90; *Burn's Will*, 121 N. Car. 336, 28 S. E. 519; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Ball v. Kane*, 1 Pennew. (Del.) 90, 39 Atl. 778; *Dennis v. Weekes*, 51 Ga. 24; see also, *Burn's Will*, *In re*, 121 N. Car. 336, 28 S. E. 519; *Kirkpatrick v. Jenkins's Exrs.*, 96 Tenn. 85, 33 S. W. 819. Letters and diary held admissible. *Marx v. McGlynn*, 88 N. Y. 357; *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Fuller v. Fuller*, 83 Ky. 345.

⁸³ *Knox's Will*, *In re*, 123 Iowa 24, 98 N. W. 468; *Bever v. Spangler*, 93 Iowa 603, 61 N. W. 1072; *Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Comstock v. Hadlyme & Co. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Gibson v. Gibson*, 24 Mo. 228; *Jones v. McLellan*, 76 Me. 49; *Rusling v. Rusling*, 36 N. J. Eq. 603.

⁸⁴ *Prentiss v. Bates*, 93 Mich. 234; 53 N. W. 153; *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Whitney v. Twombly*, 136 Mass. 145.

⁸⁵ *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691.

⁸⁶ *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171.

⁸⁷ *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771; *Roberts v. Abbot*, 127 Ind. 83, 90, 26 N. E. 565; *Abbott Tr. Ev.*, 148, 63.

mining whether or not the mother was of sound mind when she made the will.⁸⁸ And the fact that a son who was disinherited is wealthy may likewise be shown in a proper case to rebut any inference of insanity arising from the fact that he does not share in the estate.⁸⁹ But a person of sound mind is not bound to leave his property to his children or legal heirs, and the mere fact that by his will he gives it to a part of them to the exclusion of others, or leaves it all to strangers, does not necessarily show testamentary incapacity.⁹⁰ A testator has the right to select the objects of his bounty from among his collateral kindred, although he is under no legal obligation to provide for them, and the fact that a testator disinherited an old and indigent sister, or gave more of his property to his nephews and nieces than he did to her, or the like, is not of itself proof of unsoundness of mind or lack of testamentary capacity.⁹¹ But, as the provisions of the will may usually be considered as tending to throw light upon the testator's capacity,⁹² evidence as to the amount and situation of his property and the situation and needs and relation to him of those receiving and of those claiming to have been unfairly deprived of his bounty is usually competent.⁹³ So, where it was claimed that the unfriendly feeling of the testator for his brother was the result of an insane delusion, it was held that evidence was admissible to show that the brother had publicly declared that the testator in his lifetime had robbed him and

⁸⁸ *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279.

⁸⁹ *Bundy v. McKnight*, 48 Ind. 502, 523.

⁹⁰ *Perkins v. Perkins*, 116 Iowa 253; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826.

⁹¹ *Rarick v. Ulmer*, 144 Ind. 25, 42 N. E. 1099; *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. 446. So, generally the justness or unjustness of the will does not make it invalid. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, 46 Am. St. 33; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Salisbury v. Aldrich*, 118 Ill. 199, 8 N. E. 777; *Trotter v. Trotter*, 117 Iowa 417, 90 N. W. 750.

⁹² *Leach v. Burr*, 188 U. S. 510, 23 Sup. Ct. 393; *Knox v. Knox*, 95 Ala. 495, 11 So. 125, 36 Am. St. 235; *Gur-*

ley v. Park, 135 Ind. 440, 35 N. E. 279; *Slim v. Russell*, 90 Iowa 656, 57 N. W. 601; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. 503; *Spencer v. Terry*, 127 Mich. 420, 86 N. W. 998.

⁹³ *Barbour v. Moore*, 10 App. (D. C.) 30; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297; *Kenworthy v. Williams*, 5 Ind. 375; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Eastis v. Montgomery*, 95 Ala. 486, 11 So. 204, 36 Am. St. 227; *Manatt v. Scott*, 106 Iowa 203, 76 N. W. 717, 68 Am. St. 293; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; *Shaller v. Bumstead*, 99 Mass. 119; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 App. St. 552; *Woodward's Will*, In re, 167 N. Y. 28, 60 N. E. 233.

others, although there was no preliminary showing that the testator had any knowledge of such accusation before his will was made.⁹⁴ The subject of insanity and expert and opinion evidence have been fully treated elsewhere, but a reference to a few additional cases closely related to the propositions just stated may be desirable in this connection. Thus, it has been held that evidence of a line of conduct on the part of a testator before and after the will was executed is admissible as the foundation of an opinion as to his mental condition,⁹⁵ and it may be shown that he was insanely jealous of his wife without cause,⁹⁶ or that he entertained a belief that his daughter intended to poison him,⁹⁷ or that he shot himself,⁹⁸ or his wife,⁹⁹ or was guilty of any wild and irrational act. So, where it was shown that the testator frequently accused his wife of improper intimacy with another, evidence of the latter that it was untrue was held admissible as tending to show an insane delusion on the part of the testator.¹⁰⁰ Evidence of the testator's mental condition need not be confined to the precise time of making the will, but where it tends to show insanity of a permanent character it may be addressed to any time, either before or within a reasonable time after the will was executed,¹⁰¹ and this is a matter that depends somewhat on the circumstances of the particular case and is largely within the discretion of the court.¹⁰² Where unsoundness of mind of a permanent nature before the will was executed has been established by the party having the burden of proof, the presumption generally is that the same state of mind continues, until the contrary is shown.¹⁰³ This presumption, however, is one of fact varying with the

⁹⁴ *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. 446. *Dyer*, 87 Ind. 13; *Staser v. Hogan*, 120 Ind. 207, 22 N. E. 990; *Green-*

⁹⁵ *Staser v. Hogan*, 120 Ind. 207, 22 N. E. 990. *leaf Ev.* (16th ed.), Vol. II, § 690.

⁹⁶ *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. ¹⁰² See, *Shaller v. Bumstead*, 99 Mass. 112; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125; *Hester v.*

⁹⁷ *Rush v. Megee*, 36 Ind. 69. *Hester*, 122 Pa. St. 239, 9 Am. St.

⁹⁸ *Rush v. Megee*, 36 Ind. 69; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. ⁹⁹ *Rusling v. Rusling*, 36 N. J. Eq. 603.

¹⁰⁰ *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *O'Donnell v.*

¹⁰¹ *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118. *Rodiger*, 76 Ala. 222, 52 Am. R. 322; *Chandler v. Barrett*, 21 La. Ann. 58,

¹⁰³ *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Johnson v. Johnson*, 174 Pa. St. 373, 34 Atl. 603; *Boughton v. Knight*, L. R. 3 P. & D. 64.

particular case, and is said to be stronger where the mental incapacity grew out of the infirmities of age or some other cause that would not probably be removed with advancing years.¹⁰⁴ The disability to make a will by reason of unsoundness of mind does not arise out of an adjudication of mental unsoundness, but depends rather upon such mental unsoundness as deprives the party of testamentary capacity, regardless of any adjudication on the subject.¹⁰⁵ So, as already shown, while the fact that a testator had previously been adjudged of unsound mind and incapable of managing his own estate, and had been placed under guardianship before the will was executed has been held to be *prima facie* evidence of his incapacity to make a valid will,¹⁰⁶ it is not conclusive evidence of such incapacity.¹⁰⁷ Evidence of insanity of the testator's relatives is admissible in a proper case where it tends to show that he might probably have inherited it.¹⁰⁸ But evidence of mere rumor or reputation that the testator was insane is generally incompetent.¹⁰⁹

§ 2693. **Undue influence—Burden of proof.**—Upon the issue of undue influence the burden of proof, as established by the overwhelming weight of authority, is upon the party alleging it, that is, upon the contestant.¹¹⁰ But it is sometimes said that when a *prima facie*

¹⁰⁴ *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; see also, *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Manly v. Staples*, 65 Vt. 370, 26 Atl. 630.

¹⁰⁵ *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069, 31 Am. St. 422.

¹⁰⁶ *Stevens v. Stevens*, 127 Ind. 560, 567, 26 N. E. 1078; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069.

¹⁰⁷ *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069; *Blough v. Parry*, 144 Ind. 463, 493, 40 N. E. 70; *Greenleaf Ev.* (16 ed.), Vol. II, § 690; *Stone v. Damon*, 12 Mass. 488; *Fenton, Matter of*, 97 Iowa 193, 66 N. W. 99; *Ames' Will*, In re, 40 Ore. 495, 67 Pac. 737; *Miller's Estate*, In re, 179 Pa. St. 645, 36 Atl. 139; see also, *Keely v. Moore*, (U. S.) 25 Sup. Ct. 169.

¹⁰⁸ See, *Prentis v. Bates*, 93 Mich.

234, 53 N. W. 153; *Berry v. Safe Deposit & Co.*, 96 Md. 45, 53 Atl. 720; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Coughlin v. Poulson*, 2 McArth. (D. C.) 308.

¹⁰⁹ *Brinkman v. Rueggessick*, 71 Mo. 553; *Rinkard v. State*, 157 Ind. 534, 62 N. E. 14; *Townsend v. Pepperell*, 99 Mass. 40; *Hines' Appeal*, 68 Conn. 551, 37 Atl. 384.

¹¹⁰ *Chandler v. Jost*, 96 Ala. 596, 11 So. 636; *Dunlap v. Robinson*, 28 Ala. 100; *Livingstone's Appeal*, 63 Conn. 68, 26 Atl. 470; *Mallow v. Walker*, 115 Iowa 242, 88 N. W. 452, 91 Am. St. 158; *Allison's Estate*, In re, 104 Iowa 130, 73 N. W. 489; *Webber v. Sullivan*, 58 Iowa 260, 12 N. W. 319; *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957; *Bacon v. Bacon*, 181 Mass. 21, 62 N. E. 990; *Sheehan v. Kearney*, (Miss.) 21 So. 41, 35 L. R. A.

case is made or circumstances of suspicion exist, the burden shifts to the beneficiaries under the will to show that there was no undue influence.¹¹¹ "What is really meant by this form of statement," says Professor Page, is this: "If the evidence of execution introduced by proponent does not of itself tend to establish undue influence, proponent is not obliged to go further and offer affirmative evidence that there was no undue influence. If, however, proponent's evidence tends directly to show that there was undue influence, or establishes facts from which undue influence may be inferred, proponent must, in order to go before the jury, introduce other and further evidence to disprove the existence of undue influence. If, when he rests, the uncontradicted evidence introduced by proponent establishes undue influence, he may be non-suited, or the jury may be directed to return a verdict against him, in accordance with the method of procedure prevailing in that jurisdiction. If proponent's evidence is conflicting, it may be considered by the jury, together with the evidence introduced by the contestant, including all presumptions which may be drawn from the evidence introduced. If upon the whole evidence, including such

102; *Prentiss v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7; *Tibbe v. Kamp*, 154 Mo. 580, 54 S. W. 879, 55 S. W. 440; *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438; *McIntosh v. Moore*, (Tex. Civ. App.) 53 S. W. 611. It may be rebutted. *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 836; *Runyan v. Price*, 15 Ohio St. 1, 36 Am. Dec. 459; *Monroe v. Barclay*, 17 Ohio St. 302; *Messner v. Elliott*, 184 Pa. St. 41, 39 Atl. 46; *Yorke's Estate*, 185 Pa. St. 61, 39 Atl. 1119; *McGraw's Will*, 41 N. Y. S. 481; *Nelson's Will*, 89 N. Y. S. 865; *Van Ormen v. Van Ormen*, 58 Hun (N. Y.) 606; *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149; but see, *Holman's Will*, 42 Ore. 345, 70 Pac. 908. A mere suspicion of undue influence is insufficient; the evidence should be clear. *Beyer v.*

Le Fevre, 186 U. S. 125, 22 Sup. Ct. 770; *Kennedy v. Dickey*, (Md.) 59 Atl. 661.

¹¹¹ *Tyrrel v. Painton*, Prob. Div. 151, 6 Rep. 540; citing, *Barry v. Butlin*, 2 Moore P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 63 Law T. (N. S.) 465; *Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Claffey v. Ledwith*, 56 N. J. Eq. 333, 38 Atl. 433; *Dale v. Dale*, 38 N. J. Eq. 274; *Miller v. Miller*, 187 Pa. St. 572, 41 Atl. 277; *Chappel v. Trent*, 90 Va. 849, 19 S. E. 314; *Mallow v. Walker*, 115 Iowa 238, 88 N. W. 452, 91 Am. St. 158, and note; see also, *Hess' Will*, In re, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 670-691; and *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. 94-104, upon the general subject; but compare, as to burden of proof, *Sheehan v. Kearney*, (Miss.) 21 So. 41, 35 L. R. A. 102.

presumptions, the preponderance of evidence is with contestants, they will prevail; otherwise proponents will prevail."¹¹² On an issue of undue influence, testamentary capacity, it has been held, is presumed.¹¹³ The question as to whether or not there was undue influence in the particular case is usually for the jury or tribunal determining the facts.¹¹⁴

§ 2694. **Undue influence—Declarations of testator.**—Where declarations are narrations by the testator of past events they are generally hearsay and are not competent for this reason, even though the events narrated constitute acts of undue influence.¹¹⁵ But declarations made at the time of the execution of the will may be admissible as part of the *res gestae*, or declarations at other times may be admissible as the best evidence of a particular fact, in some instances, or, to show the testator's motives and state of mind.¹¹⁶ Declarations at other times will not, however, usually be entitled to consideration upon the question of undue influence unless there is other evidence in that direction.¹¹⁷

¹¹² Page Wills, 483. But it seems questionable whether a presumption should be weighed as evidence; see, however, *Sturdevant*, Appeal of, 71 Conn. 392, 42 Atl. 70; *Doble v. Armstrong*, 160 N. Y. 584, 55 N. E. 302.

¹¹³ *Kennedy v. Dickey*, (Md.) 59 Atl. 661.

¹¹⁴ *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117. But a verdict for the proponent may be directed upon this issue where there is no legal evidence of undue influence. *McLane's Estate*, In re, 21 D. C. 554; *Shell's Estate*, In re, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387; see also, *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27, 77 Am. St. 446.

¹¹⁵ *Calkins v. Calkins*, 112 Cal. 296, 44 Pac. 577; *Donovan's Estate*, In re, 140 Cal. 390, 73 Pac. 1081; *Comstock v. Hadlyme &c. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Yorty v. Webster*, 205

Ill. 630, 68 N. E. 1068; *Griffith v. Diffenderffer*, 50 Md. 566; *Shailer v. Bumstead*, 99 Mass. 112; *Middle-ditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826; *Wittsey's Will*, In re, 122 Iowa 423, 98 N. W. 294; *Waterman v. Whitney*, 11 N. Y. 157; *Herster v. Herster*, 122 Pa. St. 239; *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819. So held whether made before or after. *Townsend's Estate*, In re, 122 Iowa 246, 97 N. W. 1108; but see, *Powers' Exr. v. Powers*, (Ky.) 78 S. W. 152.

¹¹⁶ Page Wills, 499, 500, § 423; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 759; *Griffith v. Diffenderffer*, 50 Md. 480; *Muir v. Miller*, 72 Iowa 585, 34 N. W. 429; *Kaenders v. Montagu*, 180 Ill. 300, 54 N. E. 321; *Zibble v. Zibble*, 131 Mich. 655.

¹¹⁷ *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Langford*, In re, 108 Cal. 608, 41 Pac. 701; *Waterman v. Whitney*, 11 N. Y. 157; *Herster v. Herster*, 122 Pa. St. 239; *Peery v.*

§ 2695. **Undue influence—Declarations and admissions of others.** Declarations of beneficiaries are usually admissible when part of the *res gestae*.¹¹⁸ So, the admissions of a legatee who is so greatly favored by a will that all the other legatees unite in an action to set the will aside, making him the sole defendant have been held admissible to prove undue influence, not only against himself, but also against those who succeed to his interest at his death;¹¹⁹ and declarations by a son that his father, who was living with him, had "got to make a will," and that he "was going to have all the property," have been admitted as tending to show an undue influence on his part in procuring the execution of a will devising the bulk of his father's property to him.¹²⁰ So, there are other cases in which the admissions of a beneficiary against his own interest are admissible especially where he is a party to the suit.¹²¹ But evidence that a legatee said that her father must make a new will, and stated what she expected would be its provisions when made, and that after such will was executed she said that he would not have made a will if it had not been for her, does not show undue influence, especially when it appears that the will did not contain the provision that she said it would.¹²² And the admissions of a legatee or beneficiary do not ordinarily bind the other legatees and are not admissible in evidence against them in a suit against several defendants to contest a will.¹²³

§ 2696. **Evidence of undue influence generally.**—It has been laid down as a general rule that "every fact from which the inference might legitimately be drawn that such influence had or had not been exerted, or if exerted, that it had or had not been effective, is admissible, provided the time of its exertion is not so remote, either from the making of the will or from the death of the testator, that no effect

Peery, 94 Tenn. 328, 29 S. W. 1; Vol. I, § 533; Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 655, 690, and numerous authorities cited in note.

¹¹⁸ See *Morris v. Stokes*, 21 Ga. 552; *Budlong, Matter of*, 18 Civ. Proc. (N. Y.) 18, 7 N. Y. S. 289.

¹¹⁹ *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; see also, *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399.

¹²⁰ *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231.

¹²¹ *Saunders's Appeal*, 54 Conn. 108; *Shaller v. Bumstead*, 99 Mass. 112.

¹²² *Ryman v. Crawford*, 86 Ind. 262, 267.

¹²³ *Ryman v. Crawford*, 86 Ind. 262, 267; see also, *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478; *Roberts v. Trawick*, 13 Ala. 68; *Dotts v. Fetzer*, 9 Pa. St. 38; *Ames, Matter of*, 51 Iowa 596, 2 N. W. 408; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. 604.

can reasonably be attributed to it. On the one hand it may be conceded that it is not essential that the influence be employed at the time of the execution of the will, and on the other, that it must continue to be operative upon the mind and will of the testator when he executed his last testament, no matter when it was first exercised."¹²⁴ Thus, evidence has been held admissible to prove the relation that existed between the testator and the members of his family who were favored by the will,¹²⁵ and between him and the contestants,¹²⁶ whether friendly or otherwise, as bearing on the probability that the testator would have made such a will of his own volition. And in some cases evidence of a relation of trust and confidence has been held, at least under particular circumstances, to raise a presumption of undue influence.¹²⁷ But mere proof of relations of friendship and affection between the testator and devisee, and of kindly offices and proper conduct on the part of the latter, does not establish undue influence, as it is natural for a person whose will is not improperly controlled to favor his best friends.¹²⁸ The influence of the husband over the wife, that of the wife over the husband, of the parents over the children and of the children over the parents, are legitimate, so long as they do not extend to

¹²⁴ Hess' Will, In re, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 686, citing, Shaw's Will, In re, 11 Phila. (Pa.) 51; Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; Hartman v. Strickler, 82 Va. 225; Taylor v. Wilburn, 20 Mo. 306, 64 Am. Dec. 86; see also, England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Lingle v. Lingle, 121 Iowa 133, 96 N. W. 708; Patee v. Whitcomb, 72 N. H. 249, 56 Atl. 459; but compare, Wiltsey's Will, In re, 122 Iowa 423, 98 N. W. 294; Shell, Estate of, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387; and see generally Kerr v. Lunsford, 31 W. Va. 639, 8 S. E. 493, 2 L. R. A. 668; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Davis v. Strange, 86 Va. 793, 8 L. R. A. 261; Miller, In re, 179 Pa. 645, 39 L. R. A. 220.

¹²⁵ Goodbar v. Lidikey, 136 Ind. 1, 35 N. E. 691.

¹²⁶ Staser v. Hogan, 120 Ind. 207,

22 N. E. 990; Stevens v. Leonard, 154 Ind. 67, 56 N. E. 27; Piper v. Andricks, 209 Ill. 564, 71 N. E. 18.

¹²⁷ See Marx v. McGlynn, 88 N. Y. 357; Smith, Matter of, 95 N. Y. 516, and authorities cited ante in note 111, to section on undue influence—Burden of proof; but compare, Michael v. Marshall, 201 Ill. 76, 66 N. E. 273; Holman's Will, 42 Ore. 359, 70 Pac. 908; Boyd v. Boyd, 66 Pa. St. 283; Parfitt v. Lawless, L. R. 2 P. & D. 468; St. Ledger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Sparks, Matter of, 63 N. J. Eq. 242; Folks v. Folks, 107 Ky. 561, 54 S. W. 837.

¹²⁸ Goodbar v. Lidikey, 136 Ind. 1, 35 N. E. 691; Stevens v. Leonard, 154 Ind. 67, 75, 56 N. E. 27; Hess' Will, In re, 48 Minn. 304, 51 N. W. 614, 31 Am. St. 665, and note; Trumball v. Gibbons, 22 N. J. L. 117, 51 Am. Dec. 255; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762.

positive dictation and control over the mind of the testator.¹²⁹ A man who is old and feeble, for instance, may rely on his wife or child, and they may watch over and care for him without being open to the charge of undue influence on that account.¹³⁰ There is no legal presumption of undue influence from the fact that the will was made during the testator's last sickness, although the devisees were attending him and one son of the testator, who was not provided for in the will, was absent,¹³¹ but this fact may be shown along with evidence of active control exercised over the testator's actions, to establish undue influence. An influence that might be lawful and legitimate, however, when exercised by a wife might tend to show undue influence if exercised by a woman with whom he was living in unlawful relations,¹³² and the fact that the testator and his supposed widow, to whom he left a large share of his property, were never legally married, is a circumstance to be considered in determining the question of undue influence,¹³³ but such a fact in itself does not necessarily raise any presumption of undue influence.¹³⁴ The fact that some of the relatives of the deceased were needy, may be of itself entitled to little weight on the question of undue influence,¹³⁵ and evidence that the defendant had a strong personal dislike for the relatives who were given nothing by the will has been said to tend to disprove rather than to establish the exercise of undue influence by other relatives whom he liked.¹³⁶ It has also been held that expressions by the contesting relatives of dislike for the testator may also be proved to show that the will grew out of the testator's own likes and dislikes, free from any improper

¹²⁹ *Gwin v. Gwin*, 5 Idaho 271; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44.

¹³⁰ *Abbott Tr. Ev.* (2d ed.) 154, § 67; *Smith v. Henline*, 174 Ill. 196, 51 N. E. 227; *Dean v. Negley*, 41 Pa. St. 312, 80 Am. Dec. 620.

¹³¹ *O'Neill v. Farr*, 1 Rich. (S. Car.) 80; *Mondorf, In re*, 110 N. Y. 450, 18 N. E. 256; *Wainwright's Appeal*, 89 Pa. St. 220; *Roe v. Taylor*, 45 Ill. 485; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620.

¹³² *Stevens v. Leonard*, 154 Ind. 67, 75, 56 N. E. 27, 77 Am. St. 446.

¹³³ *Kessinger v. Kessinger*, 37 Ind. 341; *Main v. Ryder*, 84 Pa. St. 217; ¹³⁴ *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27.

¹³⁵ *Nolte, Matter of*, 10 Misc. (N. Y.) 608; *Vance v. Vance*, 74 Ind. 370; *Goodbar v. Lidikey*, 136 Ind. 1, 35 N. E. 691.

¹³⁶ *Bundy v. McKnight*, 48 Ind. 502, 517.

influence.¹³⁷ Evidence that the testator was advised or entreated to make the will does not, ordinarily, establish undue influence, unless it appears that such excessive importunity was used, or such influence was gained as to destroy the free agency of the testator and constrain him to do what was against his will or what he was unable to refuse.¹³⁸ The influence must generally be such as amounts to force and destroys the free agency of the testator. This may be accomplished, however, by persuasions, importunities, force, threats or coercion of such a character and degree that they cannot be resisted;¹³⁹ but advice or persuasion which falls short of depriving the testator of the power to do as he chooses will not, ordinarily, vitiate a will, although such will might not have been made except for such advice and persuasion.¹⁴⁰ No presumption of undue influence necessarily grows out of the fact that the provisions of a will as to one or more members of the testator's family seem harsh and unnatural;¹⁴¹ but, while this is true, if one devises his property in violation of all natural laws, justice, and humanity, it has been said that juries and courts will resort even to technicalities to prevent a great wrong.¹⁴² The evidence offered as tending to show undue influence need not be confined to the time of the execution of the will, but it must not be too remote and must have some probative force, and the fact that the testator had been induced by undue influence to make another will ten years before would not tend to prove that such undue influence affected the validity of a will executed just before his death.¹⁴³ As already shown, the mere declarations of a testator, not made contemporaneously with the execution of a will, such as declarations that one of the children had importuned him to make a will,¹⁴⁴ or his statements as to an intention in the mat-

¹³⁷ *Stevens v. Leonard*, 154 Ind. 67, 56 N. E. 27.

¹³⁸ *Noble v. Enos*, 19 Ind. 72, 77; *Rabb v. Graham*, 43 Ind. 1, 12; *Miller v. Miller*, 3 S. & R. (Pa.) 267, 8 Am. Dec. 651.

¹³⁹ *Bundy v. McKnight*, 48 Ind. 502, 516; *Wise v. Foote*, 81 Ky. 10.

¹⁴⁰ *Woodman v. Illinois Trust & Co.*, 211 Ill. 578, 71 N. E. 1099; *Hawley's Will*, In re, 89 N. Y. S. 803; *Pritchard v. Henderson*, 3 Pennw. (Del.) 128, 50 Atl. 217.

¹⁴¹ *Webber v. Sullivan*, 58 Iowa 260, 12 N. W. 319; *Betta*, In re, 113

Iowa 111; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Gardiner v. Gardiner*, 34 N. Y. 162; *Bowman v. Phillips*, 47 Ind. 341; *Bundy v. McKnight*, 48 Ind. 502, 517; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. 771.

¹⁴² *Bowman v. Phillips*, 47 Ind. 341; but see, *Powers' Exr. v. Powers*, (Ky.) 78 S. W. 152.

¹⁴³ *Turner v. Cook*, 86 Ind. 129, 137.

¹⁴⁴ *Todd v. Fenton*, 66 Ind. 25, 32; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

ter of disposing of his property,¹⁴⁵ are not usually admissible for the purpose of showing that the will was procured by fraud or undue influence,¹⁴⁶ and statements made a week before or a week after the will was executed cannot well be considered a part of the *res gestae*.¹⁴⁷ But where a will is attacked on the ground that its execution was procured by undue influence, the declarations of the testator before the execution of the will as to the manner in which he intended to dispose of his property have been held competent evidence, by way of rebuttal, to show that such expressed intention was carried out by the will, as where a will is made in conformity with the repeated declarations of the testator, it is more likely to have been executed without undue influence than if found contrary to such declarations.¹⁴⁸ Evidence that the testator did not want to make a will, and that his wife, who, with her children, were the chief beneficiaries under the will, to the exclusion of the testator's children by a former marriage, "made him do it,"¹⁴⁹ or that the testator's mother locked her "in a room and made her swear on a Bible that she would not let her husband have any of her money," and that the so-called "oath troubled her greatly,"¹⁵⁰ or that the sole legatee under the will had expressed a determination that the testator should make a will and give him all the property,¹⁵¹ or evidence of other facts tending to show that the will was not made by free agency of the testator,¹⁵² but expressed the will of another person, who induced the testator to act contrary to his own wishes, is usually admissible to show undue influence. And evidence of the exclusion of natural beneficiaries and unnatural provisions in the will may be very important, especially where one who occupies a fiduciary relation to the testator is given the bulk of his property.¹⁵³

¹⁴⁵ *Conway v. Vizzard*, 122 Ind. 8, 35 N. E. 691; *Abbott Tr. Ev.* (2d ed.) 158, § 70.

¹⁴⁶ *Hayes v. West*, 37 Ind. 21; *Todd v. Fenton*, 66 Ind. 25, 32; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Goodbar v. Lidikey*, 136 Ind. 1, 8, 35 N. E. 691.

¹⁴⁷ *Todd v. Fenton*, 66 Ind. 25, 32; but see *Abbott Tr. Ev.* (2d ed.) 146, §§ 63, 70, 157; so, evidence as to transactions after the execution of the will has been held inadmissible. *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321.

¹⁴⁸ *Goodbar v. Lidikey*, 136 Ind. 1,

¹⁴⁹ *Bowman v. Phillips*, 47 Ind. 341.

¹⁵⁰ *Noble v. Enos*, 19 Ind. 72.

¹⁵¹ *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231.

¹⁵² *Kettemann v. Metzger*, 23 Ohio C. C. 61; *Rabb v. Graham*, 43 Ind. 1; *Todd v. Fenton*, 66 Ind. 25. Evidence as to mental and physical condition and susceptibility to influence is admissible in a proper case. *Lingle v. Lingle*, 121 Iowa 133, 96 N. W. 708.

¹⁵³ *Tibbe v. Kamp*, 154 Mo. 580, 55

§ 2697. **Revocation—Declarations of testator.**—Upon the issue of revocation the burden of proof is upon the party alleging such revocation or seeking to defeat the will by showing a revocation.¹⁵⁴ If a will or codicil shown to have been in existence during the testator's lifetime, and in his custody, cannot be found at his death, a presumption generally arises that such will was destroyed by the testator in his lifetime with the intention of revoking it, and in the absence of rebutting evidence this presumption is sufficient to justify a finding that the will was revoked.¹⁵⁵ For the same reason it has been held that the finding among the papers of the testator, apparently in his custody in his lifetime, of a will which is torn, or cancelled, raises a presumption that such act, manifested upon or from the instrument itself, was done by the testator in his lifetime with intent to revoke the will.¹⁵⁶ But where the statute prescribes the requirements for revocation the evidence to

S. W. 440; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Ashwell v. Lomi*, L. R. 2 P. & D. 477.

¹⁵⁴ *Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Behrens v. Behrens*, 47 Ohio St. 323; *Blume v. Hartman*, 115 Pa. St. 32, 8 Atl. 219; *Padelford's Estate*, 190 Pa. St. 35, 42 Atl. 381; *Brown v. Walker*, (Miss.) 11 So. 724; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907.

¹⁵⁵ *Lillie v. Lillie*, 3 Hagg. Ecc. 184; *Jacques v. Horton*, 76 Ala. 238; *Johnson's Will*, 40 Conn. 587; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Mercer v. Mackin*, 14 Bush (Ky.) 434; *Minor v. Guthrie*, (Ky.) 4 S. W. 179; *Davis v. Sigourney*, 8 Metc. (Mass.) 487; *Cheever v. North*, 106 Mich. 390, 64 N. W. 455; *Behrens v. Behrens*, 47 Ohio St. 323; *Stewart's Will*, 149 Pa. St. 111, 24 Atl. 174; *Gardner v. Gardner*, 177 Pa. St. 218, 35 Atl. 558; *Durant v. Ashmore*, 2 Rich. (S. Car.) 184; *Minkler v. Minkler*, 14

Vt. 125; *Appling v. Eades*, 1 Gratt. (Va.) 286; *Abbott Tr. Ev.* (2d ed.) 159, § 74. And the presumption does not ordinarily arise where the will was not in the custody of the testator, and evidence as to whose custody it was in is therefore often not only admissible, but also important. *Coddington v. Jenner*, 57 N. J. Eq. 538, 41 Atl. 874, 45 Atl. 1090; *Harris v. Harris*, 10 Wash. St. 555, 39 Pac. 148; *Gardner's Estate*, 164 Pa. St. 420, 30 Atl. 300; see also, *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

¹⁵⁶ *Lambell v. Lambell*, 3 Hagg. 568; *Baptist Church v. Robbarts*, 2 Barr (Pa.) 110; *King v. Ponton*, 82 Cal. 420, 22 Pac. 1087; *Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745; *Woodfill v. Patton*, 76 Ind. 575; *Steele v. Price*, 5 B. Mon. (Ky.) 58; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; but see, *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; for other cases applying this presumption see note in, *Graham v. Burch*, 47 Minn. 171, 28 Am. St. 351. For evidence held admissible to explain or rebut, see same note on page 352.

be sufficient must generally show a revocation in some manner so prescribed,¹⁵⁷ unless the facts show a revocation by operation of law.¹⁵⁸ The subject of the admissibility of parol evidence on the question of revocation, including declarations of the testator, has been considered elsewhere.¹⁵⁹ But it may be said here that, by the weight of authority, the declarations of the testator are generally admissible to show his intention to revoke, or not to revoke, where such intention is material, when such declarations either strengthen or rebut any presumption raised from the established facts;¹⁶⁰ even where such declarations are made subsequent to the time of the alleged revocation.¹⁶¹ But there must also be some evidence of a revocatory act, and the declarations of the testator are not admissible to establish the fact of the revocatory act;¹⁶² nor are his declarations admissible to establish the existence of

¹⁵⁷ *Graham v. Burch*, 47 Minn. 171, 49 N. W. 697, 28 Am. St. 339; *Runkle v. Gates*, 11 Ind. 95; *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860; *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908. There must be an act and intention to revoke; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501; *Forbing v. Weber*, 99 Ind. 588, and authorities above cited; see *Giddings v. Giddings*, 65 Conn. 149, 48 Am. St. 198, et seq. As to evidence held sufficient, see *Woodfill v. Patton*, 76 Ind. 575; *Burns v. Travis*, 117 Ind. 44, 18 N. E. 45; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. 344, et seq.; evidence of intent to revoke is insufficient, and may be inadmissible, if the act is wholly and unquestionably insufficient. See, Vol. I, § 620, n. 369; see also, as to the rule in some instances where a presumption arises from the relations of the parties, note in, *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. 94-104, and in, *Hess' Will, In re*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 682.

¹⁵⁸ See as to implied revocation, *Graham v. Burch*, 47 Minn. 171, 28 Am. St. 356, 361.

¹⁵⁹ Vol. I, § 620; see also, *White-*

man v. Whiteman, 152 Ind. 253, 53 N. E. 225.

¹⁶⁰ *Keen v. Keen*, 42 L. J. P. C. 61, L. R. 3 P. C. 105, 29 L. T. 247; *Johnson's Will*, 40 Conn. 587; *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408; *Collogan v. Burns*, 57 Me. 449; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Pickens v. Davis*, 134 Mass. 252; *Gage v. Gage*, 12 N. H. 371; *Smock v. Smock*, 11 N. J. Eq. 156; *Behrens v. Behrens*, 47 Ohio St. 323; *Smiley v. Gambill*, 2 Head (Tenn.) 164; *Valentine's Will*, 93 Wis. 45, 67 N. W. 12.

¹⁶¹ *Behrens v. Behrens*, 47 Ohio St. 323; *Youndt v. Youndt*, 3 Gr. (Pa.) 140; *Steinke's Will*, 95 Wis. 121, 70 N. W. 61; *Caeman v. Van Harke*, 33 Kans. 333, 6 Pac. 620; *Hayes v. West*, 37 Ind. 21; *Mooney v. Olsen*, 22 Kans. 69; *Waterman v. Whitney*, 11 N. Y. 157; *McElroy v. Phink*, (Tex.) 76 S. W. 753, 77 S. W. 1025.

¹⁶² Note in, *Graham v. Burch*, 47 Minn. 171, 28 Am. St. 361; *Slaughter v. Stevens*, 81 Ala. 418, 2 So. 145; *Kimsey v. Allison*, 120 Ga. 413, 47 S. E. 899; *Toebe v. Williams*, 80 Ky. 661; *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455; see also, *Rodgers v.*

a later will revoking the one offered for probate.¹⁶³ It has also been held that his declarations that he made his will in duplicate and had destroyed one of the originals in order to revoke both, are not admissible.¹⁶⁴

§2698. Lost wills—Burden of proof—Declarations and other evidence.—The burden of proof is upon the party offering a lost will for probate.¹⁶⁵ But, upon sufficient proof of destruction, circumstantial evidence may be sufficient to support a finding for the will,¹⁶⁶ that it existed unrevoked at the time of the testator's death. In some jurisdictions the contents of a lost will must be proved by the testimony of two credible witnesses, as a condition precedent to its admission to probate.¹⁶⁷ Where this is the rule, and the beneficiaries under a will are held to be incompetent witnesses at probate, it has also been held that the contents of a lost will cannot be proved by the sole beneficiary and by a disinterested party.¹⁶⁸ And the declarations of a testator cannot be received as a substitute for one witness.¹⁶⁹ Persons who seek to establish a will under such provisions have the burden of proving that a will was executed and what disposition it made of the testator's

Rodgers, 6 Helsk. (Tenn.) 489; note to, Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Taylor v. Cox, 153 Ill. 220, 38 N. E. 656; Stevens v. Stevens, 72 N. H. 360, 56 Atl. 916.

¹⁶⁵ White's Will, 25 N. J. Eq. 501; Noyes's Will, 61 Vt. 14, 17 Atl. 743; as to republication and revival, see Graham v. Burch, 47 Minn. 171, 23 Am. St. 354-356; Kern v. Kern, 154 Ind. 29, 55 N. E. 1004; note in, Cheever v. North, 106 Mich. 390, 37 L. R. A. 561; Matter of Stickney, 161 N. Y. 42, 76 Am. St. 251, et seq.

¹⁶⁶ Atkinson v. Morris, (1897) Prob. Div. 40.

¹⁶⁷ Newell v. Homer, 120 Mass. 277; Banning v. Banning, 12 Ohio St. 437; Coddington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874, 45 Atl. 1090; Graham v. O'Fallon, 3 Mo. 507. As the evidence is required to be clear and satisfactory. Buchanan v. Mat-

lock, 8 Humph. (Tenn.) 390; Morris v. Swaney, 7 Helsk. (Tenn.) 591; Vining v. Hall, 40 Miss. 83; Dudley v. Wardner, 41 Vt. 59; Kitchens v. Kitchens, 39 Ga. 168.

¹⁶⁸ Schultz v. Schultz, 35 N. Y. 653; Harris v. Harris, 10 Wash. St. 555, 39 Pac. 148.

¹⁶⁹ Jones v. Casler, 139 Ind. 382, 38 N. E. 812; Keesy v. Dimon, 91 Hun (N. Y.) 642, 37 N. Y. S. 92; Todd v. Rennick, 13 Colo. 546, 22 Pac. 898; Harris v. Harris, 10 Wash. St. 555, 39 Pac. 148. The Indiana statute requires that it be so proved, or by a correct copy and the testimony of one witness.

¹⁷⁰ Keesy v. Dimon, 91 Hun (N. Y.) 642, 37 N. Y. S. 92.

¹⁷¹ Clark v. Turner, 50 Neb. 290, 69 N. W. 843; Harris v. Harris, 10 Wash. St. 555, 39 Pac. 148; but see Skeggs v. Horton, 82 Ala. 352, 2 So. 110.

property, that the will has been lost or destroyed,¹⁷⁰ and that it was not lost or destroyed by or through any agency of the testator¹⁷¹ for the purpose of revoking it.¹⁷² Among the ways in which this may be established are by affirmative proof that the will was destroyed by the testator, either accidentally or while suffering from temporary insanity,¹⁷³ or by some other person after the testator's death,¹⁷⁴ or the loss of the will may be shown, where its execution has been established, by proof of a search and failure to find the will,¹⁷⁵ and evidence that it was in existence when the testator died, or of other circumstances which will rebut the presumption that the testator destroyed it *animo revocandi*.¹⁷⁶ The scrivener who wrote the will,¹⁷⁷ or persons who have seen and read it, are generally competent witnesses to prove its provisions,¹⁷⁸ and such provisions must usually be established by the best secondary evidence in existence, or that can be obtained.¹⁷⁹ The weight of authority is to the effect that the declarations of the testator are admissible as tending to prove the existence and contents of the will.¹⁸⁰

¹⁷⁰ *Kaster v. Kaster*, 52 Ind. 531;

¹⁷¹ *McDonald v. McDonald*, 142 Ind. 55, 82, 41 N. E. 336.

¹⁷² *Forbing v. Weber*, 99 Ind. 588.

¹⁷³ *Forbing v. Weber*, 99 Ind. 588.

¹⁷⁴ *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812.

¹⁷⁵ See, *Ford v. Teagle*, 62 Ind. 61; *Jones v. Casler*, 139 Ind. 382, 394, 38 N. E. 812; *Abbott Tr. Ev.* (2d ed.) 163, § 78.

¹⁷⁶ *Cassoday Wills*, § 318; *Jones v. Casler*, 139 Ind. 382, 394, 38 N. E. 812; *Timon v. Claffy*, 45 Barb. (N. Y.) 438; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; see generally as to necessary and proper evidence, *Thorn-ton Lost Wills*, Chapters IV, VII, VIII.

¹⁷⁷ *Ford v. Teagle*, 62 Ind. 61.

¹⁷⁸ *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812.

¹⁷⁹ *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874, 45 Atl. 1090; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

¹⁸⁰ *Sugden v. St. Leonards*, 1 Prob. Div. 154; *Keen v. Keen*, L. R. 3 Prob.

& Div. 105; *Woodward v. Goulstone*, 11 App. Cas. (D. C.) 469; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Southworth v. Adams*, 11 Biss. (U. S.) 256; *Weeks v. McBeth*, 14 Ala. 474; *Johnson's Will*, 40 Conn. 587; *Dawson v. Smith*, 3 Houst. (Del.) 335; *Patterson v. Hickey*, 32 Ga. 156; *Page, In re*, 118 Ill. 576, 8 N. E. 852; *Schnee v. Schnee*, 61 Kans. 643, 60 Pac. 738; *Steele v. Price*, 5 B. Mon. (Ky.) 58; *Collagan v. Burns*, 57 Me. 449; *Pickens v. Davis*, 134 Mass. 252; *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961; *Lambie's Estate*, 97 Mich. 49, 56 N. W. 223; *Harring v. Allen*, 25 Mich. 505; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110; *Knapp v. Knapp*, 10 N. Y. 276; *Behrens v. Behrens*, 47 Ohio St. 323; *Youndt v. Youndt*, 3 Grant Cas. (Pa.) 140; *Foster's Appeal*, 87 Pa. St. 67; *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184; *Minkler v. Minkler*, 14 Vt. 125; *Valentine's Will*, 93 Wis. 45, 67 N. W. 12. But not to show due execution. *McDonald v.*

Other question relating to the subject are sufficiently treated in the chapter on lost instruments.¹⁸¹

§ 2699. **Nuncupative wills.**—The statutes of the various states usually prescribe in what cases nuncupative wills may be made and the formalities to be observed, and two or more witnesses are usually required, except that in the case of certain favored classes, such as soldiers and sailors in actual service, the same formalities are not required. It must appear that the testator intended to make a will and that he intended to make a nuncupative will and not merely that what he said was preparatory to making a written will or the like.¹⁸² The number of persons prescribed by statute must be called upon to witness the will, and it must be afterwards reduced to writing as provided by statute, and, in general, all the statutory requirements must be observed.¹⁸³ The *animus testandi* and testamentary capacity must be shown, and it is frequently said that it must be made to appear by clear and convincing evidence.¹⁸⁴

§ 2700. **Alteration of wills.**—Where alterations appear upon the face of the will offered for probate it is often said that the burden of proof is upon the party offering it, to show that the alterations were made before execution.¹⁸⁵ "This proposition," says Professor Page,

McDonald, 142 Ind. 55, 41 N. E. 336; Cheever v. North, 106 Mich. 390, 64 N. W. 455. Nor, perhaps, as sufficient in themselves as to prove the contents. See as to presumptions, Anderson v. Irwin, 101 Ill. 411; Kotz v. Belz, 178 Ill. 434, 53 N. E. 367; Marshall v. Marshall, 42 S. Car. 436, 20 S. E. 298.

¹⁸¹ Vol. II, Ch. LXX.

¹⁸² Grossman's Estate, 175 Ill. 425, 51 N. E. 750; Knox v. Richards, 110 Ga. 5, 35 S. E. 295; Porter's Appeal, 10 Pa. St. 254; Donald v. Unger, 75 Miss. 294, 22 So. 803; Dockum v. Robinson, 26 N. H. 372; Wiley's Estate, 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. 569, and note on the entire subject.

¹⁸³ Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Biddle v. Biddle, 36 Md.

630; Taylor's Appeal, 47 Pa. St. 31; Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; Askin's Estate, 9 Mackey (D. C.) 12; Martinez v. Martinez, 19 Tex. Civ. App. 661, 48 S. W. 532; Bolles v. Harris, 34 Ohio St. 38.

¹⁸⁴ Lucas v. Goff, 33 Miss. 629; Dorsey v. Shepperd, 12 Gill & J. (Md.) 193, 37 Am. Dec. 77; see also, Mitchell v. Vickers, 20 Tex. 377. So, ordinarily, the will must be shown to have been made *in extremis*. Sykes v. Sykes, 2 Stew. (Ala.) 364, 20 Am. Dec. 40; Morgan v. Stevens, 78 Ill. 287; Scaife v. Emmons, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. 383.

¹⁸⁵ Cooper v. Bockett, 4 Moore P. C. C. 419, 10 Jur. 931; Lushington v. Onslow, 6 Not. Cas. 183; Doe v. Palmer, 15 Jur. 836; Lawson, *In re*,

"means first, that in every will the burden of proof is upon proponents to establish the execution in the form in which it is offered for probate;¹⁸⁶ and second, that in case of certain alterations the presumption arises that they were made after execution."¹⁸⁷ The question as to the burden of proof and as to whether there is any presumption as to the time of the alteration of an instrument, and, if so, what it is, has been considered elsewhere,¹⁸⁸ but there is, perhaps, more reason for presuming that an alteration in a will was made after its execution, than there is in the case of other writings, and it seems that an alteration in a will, which is found in the custody of the testator, is, as a general rule, presumed, in the absence of evidence, to have been made by the testator after the execution of the will.¹⁸⁹ But it has been held that where the evidence shows that the will was in the custody of one who was interested in suppressing it, alterations apparent on the will are not ordinarily presumed to have been made by the testator.¹⁹⁰ And it is held that if the words, claimed to be an alteration, are necessary to the sense of the will, it will be presumed that they were accidentally omitted in drafting the will, and were inserted before execution.¹⁹¹ And, in New York, it has been stated broadly that "where an interlineation on a will is fair upon its face, and it is entirely unexplained, there being no circumstances whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution."¹⁹² The subject of the admissibility of evidence where an alteration appears in an instrument has already been considered,¹⁹³ but it may be said in this connection that a certificate in the attestation clause that the alterations were made before execution is admissible

25 Nova Scotia 454; *Camp v. Shaw*, 52 Ill. App. 241; also, *Shaw v. Camp*, 163 Ill. 144, 45 N. E. 211; *Wilson*, In re, 8 Wis. 171.

¹⁸⁶ *Holman v. Riddle*, 8 Ohio St. 384.

¹⁸⁷ *Page Wills*, 513.

¹⁸⁸ Vol. II, §§ 1504-1509.

¹⁸⁹ *Cooper v. Bockett*, 4 Moore, P. C. C. 419; *Sykes*, Goods of, L. R. 3 P. & D. 26; *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Lawson*, In re, 25 Nova Scotia 454; *Camp v. Shaw*, 52 Ill. App. 241; *Toebe v. Williams*, 80 Ky. 661; *Baptist Church v. Rob-*

barts, 2 Pa. St. 110; *Williams v. Ashton*, 1 Johns. & Hem. 115.

¹⁹⁰ *Mile's Appeal*, 68 Conn. 237, 36 Atl. 39; *Bennett v. Sherrod*, 3 Ired. L. (N. Car.) 303; see also, Vol. II, § 1509.

¹⁹¹ *Cadge*, Goods of, L. R. 1 P. & D. 543; *Birt*, Goods of, L. R. 2 P. & D. 214; *Adams*, Goods of, L. R. 2 P. & D. 367; *Martin v. King*, 72 Ala. 354. And the attesting clause may show this.

¹⁹² *Grossman v. Grossman*, 95 N. Y. 145.

¹⁹³ Vol. II, §§ 1510, 1511.

to prove such fact, and, if genuine, is generally conclusive;¹⁹⁴ and that extrinsic evidence from those who saw the will at the time of the execution is usually admissible to show whether the alterations were made before execution or not.¹⁹⁵ It has also been held that declarations of the testator before or at the time of the execution of the will are admissible to show whether the alterations then existed;¹⁹⁶ but that his declarations after the execution of his will as to the time when the alterations were made are inadmissible.¹⁹⁷

§ 2701. **Attesting or subscribing witnesses.**—The history of the rule requiring the calling of attesting or subscribing witnesses is an interesting one,¹⁹⁸ but most of the reasons for it no longer exist, except, perhaps, where the statute requires the instrument to be attested, and the principal, if not the only, instance in which it is still retained in most jurisdictions is in the case of wills, as to which there is more reason for it than in other cases. The modern statutes vary somewhat in their provisions, but at least two attesting witnesses are usually required,¹⁹⁹ and, if available, at least one of them must be called to prove the due execution of the will, and if he cannot testify to all the necessary facts the other must also generally be called.²⁰⁰ But when called other witnesses may also be called to prove or disprove testamentary capacity and the execution of the will.²⁰¹ The statutes generally contain provisions as to when attesting witnesses shall be considered unavailable, and for proof of the testator's signature, or that of the witnesses or both. The attesting witnesses are not necessarily pre-

¹⁹⁴ *Lurie v. Radnitzer*, 166 Ill. 609, 46 N. E. 1116; *Crossman v. Crossman*, 95 N. Y. 145.

¹⁹⁵ *Hindmarch, Goods of*, L. R. 1 P. & D. 307; *Wright v. Wright*, 5 Ind. 389.

¹⁹⁶ *Doe v. Palmer*, 16 Q. B. 747; *Sykes, Goods of*, L. R. 3 P. & D. 26.

¹⁹⁷ *Adamson, Goods of*, L. R. 3 P. & D. 253; but see, *Ravenscroft v. Hunter*, 2 Hagg. 65; see, Vol. II, § 1513.

¹⁹⁸ See, *Thayer Prelim. Treatise* Ev. 502.

¹⁹⁹ See, *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. 459.

²⁰⁰ *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. 469-473.

²⁰¹ *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 51 Am. St. 131; *Morton v. Heidon*, 135 Mo. 608, 37 S. W. 504; *Elliot v. Elliot*, 10 Allen (Mass.) 357; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; *Rugg v. Rugg*, 83 N. Y. 592; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Meurer, Will of*, 44 Wis. 393, 28 Am. R. 591; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. 151; *Tyler, Estate of*, 121 Cal. 405, 53 Pac. 928; note in, *Padgett v. Lawrence*, 10 Paige Ch. (N. Y.) 170, 40 Am. Dec. 232, and *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. 474; see also, *Haynes v. Haynes*, 33 Ohio St. 598.

cluded from denying the testator's testamentary capacity or the due execution of the will, but, according to the better rule, their testimony may be looked upon with suspicion if they do so, and the jury may be instructed that they have a right to consider the apparently inconsistent position and contradiction in weighing the testimony of such witnesses.²⁰² In one of the cases cited, the court treats the subject as follows: "It cannot be thought possible that an honest man, of ordinary intelligence, would subscribe his name as a witness to an instrument executed by a person whom he believed to be of unsound mind, or under coercion or constraint. The fact that such a man voluntarily identifies himself with the transaction as a witness is an indication that, in his opinion, the person executing the instrument is competent to do so. The witness must be understood to attest not merely the act of signing, but also the mental capacity of the testator to sign. A subscribing witness may, it is true, be heard to impeach the will; but, if he assumes that attitude toward it, he does so at the peril of his reputation for candor and veracity. Such an attitude is not merely inconsistent with the position he has voluntarily taken, but is suggestive of fraud and double dealing. It involves a betrayal of confidence, and, if the witness is believed, in some instances, it may be attended with the most distressing consequences. The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury. In such a case, it is entirely proper for the court to inform the jury that they may consider the fact of such implied contradiction, if they find that it exists, in weighing his testimony. A direction of this character is not an invasion of the province of the jury; nor is it objectionable on the ground that it singles out a witness for attack or criticism. It is the duty of the court, in all cases, to instruct the jury upon the law of the case, whether the testimony of one witness or the testimony of a score of witnesses is comprehended within the rules necessary to be stated for their guidance."²⁰³

²⁰² *Stevens v. Leonard*, 154 Ind. 67, 6 N. Y. S. 122; *Scribner v. Crane*, 2 56 N. E. 27, 77 Am. St. 446; *Gwin v. Paige* (N. Y.) 147, 21 Am. Dec. 81; *Gwin*, 5 Idaho 271, 48 Pac. 295; *Tatham v. Wright*, 2 Russ. & M. 31; *Webb v. Dye*, 18 W. Va. 276; *Heatham v. Hatcher*, 30 Gratt. (Va.) 56, *Starkie Ev.* (10th Am. ed.) 504, 519. ²⁰³ *Stevens v. Leonard*, 154 Ind. 67, 32 Am. R. 650; *Jacott's Will*, In re, 78, 79, 56 N. E. 27, 77 Am. St. 446.

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